

# RACIAL RECONCILIATION IN MISSISSIPPI: AN EVALUATION OF THE PROPOSAL TO ESTABLISH A MISSISSIPPI TRUTH AND RECONCILIATION COMMISSION

---

*Patryk Labuda*<sup>1</sup>

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

—Martin Luther King, Jr., August 28, 1963<sup>2</sup>

## I. INTRODUCTION

When Martin Luther King, Jr. made his famous “I have a dream” speech over forty-five years ago, racial segregation in Mississippi was still legally mandated by the state government and federally sanctioned by the United States Supreme Court.<sup>3</sup> Though much has changed since those days, the brutal legacy of the Jim Crow era remains palpably noticeable in the “Magnolia State”. African Americans continue to suffer disproportionately from lower quality education, persistent segregation in housing,

- 
1. Patryk I. Labuda, Adam Mickiewicz Law School, M.A. 2006, B.A. History 2007, Columbia Law School, LLM 2009. This article was initially a seminar paper for Professor Graeme Simpson’s seminar on transitional justice at Columbia Law School (Fall 2008). I would like to thank Graeme Simpson and Lisa Magarrell of the International Center for Transitional Justice, as well as Susan Glisson and Patrick Weems of the William Winter Institute for Racial Reconciliation for their comments and suggestions.
  2. Martin Luther King, Jr., *I Have a Dream Speech*, Washington D.C. (Aug. 28, 1963), reprinted in JAMES M. WASHINGTON, *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 219 (1990).
  3. Racial segregation gradually became unconstitutional through the 1950s and 1960s, but it was the 1964 Civil Rights Act that definitively proscribed it in most everyday activities. The last vestige of federally sanctioned racial segregation was abolished in 1967 in the *Loving v. Virginia* case concerning race-based restrictions on marriage. 388 U.S. 1 (1967). For more, see ROBERT D. LOEVY, *TO END ALL SEGREGATION. THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* (1990). See also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004), especially after p. 344.

and some of the highest poverty, teen pregnancy and child mortality rates in the country.<sup>4</sup>

Americans are prone to saying “how things have changed in Mississippi” when symbolic milestones are reached, but then are equally quick to retort “some things never change” when a racially charged event brings back the ghosts of the past.<sup>5</sup> Notwithstanding the lingering disparities, the Magnolia State has undergone a significant transformation in recent decades.<sup>6</sup> It may have done its fair share to earn a reputation for “backwardness” — to which King pointedly alluded in his speech — but the past twenty years have also hailed the beginning of a new chapter in Mississippi history; in many ways, it is the utterly inhospitable “Hospitality State”<sup>7</sup> of the 1960s which is now leading the South in making amends for the past.<sup>8</sup>

This article will examine how Mississippi is attempting to bring about a reckoning with its racial past through the present-day pursuit of reconciliation. A brief introduction to the state’s history during Jim Crow (II) is followed by an overview of state efforts at delivering substantive criminal justice through its prosecutions of leading Ku Klux Klan members (III). Both themes are surveyed only cursorily as a stepping stone to identifying key patterns in Mississippi’s approach to the past, and how this has informed the emerging discussion on racial reconciliation.

The primary focus of this article shall be the proposal to create a Mississippi Truth and Reconciliation Commission (IV). Its institutional framework and substantive mandate have been under discussion for several years, with important developments intervening in the past six months.<sup>9</sup> The concept of a truth commission will be introduced (IV.1), followed by an overview of on-the-ground progress toward establishing a Commission and how these efforts compare to reconciliation projects in other places (IV.2). The article will then focus on four main challenges facing the proposed Commission: the state’s inherited institutional racism (IV.3), the role of ordinary Mississippians in past discrimination and the reconciliation process (IV.4), the relationship between the Commission and other tools for pursuing justice (IV.5), and an analysis of the Commission’s chances of moving beyond retributive justice, and achieving dura-

- 
4. See Erik Eckholm, *In Turnabout, Infant Deaths Climb in South*, N.Y. TIMES, July 2, 2007 (infant mortality); *Division of Economic Assistance: “Just Wait” Abstinence Program*, MISS. DEP’T OF HUMAN SERVS., [http://www.mdhs.state.ms.us/ea\\_justwait.html](http://www.mdhs.state.ms.us/ea_justwait.html) (teen pregnancy). For poverty, see STATE HEALTH FACTS, <http://www.statehealthfacts.org/profileind.jsp?rgn=26&cat=1&ind=14>. Only Louisiana has a marginally higher poverty to black race ratio at 44.1% to Mississippi’s 44%. *Id.*
  5. See ADAM NOSSITER, *OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS*, at xv-xvi (2002).
  6. See discussion in Part II.
  7. Mississippi has two official nicknames. It is an irony of history that its other moniker—the first one being “Magnolia State”—should be “Hospitality State.” The name rings hollow when writing on such a topic.
  8. See discussion in Parts II and III.
  9. A truth commission was expected to be seated in the summer of 2010. Earlier this year, the project’s organizers decided to delay the Commission’s launch so that more preparation and capacity-building could be carried out at the grassroots level. For more discussion on this topic, see *infra* Part IV.2.

ble restorative justice through alternative means such as reparations (IV.6). Lastly, a conclusion (V) will include some thoughts looking forward.

This is the first article to offer an in-depth evaluation of the proposal to establish a Truth and Reconciliation Commission in Mississippi.<sup>10</sup> The Magnolia State's truth-seeking project will be examined from several perspectives, integrating legal and historical analysis and, where appropriate, drawing on comparative case studies of reconciliation efforts in other countries. On the basis of theoretical and practical examples, this article will assess Mississippi's efforts at truth-seeking and will develop normative proposals for the Commission's future operation.

The year 2009 was symbolic in more ways than one. At the national level, it saw the inauguration of Barack Obama, the nation's first African American President, while at the international level, the United Nations designated it the "International Year of Reconciliation."<sup>11</sup> But it was at the local level, in Mississippi, where the Draft Declaration of Intent to create a statewide truth and reconciliation commission was announced.<sup>12</sup> No other project of this nature, on such a scale, has yet been tried in the United States. Against the backdrop of these milestones, I will conclude with some thoughts on the long-term prospects of truth-seeking in Mississippi and how this experiment relates to the bigger picture of racial reconciliation in the United States.

. . . [T]here's not enough troops in the army to force the Southern people to break down segregation and admit the nigger race into our theaters, into our swimming pools, into our homes, and into our churches.

—Sen. Strom Thurmond, U.S. Presidential candidate 1948<sup>13</sup>

- 
10. Only one other piece has dealt with the topic, in a more general manner. See Howard Ball, *It's Time Mississippi Established a Truth and Reconciliation Commission*, HISTORY NEWS NETWORK (September 25, 2006), <http://hnn.us/articles/29718.html>.
  11. G.A. Res. 61/17, ¶ 5, U.N. Doc. A/RES/61/17 (Nov. 20, 2006).
  12. Several other bodies of inquiry into past injustices have functioned in the United States, but none on this scale. See, e.g., Okla. Comm'n to Study the Race Riot of 1921 (Tulsa Race Riot Commission) <http://www.tulsareparations.org/> (last visited Sept. 10, 2010); Rosewood (Fla.) Comm'n; Wilmington (N.C.) Race Riot Commission, <http://www.history.ncdcr.gov/1898-wrrc/report/report.htm> (last visited Sept. 10, 2010); Greensboro Truth and Reconciliation Commission, <http://www.greensborotrc.org/> (last visited Sept. 10, 2010). Many important features distinguish these commissions from the Mississippi TRC. See also Lisa Magarrell, *A Sampling of Truth-Seeking Projects in the United States*, INTERNATIONAL CENTER OF TRANSITIONAL JUSTICE, <http://www.mississippitruith.org/documents/sampling.pdf> (last visited Aug. 30, 2010).
  13. Thurmond broke with the Democratic Party, and formed a "Dixiecrat" presidential ticket in the 1948 elections (from Dixie, the South's nickname, and -crat, as in Democrat). The party's main policy platform was unconditional support for all forms of racial segregation. Thurmond carried four states in the election: Alabama, Louisiana, Mississippi, and South Carolina. See KARI FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968*, at 150-186 (1994); see also *infra* Part VI.3.

## II. HISTORICAL BACKGROUND

The origins of today's racial inequalities in the United States can be traced to when African slaves first set foot in America. But the more direct causes of Mississippi's present efforts at truth and reconciliation are rooted in the aftermath of the Civil War. The promise of Reconstruction (1865-1877) — a brief period during which African Americans staked, for the first time, a claim to full civil and political rights — ended when white majorities regained control of local governments in all Southern states.<sup>14</sup> In Mississippi, this happened in 1875 when the all-white Democratic Party wrested control from Republicans, and went on to maintain a stranglehold on local politics for almost 100 years.<sup>15</sup> During this time, racial segregation and racial oppression, or "Jim Crow" as the system was known, became the *de jure* and *de facto* way of life.<sup>16</sup>

Jim Crow mandated the strict segregation of blacks and whites, *inter alia*, in public accommodations, transportation, schools and housing.<sup>17</sup> The oppressive climate of this era was reinforced by an extra-legal system of racial customs and racist violence.<sup>18</sup> Public lynchings were a particularly virulent form of violence, nearly 5000 of which took place in the post-Reconstruction era.<sup>19</sup> The highest number of lynchings in the country after the Civil War occurred in Mississippi.<sup>20</sup> Though efforts at dismantling Jim Crow began well before World War II, it was not until after the war that a concerted, nationwide movement developed to end legally sanctioned discrimination.<sup>21</sup> The Supreme Court's landmark decision in *Brown v. Board of Education* (1954) began the process by forbidding segregation in public schools as an inherently unequal practice.<sup>22</sup> Though the ruling did

- 
14. The transition from Reconstruction to Jim Crow remains one of the most contested moments in American history. For a discussion of the historical background leading to the triumph of full blown Jim Crow and the so-called "nadir of race relations," see MAJOR PROBLEMS IN THE HISTORY OF THE AMERICAN SOUTH VOLUME II: THE NEW SOUTH 161–203 (Paul D. Escott, David R. Goldfield, Sally G. McMillen & Elizabeth Hayes Turner eds., 2d ed. 1999); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).
  15. See WILLIAM C. HARRIS, *THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI* 760 (1979); KARI A. FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968* (1994).
  16. *Plessy v. Ferguson*, 163 U.S. 537 (1896), is the landmark Supreme Court case which enshrined the concept of "separate but equal" as the proper way of regulating segregated black-white relations in America. For a critical examination of the case's significance in the short- and long-term, see OTTO H. OLSEN, *THE THIN DISGUISE: Plessy v. Ferguson* (1967).
  17. See Chandra Manning, *Segregation and Jim Crow*, in 2 *THE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 735-37 (Michael Kazin, Rebecca Edwards, Adam Rothman eds., 2010).
  18. *Id.*
  19. See Jessie Parkhurst Guzman, *Lynching*, in *A SOCIAL HISTORY OF RACIAL VIOLENCE* 57 (Allen D. Grimshaw ed., Transaction Publishers 2009).
  20. See *id.* at 56-7. Between 1882 and 1951, 574 lynchings took place in Mississippi, more than anywhere else in the country. See also JULIUS THOMPSON, *LYNCHINGS IN MISSISSIPPI: A HISTORY, 1865-1965* (2007).
  21. See Manning, *supra* note 17 at 737. See also Simon T. Cuthbert Kerr, *Mississippi*, in *JIM CROW ENCYCLOPEDIA* 539 (Nikki L. Brown & Barry M. Stentiford eds., 2008).
  22. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

not address all forms of legal and extra-legal discrimination, it set the stage for a series of sweeping reforms in other areas of public and private life over the next decade.<sup>23</sup>

*Brown v. Board* opened a new chapter in Mississippi's history. Within weeks of the decision, the first White Citizen's Council — a community initiative to maintain segregation — was set up in Indianola, Mississippi.<sup>24</sup> From there the movement spread across the South and soon became an endemic feature of the region for nearly two decades.<sup>25</sup> These grassroots initiatives at maintaining segregation were not opposed, but rather reinforced by state governments, municipalities, and local communities. This was also the case in Mississippi where in 1956 the state government created the Mississippi State Sovereignty Commission to "protect the sovereignty of the state of Mississippi, and her sister states" from "federal encroachment."<sup>26</sup> The state's governor chaired the body *ex officio*.<sup>27</sup> It soon transpired that this radical move in support of segregation was a harbinger of things to come across the South, where top government representatives and rank-and-file public officials almost uniformly opposed desegregation.<sup>28</sup>

Unlike during and after Reconstruction, this time the federal government refused to back down in the face of mass Southern opposition. Federal troops were deployed to ensure that desegregation orders were enforced in places such as Little Rock High School (1957) and Ole Miss University (1962).<sup>29</sup> The growing strength of the Civil Rights Movement in the late 1950s and 1960s, coupled with the continued enforcement of racial integration by federal courts, spawned different reactions among Mississippians. Some embraced change as it came. Others accepted it

- 
23. Some scholars de-emphasize the role of the Supreme Court ruling. They see it as only one of many factors which contributed to the Civil Rights revolution in the 1960s. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* (Jack M. Balkin ed., 2002).
  24. See JOE CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 18–48* (2007).
  25. Many of the movement's goals are carried forward today by its successor organization, the Council of Conservative Citizens, formed in 1985. See FRED KLOPFER, SUSAN KLOPFER, & BARRY KLOPFER, *WHERE REBELS ROOST: MISSISSIPPI CIVIL RIGHTS REVISITED 221–224* (2005). See also *infra* Part VI.3.
  26. The Commission's declassified archives are available in their entirety online at [http://mdah.state.ms.us/arrec/digital\\_archives/sovcom/](http://mdah.state.ms.us/arrec/digital_archives/sovcom/) (last visited: March 5, 2010). See also YASUHIRO KATAGIRI, *THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION: CIVIL RIGHTS AND STATES' RIGHTS* (2001).
  27. See KATAGIRI,, *supra* note 26, at 6–7. The exact appointment procedure as well as membership are described.
  28. The role played by these politicians is examined in DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (2000). For a bottom-up view of these issues, see VIRGINIA DURR, *OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR 171–72* (1985).
  29. See Faustine C. Jones-Wilson, *Little Rock Nine*, in *ENCYCLOPEDIA OF AFRICAN-AMERICAN EDUCATION 26–27* (1996); see also Victor M. Goode and Crystal R. Gafford Muhammad, *Meredith v. Fair and Cooper v. Aaron*, in *ENCYCLOPEDIA OF AFRICAN AMERICAN EDUCATION 188–93, 443–44* (2d ed., 2009).

only grudgingly, while yet others turned to violence to maintain what they viewed as the “Southern way of life.”<sup>30</sup> Resistance in this context should not be understood as the preserve of radical organizations such as the Ku Klux Klan. The story of James Meredith’s enrollment at Ole Miss—the first African American to do so at a public university in Mississippi—where violent riots broke out in the relatively liberal, university town of Oxford testifies to the pervasiveness of social opposition.<sup>31</sup> The drive to increase black voting known as the Mississippi Freedom Summer, just two years later, encountered similarly widespread hostility, and made little headway in actually registering black voters.<sup>32</sup>

For the most part progress was exasperatingly slow. It would take several more years of incessant court battles, countless injuries, and needless deaths to finally put an end to the state-sponsored system of segregation.<sup>33</sup> White Mississippians’ resistance to racial integration, especially with respect to the public school system, eroded slowly during the 1970s, finally allowing the dismantlement of the Mississippi State Sovereignty Commission — the state’s *de facto* segregation watchdog — in 1977.<sup>34</sup> In 1980 William Winter was elected governor, after campaigning on a platform of racial reconciliation,<sup>35</sup> and in 1987 the first black representative from Mississippi since Reconstruction was elected to the US Congress.<sup>36</sup> Though there can be little doubt that these symbolic milestones testified to a changing racial climate throughout the Magnolia State, the struggle for justice was hardly over, and the journey toward an open acknowledg-

---

30. See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945-1975* 114-81 (2006).

31. Meredith’s enrollment was actively resisted by the then-governor of Mississippi, Ross Barnett. Barnett’s repeated refusal to allow Meredith’s enrollment prompted John F. Kennedy to send federal troops to Oxford to enforce his student rights. Two people died and hundreds were wounded in the ensuing two-day race riots. The murders remain unresolved to this day. See CRESPINO, *supra* note 24, at 39-48; JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 139-43 (1995); CHARLES EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* (2009).

32. See DITTMER, *supra* note 31, at 242-271. See also BRUCE WATSON, *FREEDOM SUMMER: THE SAVAGE SEASON THAT MADE MISSISSIPPI BURN AND MADE AMERICA A DEMOCRACY* (2010).

33. See Kerr, *supra* note 21, at 541-42. See also generally KATAGIRI, *supra* note 26, at 176-226.

34. See KATAGIRI, *supra* note 26, at 227-229. No funding was appropriated for the Commission’s operations after 1973, but the act creating the Commission was only repealed in 1977.

35. The election of William Winter had important ramifications as he soon became a steadfast advocate of racial reconciliation and public education reform. The William Winter Institute for Racial Reconciliation at Ole Miss, which leads current efforts to establish the TRC in Mississippi, is named after him. See WILLIAM WINTER INSTITUTE FOR RACIAL RECONCILIATION, <http://www.winterinstitute.org> (last visited Aug. 31, 2010). Bill Clinton also appointed him to the One America Initiative. See ONE AMERICA IN THE 21ST CENTURY: THE PRESIDENT’S INITIATIVE ON RACE, <http://clinton2.nara.gov/Initiatives/OneAmerica/PIR.pdf> (last visited Aug. 31, 2010).

36. In reality, the election of Mike Espy was largely the result of federally imposed re-districting and racially polarized voting. See JERE NASH, ANDY TAGGART & JOHN GRISHAM, *MISSISSIPPI POLITICS: THE STRUGGLE FOR POWER, 1976-2008*, at 180-82 (2009).

ment of the past and a genuine reckoning with its demons had not yet begun.

Who can forget a jubilant Myrlie Evers, the widow of Medgar Evers, crying out “Medgar” in triumph and vindication after his murderer, Byron de la Beckwith, was finally convicted in 1994?<sup>37</sup>

### III. MISSISSIPPI’S FIRST PHASE OF ATONEMENT – CRIMINAL PROSECUTIONS

The end of Mississippi’s defiant resistance to federally mandated integration did not mean the advent of peace and harmony between the state’s black and white populations. Though overt manifestations of violence and racism became more rare, initially the state’s inhabitants were unwilling to confront their separate and confused past.<sup>38</sup> There was little talk of re-investigating unsolved crimes or re-trying unrepentant suspects, let alone of establishing an independent commission of inquiry into Jim Crow’s many excesses.<sup>39</sup>

Nonetheless, as old ways faded and change gradually crept in, the visceral and heinous crimes of the previous period became increasingly embarrassing reminders of the not-so-distant past.<sup>40</sup> It was difficult to reconcile the fact that growing numbers of African Americans were rising to prominent positions in the state’s private and public sectors, while some of the most well known perpetrators of hate crimes continued to freely roam the streets of Mississippi towns.<sup>41</sup> The decision in 1990 to retry Byron De la Beckwith for the murder of Medgars Evers, a leading National Association for the Advancement of Colored People (NAACP) figure in Jackson, was groundbreaking.<sup>42</sup> At the time, the re-opening of an unsolved civil rights case was still an unprecedented move in the South.<sup>43</sup> De La Beckwith had already been tried twice in 1964,<sup>44</sup> but on both occa-

37. SHERRILYN IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* 130 (2007).

38. No prosecutions took place for over twenty years, between the late 1960s and early 1990s. See HOWARD BALL, *JUSTICE IN MISSISSIPPI: THE MURDER TRIAL OF EDGAR RAY KILLEN* 13-14, 51-52 (2006) (hereinafter BALL, *JUSTICE IN MISSISSIPPI*).

39. An independent commission of inquiry was first proposed by John Horhn in 2001. See discussion *infra* Part IV.1.

40. The 1988 premiere of the movie *Mississippi Burning* is a case in point. The film is broadly based on the FBI investigation of the 1964 Freedom Summer murders, though it is important to emphasize that it shows a fictionalized account of those events and makes no claims to historical accuracy. The murders and the trials surrounding the case will be discussed below.

41. See SOKOL, *supra* note 30, at 330.

42. See generally NOSSITER, *supra* note 5. See also DITTMER, *supra* note 31, at 143-169.

43. Importantly, De La Beckwith was re-indicted on state, not federal charges. It should also be noted that in 1977, the State of Alabama re-prosecuted one suspect in the bombings of the Sixteenth Street Baptist Church. However, this was a one-off re-opening, owing in part to the political ambitions of the Attorney General at the time, William J. Baxley. A concerted effort to re-prosecute unsolved civil rights murders across the South did not begin until the early 1990s. For more on the Alabama case and the first trial, see S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 482-84 (2008).

44. Evers’ murder drew severe criticism from around the nation when it happened. Unlike the victims of most racial killings during Jim Crow, Evers was a leading

sions, all white, male juries failed to reach a unanimous verdict of guilt. Crucially for the prosecution, however, De la Beckwith had not been acquitted in any of those trials either. Since Mississippi law does not have a statute of limitations on murder, the attorney general was able to issue a new indictment.<sup>45</sup> The trial turned out to be a far more daunting reckoning with the past than had initially been expected, but after three years of thorough investigative work, the court finally sentenced De la Beckwith to life in prison.<sup>46</sup>

The reopening of the Evers case prompted other victims to pursue justice in the courts. In 1991, the widow of Vernon Dahmer — burnt alive in a 1966 firebombing — convinced prosecutors to reopen her slain husband's case.<sup>47</sup> This time the defendant was none other than Samuel H. Bowers, the founder and Imperial Wizard of the White Knights of the KKK, the Klan's radical offshoot in Mississippi during the 1960s.<sup>48</sup> Bowers had already been tried for the murder of Dahmer a total of four times during the 1960s, but all his trials ended in hung juries.<sup>49</sup> The fifth trial, which finally began in 1996, yielded several new witnesses, and ultimately in 1998 Bowers was convicted of conspiracy to commit murder and sentenced to life in prison.<sup>50</sup>

The Bowers conviction started a renewed drive to open "cold cases" not just in Mississippi, but also in six other 'Deep Southern' states.<sup>51</sup> Most prominent among them were the 2001-2002 convictions of two Alabama Klansmen for their role in the 1963 bombing of a Birmingham church, in which four black girls had been killed.<sup>52</sup> Two other convictions were secured in Mississippi: in 2000, three Klansmen from Humphrey County

---

figure of the civil rights movement. The KKK rarely targeted such prominent figures. *But see* Jeremy Mitchell, *Did James Earl Ray Kill MLK, Hoping to Collect a \$100,000 Bounty from the KKK?*, JOURNEY TO JUSTICE BLOG, (Mar. 9, 2010), <http://blogs.clarionledger.com/jmitchell/2010/03/09/did-james-earl-ray-kill-mlk-hoping-to-collect-a-100000-bounty-from-the-kkk/>.

45. De La Beckwith was re-indicted on state, not federal charges. *See also* NOSSITER, *supra* note 5, at xv.
46. David Stout, *Byron De La Beckwith Dies; Killer of Medgar Evers Was 80*, N.Y. TIMES, Jan. 23, 2001. For a detailed account of the investigation and trial, see BOBBY DELAUGHTER, *NEVER TOO LATE: A PROSECUTOR'S STORY OF JUSTICE IN THE MEDGAR EVERS CASE* (2001).
47. *See* Joseph Gill, *Mississippi Justice at Last: The Trials and Convictions of Beckwith, Bowers and Killen*, PROSECUTOR, J. OF THE NAT'L DIST. ATT'Y ASS'N., July-Aug. 2007, at 38.
48. Jennifer Lee, *Samuel Bowers, 82, Klan Leader Convicted in Fatal Bombing, Dies*, N.Y. TIMES, Nov. 6, 2006.
49. Bowers did, however, serve a seven-year sentence in the *Mississippi Burning* murders, discussed *infra*. *See also* HOWARD BALL, *MURDER IN MISSISSIPPI: United States v. Price and the Struggle for Civil Rights* (2004).
50. *See* Lee, *Klan Leader Convicted in Fatal Bombing, Dies*, *supra* note 48.
51. For a more comprehensive list of reopened cases, see BALL, *MURDER IN MISSISSIPPI*, *supra* note 49, at 141–49 (2004) (valid as of 2004). *See also* FBI WEBPAGE, <http://www.fbi.gov/wanted/seekinfo/civilrightsnextofkin.htm> (last visited Mar. 10, 2010) (listing victims whose murders are under investigation).
52. *See* S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 484 (2008).

were sentenced in the 1970 murder of Rainey Pool, and in 2003, a jury convicted Ernest Avants for the murder of Ben Chester White.<sup>53</sup>

In the past several years, three high profile cases have recaptured the attention of the Mississippi and national public. The trials of Edgar Ray Killen (1999, 2005) and James Seale (2005-2010), and the unsuccessful indictment of new suspects in the Emmett Till case (2004-2007)<sup>54</sup>—up to now the state’s last major prosecutions—also coincided with recent developments surrounding truth and reconciliation.<sup>55</sup> As will be discussed later, the challenges and obstacles presented by each of these cases contributed to the on-going reappraisal of justice-seeking efforts within the Magnolia State.

The so-called “*Mississippi Burning*” murders of three civil rights workers, Andrew Goodman, Michael Schwener, and James Chaney, are connected to Edgar Ray Killen, Samuel Bowers, and indirectly, also James Ford Seale.<sup>56</sup> Bowers was sentenced to ten years imprisonment in the 1967 federal trial of the murders,<sup>57</sup> but went on to serve only six years in the 1970s after exhausting all his appeals.<sup>58</sup> Another major suspect in the killings, Edgar Ray Killen, had also been tried in 1967, but at sentencing one woman on the all-white jury decided that “she could never convict a

---

53. Avants had been acquitted on state charges in 1967. The Department of Justice reopened the case in 1999, after it was brought to their attention that the killing had occurred on federal property in the Homochitto National Forest. Federal murder charges were brought soon thereafter. See Ernest Avants, 72, *Plotter Against Dr. King*, N.Y. TIMES, June 17, 2004. The murder of Ben Chester White is also discussed in two Fifth Circuit decisions. See *United States v. Avants*, 278 F.3d 510 (5th Cir. 2002) and *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004). The Rainey Pool case is covered by Northwestern University’s Civil Rights and Restorative Justice Project ([http://nuweb9.neu.edu/civilrights/?page\\_id=780](http://nuweb9.neu.edu/civilrights/?page_id=780)).

54. The dates refer to the years in which the trials and/or investigations took place.

55. See *infra*, especially Part IV.2.

56. There is an entire website devoted to this case: <http://www.law.umkc.edu/faculty/projects/ftrials/price&bowers/price&bowers.htm> (last visited: September 10, 2010). The disappearances of the three civil rights workers, code-named *Mississippi Burning* by the FBI, became the focus of a mass media campaign, leading – among other things – to the passage of the Civil Rights Act of 1964. Many commentators admit that the (disproportionate) attention lavished on this case was due in no small part to the fact that two of the victims were white New Yorkers as opposed to anonymous rural blacks from the South. It should be noted that the media’s obsession with this case continues to this day, despite significant efforts to also investigate other “cold cases.” See WILLIAM T. MARTIN RICHES, *THE CIVIL RIGHTS MOVEMENT. STRUGGLE AND RESISTANCE* 79-80 (2d ed., 2004); Claudia Matherly Stolz, *Freedom Summer (Mississippi) of 1964*, in *ENCYCLOPEDIA OF AMERICAN RACE RIOTS* 242 (Walter C. Rucker & James N. Upton eds., 2007). A current Google search (e.g., “civil rights murder”) still returns dozens of current *Mississippi Burning*-related reports, whereas other civil rights cases receive barely a passing mention. The only other cases to garner as much national attention are the slayings of Medgar Evers and Emmett Till.

57. Seven of the eighteen accused in the 1967 trial were convicted on federal civil rights charges. No murder charges were brought in the first case. See generally BALL, *MURDER IN MISSISSIPPI*, *supra* note 49.

58. See *id.* at 134. Bowers escaped conviction in the Dahmer case, while his appeals in the *Mississippi Burning* murders were still pending. As noted above, he would later be re-tried and convicted (1998) for his role in the Dahmer slaying.

preacher."<sup>59</sup> As a result, Killen's case ended in a mistrial and he walked free.<sup>60</sup>

Calls to reopen the case, and to re-examine Killen's role in it, had come as early as 1989 through the work of Jerry Mitchell, an investigative reporter for the Clarion-Ledger in Jackson.<sup>61</sup> The case stalled for years, but shortly after Bower's 1998 conviction in the Dahmer case, Mitchell published excerpts of a 1983 sealed interview with Bowers, in which the former Imperial Wizard said he was "quite delighted to be convicted and have the main instigator of the entire affair walk out of the courtroom a free man."<sup>62</sup> Following the article's publication, Killen's case was finally reopened, and the search for new evidence began. The death of a key witness caused further delay,<sup>63</sup> but then, in a sudden about-face, indictments were issued in January 2005.<sup>64</sup> Several months later a jury convicted Killen on three counts of manslaughter.<sup>65</sup>

The murder of Emmett Till<sup>66</sup> remains one of the most gruesome crimes and defining moments of the Civil Rights Era.<sup>67</sup> Till was only 15 years old when he was tortured, mutilated and killed during a visit in 1955 to his family in Sumner, Mississippi. An all-white jury acquitted two defendants in a sham trial, causing public outcry in the United States and abroad.<sup>68</sup> To add insult to injury, both suspects confessed to the murder several months later.<sup>69</sup> No developments occurred for almost half a century, but the case was finally revived by the Department of Justice, in cooperation with local Mississippi authorities, after new facts surfaced thanks to the work of an independent investigative journalist, Keith Beauchamp.<sup>70</sup> However, in 2007, when the prosecutors' evidence was finally submitted to a grand jury, it found no grounds to indict any new suspects and declined to proceed with the case.<sup>71</sup>

---

59. *Id.* at 38.

60. *See id.* at 52. Killen served five years on an unrelated felony charge in the 1970s.

61. *See* discussion *infra* Part IV.5. Mitchell's contribution to justice-seeking in Mississippi is discussed in that section as well.

62. *See* Joseph Gill, *Mississippi Justice at Last: The Trials and Convictions of Beckwith, Bowers and Killen*, PROSECUTOR, J. OF THE NAT'L DIST. ATT'Y ASS'N., July-Aug. 2007, at 30. Of course, in this excerpt Bowers is referring to his conviction in the 1967 federal case. Deborah Spencer, Interview with Samuel H. Bowers, October 24, 1983, Mississippi Department of Archives and History. The interview was supposed to be sealed until Bowers' death, but excerpts were leaked to Mitchell. *See also* BALL, MURDER IN MISSISSIPPI, *supra* note 49.

63. *See* BALL, MURDER IN MISSISSIPPI, *supra* note 49, at 70-71, 99. The prosecution's main witness, Cecil Price, died in 2001. Price was the main defendant in the 1967 federal trial, where he was convicted and sentenced to six years imprisonment.

64. *See* BALL, JUSTICE IN MISSISSIPPI, *supra* note 49, at 96.

65. *Id.* at 151-94.

66. *See* KLOPFER, *supra* note 25, at 249-279; Richard Rubin, *The Ghosts of Emmett Till*, N.Y. TIMES SUNDAY MAGAZINE, July 31, 2005.

67. *See generally* Margaret Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2123-25 (2004).

68. *Id.* at 2120-21.

69. *Id.* at 2103, 2122.

70. *Id.* at 2103-04.

71. *See* Shaila Dewan, *After Inquiry, Grand Jury Refuses to Issue New Indictments in Till Case*, N.Y. TIMES, February 28, 2007.

Already in 1964, James Seale was the main suspect in the killings of Charles Moore and Henry Dee.<sup>72</sup> The case garnered some short-lived attention after the media mistakenly reported that the bodies of the two victims were the ones sought in the *Mississippi Burning* investigation.<sup>73</sup> Once the mistake was uncovered, the national public lost interest and local authorities failed to ever bring charges.<sup>74</sup> Investigative journalists in Mississippi revived the case in the late 1990s,<sup>75</sup> but local authorities declined to formally reopen it.<sup>76</sup> In 2005 David Ridgen, of the Canadian Broadcasting Company, convinced Thomas Moore, the brother of one of the victims, to shoot a documentary about the killings, which in turn prompted the Department of Justice to launch a joint federal and state task force to review the existing evidence.<sup>77</sup> In January 2007, James Seale was indicted by a federal grand jury<sup>78</sup> on two counts of kidnapping and one count of conspiracy in connection with the murders.<sup>79</sup>

The prosecution's charges were based almost entirely on the testimony of Charles Marcus Edward, another Klansmen suspected in the killings, whom the FBI had granted federal immunity from prosecution<sup>80</sup>. The jury returned a guilty verdict in June 2007, only to be overturned by a three-judge panel of the Fifth Circuit Court of Appeals in September 2008.<sup>81</sup> The original conviction was reinstated in June 2009, after the case was re-examined *en banc* by the full Fifth Circuit, whose judges split evenly on the legal matter under review. The split meant that the court failed to affirm the decision of the three-judge panel, thereby reinstating the original con-

---

72. Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecution of Unsolved Civil Rights Murders*, 34 OHIO N.U. L. REV. 797, 808 (2008).

73. See Donna Ladd, *A Trail of Documents Tells the Story*, JACKSON FREE PRESS, January 31, 2007, available at [http://www.jacksonfreepress.com/index.php/site/comments/james\\_ford\\_seale\\_a\\_trail\\_of\\_documents\\_tells\\_the\\_story](http://www.jacksonfreepress.com/index.php/site/comments/james_ford_seale_a_trail_of_documents_tells_the_story) (last visited April 4, 2011).

74. *Id.*

75. Donna Ladd, *I Want Justice Too*, JACKSON FREE PRESS (July 20, 2005), available at [http://www.jacksonfreepress.com/index.php/site/comments/i\\_want\\_justice\\_too/](http://www.jacksonfreepress.com/index.php/site/comments/i_want_justice_too/) (last visited July 31, 2010).

76. McDonald, *supra* note 72, at 814.

77. *Id.* at 813-16. This article offers a detailed description of how this case evolved, and insightful commentary on the risks involved in media-sponsored prosecutions,

78. Deputy Assistant Attorney General Grace Chung Becker before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, US House of Representatives, Statement concerning H.R. 923 – Emmett Till Unsolved Civil Rights Act. (June 12, 2007), available at [http://www.justice.gov/crt/speeches/gcb\\_070626.pdf](http://www.justice.gov/crt/speeches/gcb_070626.pdf) (last visited July 31, 2010). As in the Avants case, *supra* note 53, the federal government acquired jurisdiction over the case because the murders took place on federal property, namely the Homochitto National Forest.

79. Donna Ladd, *A Trail of Documents Tells the Story*, JACKSON FREE PRESS (January 31, 2007), available at [http://www.jacksonfreepress.com/index.php/site/comments/james\\_ford\\_seale\\_a\\_trail\\_of\\_documents\\_tells\\_the\\_story](http://www.jacksonfreepress.com/index.php/site/comments/james_ford_seale_a_trail_of_documents_tells_the_story) (last visited April 4, 2011).

80. Jerry Mitchell, Brenda Goodman, *Ex-Klansman is Sentenced to Life for Killings in 1964*, N.Y. TIMES, Aug. 25, 2007.

81. *Court Overturns Conviction in Alleged KKK case*, MSNBC, September 10, 2008, <http://www.msnbc.msn.com/id/26631689/> (last visited August 30, 2010).

viction.<sup>82</sup> By declining to hear the case, the Supreme Court effectively affirmed this outcome in late 2010.<sup>83</sup>

In total, seven unsolved civil rights cases have been reopened and pursued in Mississippi's courts—federal and state—since the 1990 indictment of De La Beckwith.<sup>84</sup> Six of those cases have yielded convictions, which puts Mississippi well ahead of any other state in trying civil rights 'cold cases.'<sup>85</sup> Some cautious optimism regarding the progress of race relations in the state would probably be merited. But not all Mississippians seem to take this view. In reality, many of the state's residents remain unconvinced about the purposefulness of individual retribution.<sup>86</sup> Surveys have shown that, while there is slightly less resistance to the idea of re-prosecuting suspects of civil rights murders, actual support for these trials has not grown.<sup>87</sup> Some reactions have even been outright hostile—for instance, in Killen's hometown, his incarceration actually spawned a new far right organization.<sup>88</sup>

Though it is true that such reactions are rather atypical and unrepresentative of today's Mississippi landscape at large, it should also be noted that prosecutions, especially in the last three cases, raised increasingly difficult questions about the feasibility of justice. Margaret Russell made this point forcefully in the context of the unsuccessful Till re-indictment, when she argued that "the reopening is problematic not because it de-

---

82. *Court Overturns Conviction in Alleged KKK case*, MSNBC, September 10, 2008, <http://www.msnbc.msn.com/id/26631689/> (last visited August 30, 2010).

83. The Supreme Court's denial of certiorari can be found on page 31 at: <http://www.supremecourt.gov/orders/courtorders/100410ZOR.pdf> (last visited April 4, 2011).

84. These cases are discussed above: the De La Beckwith trial, the Bowers trial, the Avants trial, the trial of Rainey Pool's murderers, the unsuccessful re-opening of the Emmett Till case, the Killen trial, and the Seale trial. The case of Wharlest Jackson was reopened in 2005, but no formal charges have been brought. See CIVIL RIGHTS COLD CASE PROJECT for more information: <http://coldcases.org/cases/wharlest-jackson-case> (last visited August 30, 2010).

85. Nonetheless, Mississippi still has the highest number of unresolved civil rights murders. See <http://www.fbi.gov/wanted/seekinfo/civilrightsnextofkin.htm> (last visited August 31, 2010). See also BALL, MURDER IN MISSISSIPPI, *supra* note 49, at 141-149; <http://www.fbi.gov/wanted/seeking-info/civil-rights-era-cold-case-initiative-seeking-victims-next-of-kin> (last visited August 31, 2010); The Attorney General's Second Annual Report to Congress Pursuant to the Emmett Till Unsolved Civil Rights Crime Act of 2007, May 13, 2010, available at: <http://nuweb9.neu.edu/civilrights/wp-content/uploads/AG-Second-Report-to-Congress-Till-Bill.pdf>.

86. See, e.g., Donna Ladd, *Franklin Advocate Editorial and Thomas Moore response*, JACKSON FREE PRESS, July 28, 2005, available at [http://www.jacksonfreepress.com/index.php/site/comments/franklin\\_advocate\\_editorial\\_and\\_thomas\\_moore\\_response/](http://www.jacksonfreepress.com/index.php/site/comments/franklin_advocate_editorial_and_thomas_moore_response/) (last visited August 30, 2010) (noting the official and negative opinion of Meadville's press in response to the planned re-indictment of James Ford Seale).

87. BALL, MURDER IN MISSISSIPPI, *supra* note 49, at 22 (reporting statistics of reactions: Should Killen be tried: 47% yes, 35% no, 16% uncertain, 2% no comment; Should De la Beckwith be tried: 45% yes, 41% no, 14% no opinion).

88. See *White People's Party Attempts Political Activity*, ANTI-DEFAMATION LEAGUE, July 21, 2005, [http://www.adl.org/learn/extremism\\_in\\_the\\_news/White\\_Supremacy\\_polit\\_activity.htm?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_the\\_News](http://www.adl.org/learn/extremism_in_the_news/White_Supremacy_polit_activity.htm?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_the_News) (last visited August 30, 2010). The National States Rights Party formed in Philadelphia shortly after the 2005 conviction of Killen. The relevance of this fringe movement should not be overemphasized, but it does serve as an example of some of the difficulties awaiting the organizers of the Mississippi TRC.

mands too much, but rather because it demands too little.”<sup>89</sup> In the next section I will examine the limitations of traditional criminal justice, and then evaluate Mississippi’s unfolding experiment with an alternative transitional justice tool: the pursuit of reconciliation through truth.

Stop studying our Truth and Reconciliation Commission and begin your own reconciliation process.

—Archbishop Desmond Tutu, Chair of South African TRC<sup>90</sup>

#### IV. MISSISSIPPI’S SECOND PHASE OF ATONEMENT – TRUTH AND RECONCILIATION

The Mississippi Freedom Summer, including the deaths of Andrew Goodman, James Chaney, Michael Schwerner, is still considered a defining moment of the Civil Rights Era.<sup>91</sup> Not surprisingly, Killen’s conviction for his role in the slayings, over 40 years after the first mistrial, was heralded as groundbreaking.<sup>92</sup> The trial itself garnered much publicity and elicited vigorous commentary in Mississippi’s media.<sup>93</sup> The symbolic nature of the jury’s guilty verdict even prompted the Republican Governor, Haley Barbour, to declare that the crimes of the past had finally been put to rest and that, at long last, there could be a sense of “closure.”<sup>94</sup>

Barbour’s declaration was met with immediate skepticism from some observers. Rita Bender, the widow of the slain Michael Schwerner, expressed this sentiment in powerful terms when she demanded “more” from the state government in a letter addressed to Barbour:

[P]lease do not assume that the book is closed. There is yet much work to be done. As the Governor of Mississippi, you have a unique opportunity to acknowledge the past and to participate in ensuring a meaningful future for your state. Please don’t squander this moment by proclaiming that the past does not inform the present and the future.<sup>95</sup>

89. Russell, *supra* note 66, at 2130-31.

90. IFILL, *supra* note 37, at 174; see also *History*, SOUTHERN TRUTH AND RECONCILIATION, HISTORY, available at [http://www.southerntruth.org/about\\_us\\_history.htm](http://www.southerntruth.org/about_us_history.htm) (last visited March 10, 2010).

91. See Kerr, *supra* note 21, at 540-542; Claudia Matherly Stolz, *Freedom Summer (Mississippi) of 1964*, in *ENCYCLOPEDIA OF AMERICAN RACE RIOTS 239-44* (Walter C. Rucker & James N. Upton eds., 2007).

92. See Shalia Dewan, *Former Klansman Guilty of Manslaughter in 1964 Deaths*, N.Y. TIMES, June 22, 2005.

93. See “Mississippi Burning” trial begins, CNN INTERNATIONAL (June 14, 2005), <http://edition.cnn.com/2005/LAW/06/13/miss.killings/> (last visited September 10, 2010). The 2005 reopening of the Killen case did not quite grasp the nation’s attention to the same extent as the first trial, but it did receive significant national and international coverage.

94. Numerous reports refer indirectly to Barbour’s “closure” statement. I have not been able to find the exact source of this quote. See BALL, JUSTICE IN MISSISSIPPI *supra* note 49, at 181.

95. KLOPPER, *supra* note 25, at 457. To read the entire letter, see Letter from Rita L. Bender to Governor Barbour (June 27, 2005), <http://www.mississippitrueth.org/documents/bender-letter.pdf> (last visited July 31, 2010).

The Philadelphia Coalition, a group of citizens from Philadelphia, Mississippi — the town where the murders took place — issued a statement in the same vein on the day of the verdict:

Today justice was served. We are satisfied with today's verdict but justice is still incomplete. Others responsible for this crime must be brought to justice as well. Seeking justice for the brutal murders of James Chaney, Andrew Goodman, and Michael Schwerner was long overdue. But we have only begun our work here.<sup>96</sup>

It is clear from these two sample statements that some Mississippians were demanding more than just sporadic instances of criminal justice from the government. The trials of individual Klansmen may have been useful in exposing instances of past discrimination, but that, on its own, left a feeling of incompleteness and disillusionment. The piecemeal nature of trials which, by necessity, center on a narrowly circumscribed set of facts meant that much of Mississippi's history remained in the shadows.<sup>97</sup> The state's citizens were beginning to contemplate ways in which this "other history" could be uncovered.

### 1. *The idea of a truth commission*

Most transitional justice experts agree that prosecutions serve as a valuable — if not always indispensable — justice mechanism in the early phases of dealing with historical injustice.<sup>98</sup> The dominant culture of impunity must at some point be broken if outright conflict or lingering mistrust are to be overcome. Criminal law is well suited to this narrowly defined end, and Mississippi's first phase of atonement — the trials of leading Klansmen — achieved precisely that. The vicious cycle of impunity that had terrorized black Mississippians for decades and left them without any viable avenues of legal redress had finally come to an end.

But criminal convictions are not a 'once and for all' panacea to all of history's injustices. Mississippi is by no means the first place to discover that retributive justice cannot always satisfy victim expectations in the long run. The question of whether high-profile prosecutions of individuals can truly bring "closure" to victims, communities or even an entire

96. See 2005 Statement, THE PHILADELPHIA COALITION RECOGNITION, RESOLUTION, REDEMPTION: UNITING FOR JUSTICE (June 21, 2005), available at <http://www.neshobajustice.com/pages/2005stmt.htm> (last visited February 25, 2010). The Coalition's statement echoed Bender's own reaction to the sentencing: "I hope this case is just a beginning and not an end." Jerry Mitchell, *Widow of Schwerner Says She Hopes Case a Beginning*, JACKSON CLARION-LEDGER, June 22, 2005, at A1, A5.

97. Rita Bender's letter to Governor Barbour discusses the state's racial history, including the following passage: "Certainly, as the present governor, you must be aware of this history. This history must be known and understood by everyone. . . ." Letter from Rita L. Bender, *supra* note 95. For an account of the same process in the context of the Birmingham bombings, see S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 485, 488–89 (2008).

98. See, e.g., RUTI G. TEITEL, TRANSITIONAL JUSTICE 28 (2002); DAVID BLOOMFIELD, TERESA BARNES, & LUC HUYSE (ED.), RECONCILIATION AFTER VIOLENT CONFLICT, A HANDBOOK 97–98 (2004).

society, is well known.<sup>99</sup> In the context of the famous South African reconciliation project,<sup>100</sup> Graeme Simpson has observed that “some of the most striking lessons to be learned from the South African TRC concern the fundamental clumsiness of criminal law as a means of doing substantive justice, of achieving reconciliation, and of meeting the needs of victims and survivors of human rights abuses for information and acknowledgement.”<sup>101</sup> The experiences of other countries, where the relative strengths and weaknesses of criminal law in achieving peace and justice have already been explored, serve as an important guide to what can be expected in the long term.<sup>102</sup>

It has been well documented that traditional criminal processes tend to de-emphasize victim needs due to the fact that trials, by their very nature, focus on perpetrators.<sup>103</sup> Dormant wounds may actually be reopened and, contrary to expectations, make things worse for the victim.<sup>104</sup> This problem is particularly acute in the context of old crimes, where the passage of time means that evidence is often of questionable value, either tainted by defective procedures or faulty witness memories. Some observers argue also that it is simply too late to right the wrongs of the distant past, and cite the adage “justice delayed is justice denied.”<sup>105</sup> Doubts are expressed about the motives behind the trials of old (and often sick) men who, having roamed the streets for decades, are suddenly charged with crimes they committed as youth. Is justice really being delivered, or is this just the state trying to remove an old stain and burnish its contemporary image?<sup>106</sup>

In Mississippi all these points were driven home by the unsuccessful attempt to reopen the Emmett Till case between 2005 and 2007. Given the

---

99. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS. TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 8-9 (2010).

100. The South African project is still held up as a model to follow. As a result, there is considerably more scholarship on the South African TRC than any other single truth commission. For a critical assessment of not only the strengths but also the weaknesses of the South African TRC, see Piers Pigou, *False Promises and Wasted Opportunities?: Inside South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 38-40 (Deborah Posel & Graeme Simpson eds., 2002).

101. Graeme Simpson, 'Tell No Lies, Claim No Easy Victories': *A Brief Evaluation of South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION, 230 (Deborah Posel & Graeme Simpson eds., 2002 ).

102. See generally Luc Huyse, *Dealing with the Past and Imaging the Future*, in PEACEBUILDING. A FIELD GUIDE, 322-327 (Luc Reyckler & Thania Paffenholz eds., 2001). This article uses comparative examples drawn from a mix of various truth commissions, though the South African TRC figures most prominently.

103. See Luc Huys, *Justice*, in RECONCILIATION AFTER VIOLENT CONFLICT, A HANDBOOK 97 (David Bloomfield et. al eds., 2004).

104. See Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, J. OF INT'L AFFAIRS 647, 659 (1999).

105. See generally JON ELSER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 88 (2004).

106. For a discussion of these issues, see S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CAL. L. REV. 471, 472, 487 (2008). See also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25-90 (1998).

quasi-legendary status of the Emmett Till murder within the Civil Rights Movement,<sup>107</sup> it is not surprising that the jury's refusal to proceed with indictments aroused frustration and disappointment.<sup>108</sup> But these reactions — understandable as they may be — were grounded in abstract principle. They failed to take account of the bigger picture: when the real perpetrators of a crime, as opposed to its bit players, cannot be prosecuted, traditional criminal justice no longer offers any real remedy. As Margaret Russell observed in this context, “[G]iven 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.”<sup>109</sup>

The trial of James Seale is another example of how an overreliance on prosecutions may miss the more important task of delivering substantive justice. Unsuccessful, or worse yet, bungled re-prosecutions, can lead to the ultimate perversion of justice — acquittals.<sup>110</sup> Prioritizing the pursuit of individuals at all costs may even produce the worst possible outcome: not just failed victim expectations, but a vindication of the perpetrators’ actions. In Mississippi, this became a distinct possibility when the Fifth Circuit Court of Appeals overturned the lower court’s conviction of James Seale.<sup>111</sup> After prosecutors had put victims and entire communities through years of additional investigations and trials, it looked as if Seale would walk free, with the court’s and the state’s blessing. Fortunately for the victims, Seale’s conviction was subsequently reinstated.<sup>112</sup>

Nonetheless, both the Seale trial and the failed reopening of the Till case harbor the danger of defeating truth and justice in one fell swoop, making a mockery of the criminal justice system and leaving the victims in an even worse position.<sup>113</sup> Given the long history of illegitimate trials and tacit support of racism (or, in many cases, the overt support of racism) in Mississippi and elsewhere in the United States,<sup>114</sup> the possibility of defendants walking free with the state’s (or federal government’s) seal of approval is particularly troubling. This and other mundane obstacles — unreliable witness testimony, fading memories, and tainted evidence — all hint that in some situations, a more expansive approach to the idea of justice would be advisable.<sup>115</sup>

---

107. See Margaret Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 *FORDHAM L. REV.* 2101, 2123-2124 (2005).

108. See discussion *supra* Part III.

109. Russell, *supra* note 107, at 2131.

110. Today’s state judiciary seems well aware of these dangers. For a discussion on the impediments to reopening the De La Beckwith and Killen trials, see generally BALL, *JUSTICE IN MISSISSIPPI*, *supra* note 59, and Gill, *Mississippi Justice at Last: The Trials and Convictions of Beckwith, Bowers and Killen*, *PROSECUTOR, J. OF THE NAT’L DIST. ATT’Y ASS’N*, July-Aug. 2007, at 26-30.

111. See discussion *supra* note 84.

112. See discussion *supra* Part III.

113. I am grateful to Graeme Simpson for this point.

114. The special problems arising from the state legal system’s complicity in past civil rights crimes will be discussed below. See *infra* Part IV.3.

115. These problems arose in most of the trials discussed above. For instance, the jury in the 2005 Killen trial could not agree on a murder verdict because the evidence did not satisfy the threshold of ‘beyond reasonable doubt’ required for a criminal con-

The concept of restorative justice grows out of the disillusionment with traditional schemes of retributive justice.<sup>116</sup> It expands the notion of harm to encompass not only direct victims of past crimes, but also those indirectly affected by such events, even entire communities. As such, the term ‘victim’ is understood more comprehensively than in a court setting, and the state’s duty to prosecute is no longer a yardstick for success. Restorative justice mechanisms seek to reintegrate victims and communities into society through an acknowledgment of past injustices and — equally important — their lingering contemporary embodiments.<sup>117</sup> Broadly speaking, these aims can be described as ‘forward looking,’ where ‘acknowledgment of responsibility’ *per se* should prevail over ‘severity of punishment.’ In the end, the paramount objective is to provide a reckoning with the past, to the extent possible, while at the same time highlighting the relevance of reparations and reconciliation.<sup>118</sup>

Truth and reconciliation commissions (“TRCs”) are an important tool of restorative justice. They are usually autonomous and non-judicial bodies created to investigate facts relating to past injustices. Though they incorporate some criminal justice tools and remedies, such as written depositions and public hearings, TRCs have fewer powers than traditional courts. Moreover, they are always temporary bodies, whose operations last between one-and-a-half and three years.<sup>119</sup> The support of civil society is usually a significant factor in advancing the goals of truth-seeking, especially when government backing is missing.<sup>120</sup> The TRC’s ultimate aim is to foster societal reconciliation through the acknowledgment of an accepted version of the past.<sup>121</sup>

---

viction. See Shalia Dewan, *Former Klansman Guilty of Manslaughter in 1964 Deaths*, N.Y. TIMES, June 22, 2005.

116. See BLOOMFIELD ET AL., *supra* note 98, at 111.

117. For a theoretical examination of restorative justice, see MINOW, *supra* note 106, at 91-92; RUTI G. TEITEL, TRANSITIONAL JUSTICE, 119-148 (2002); BLOOMFIELD ET AL., *supra* note 98, at 111-114. See also JOHN BRAITHWAITE, *Restorative Justice and Responsive Regulation* (2002).

118. It should be reiterated however, that there are no universal panaceas and frameworks. Each society must blaze its own unique trail toward reconciliation. The Sierra Leone TRC summarized this point: “The TRC began its work on the premise that there is no universal model of reconciliation that can apply to all countries. Reconciliation is not a concept that can be imported to a country from abroad. It has to emerge from within the society and be owned by that society.” 3 SIERRA LEONE TRUTH & RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION ch.7, ¶ 6 (2005).

119. See Office of the United Nations High Commissioner for Human Rights, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: TRUTH COMMISSIONS 8 (2006). See also HAYNER, *supra* note 98 at 215.

120. See International Center for Transitional Justice, *Truth Commissions and NGOs: The Essential Relationship* (July 31, 2010) <http://www.ictj.org/images/content/1/0/106.pdf>. See also Neil Kritz, *Progress and Humility: the Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE 61 (Cherif Bassiouni ed., 2002)

121. For an examination of a TRC, see Priscilla B. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 2001, 24-31, [http://www.mississippitrueth.org/documents/ICTJ\\_TruthCommissions\\_fs2008.pdf](http://www.mississippitrueth.org/documents/ICTJ_TruthCommissions_fs2008.pdf) (last visited Aug. 30, 2010). See also RUTI G. TEITEL, TRANSITIONAL JUSTICE 88 (2002) (examining the relation between truth and justice).

The idea of creating something akin<sup>122</sup> to the South African TRC is not entirely novel in Mississippi (or the South, for that matter).<sup>123</sup> Since 2001, every year Democratic Senator John Horhn has introduced a bill in the Mississippi legislature calling for the establishment of a truth commission. All his bill proposals have died in working committees, without ever even reaching a formal vote in the state Senate.<sup>124</sup> It is quite clear that, up to now, the government of Mississippi has shown little or no interest in probing the state's racial history.

In the absence of official action on the matter, the state's citizens have taken it upon themselves to explore the idea of truth-seeking. Killen's conviction in June 2005,<sup>125</sup> followed by the landfall of Hurricane Katrina later that year, generated much interest in a truth commission at the community level.<sup>126</sup> Both events served to emphasize how important the state's racial past continued to be in the twenty-first century.<sup>127</sup> The need for truth-seeking has gradually matured since then: in 2006 the Mississippi Coalition for Racial Justice launched a year of dialogue on race, where it was discovered that many communities still felt an acute need to talk about the state's racial history.<sup>128</sup> The Coalition has responded by promoting story-telling as a form of coming to terms with past grievances, and in 2010 the program launched several additional training initiatives in five Mississippi regions: Oxford, Greenwood, Philadelphia, McComb, and the Gulf Coast.<sup>129</sup>

Parallel to these initiatives, academics, practitioners and community leaders have called for the establishment of a full-blown Truth and Reconciliation Commission.<sup>130</sup> The dialogue and exchange of ideas fostered by the Coalition and another project called the Welcome Table, both at a local

---

122. See *infra* note 143.

123. See generally SOUTHERN TRUTH AND RECONCILIATION: THE ROAD TO JUSTICE FOR HUMAN RIGHTS ABUSES, available at <http://www.southerntruth.org/> (last visited August 30, 2010).

124. The bill proposal reads as follows each year: *An Act to Create the State Truth Commission; To Prescribe Powers and Duties of the Commission; To Provide for the Establishment of Procedures to Investigate Grievances Registered with the Commission; and for Related Purposes*. See, e.g. S. 2719, 2002, Reg. Sess. (Miss. 2002), <http://billstatus.ls.state.ms.us/2002/pdf/history/SB/SB2719.htm>; S. 2834, 2008, Reg. Sess. (Miss. 2008), <http://billstatus.ls.state.ms.us/2008/pdf/history/SB/SB2834.xml>.

125. See *supra* note 95.

126. Author's interview with Susan Glisson of the William Winter Institute for Racial Reconciliation, January 6, 2009.

127. The entire United States, not just Mississippi, watched the unmistakable disparities in the racial composition of populations affected by Katrina's devastation.

128. Author's interview with Susan Glisson of the William Winter Institute for Racial Reconciliation, January 6, 2009.

129. See generally THE WELCOME TABLE, <http://www.welcometable.net>. (last visited Aug. 30, 2010).

130. See Howard Ball, *It's Time Mississippi Established a Truth and Reconciliation Commission* GEORGE MASON UNIVERSITY'S HISTORY NEWS NETWORK (September 25, 2006) <http://hnn.us/articles/29718.html>. At the same time, academic conferences at Harvard and Northwestern in 2007 helped start the debate on creating a truth commission for Mississippi.

and regional level, produced the so-called Mississippi Truth Project.<sup>131</sup> A statewide gathering of community leaders discussed and approved a Declaration of Intent<sup>132</sup> in Jackson in early 2009,<sup>133</sup> which was then circulated to the public as a roadmap for the TRC's proposed scope of activities. The Commission was originally scheduled to begin its work in the summer of 2010, but plans to draw up a detailed mandate and seat commissioners have experienced delays.<sup>134</sup> In 2010, the truth project's organizers decided that more momentum needed to be gathered at the grassroots level before a statewide initiative of this nature could be launched.<sup>135</sup> The project's goal remains the institution of the first statewide truth commission in United States history.<sup>136</sup>

## 2. *The Commission's mandate and objectives*

Due to the delay in setting up the TRC, no formal mandate has yet been adopted and the concrete mechanics of truth-seeking in the Magnolia State remain open to discussion. Nonetheless, the Declaration of Intent sheds much light on the objectives of the Mississippi truth project. Many questions concerning the TRC's future operations seem settled, even if others — especially of a procedural nature — still need to be resolved. In this section I will examine the probable design of the TRC, its mandate and objectives, and how these issues relate to the key challenges awaiting the Commissioners.

The Declaration of Intent clearly states that the Commission will be tasked with investigating events covering the period 1945 — 1975.<sup>137</sup> The chosen timeframe begins when desegregation became a federal policy in many areas of American life,<sup>138</sup> and ends when federally-imposed school desegregation ceased in Mississippi.<sup>139</sup> Given the nature of truth commissions, which rely on people's recollections of the past, it seems the or-

131. The project's timeline is available at MISSISSIPPI TRUTH PROJECT, <http://www.mississippitrueth.org/pages/timeline.htm> (last visited April 4, 2011).

132. MISSISSIPPI TRUTH PROJECT, <http://www.mississippitrueth.org/documents/declaration.pdf> (last visited Aug. 30, 2010).

133. Donna Ladd, *Mississippi Truth Project to Probe State's Race History*, JACKSON FREE PRESS (Jan. 30, 2009); available at [http://www.jacksonfreepress.com/index.php/site/comments/mississippi\\_truth\\_project\\_to\\_probe\\_states\\_race\\_history\\_013009/](http://www.jacksonfreepress.com/index.php/site/comments/mississippi_truth_project_to_probe_states_race_history_013009/).

134. Author's interview with Patrick Weems of the William Winter Institute for Racial Reconciliation, May 11, 2010.

135. *Id.*

136. Information as provided at: [www.mississippitrueth.org](http://www.mississippitrueth.org) (last visited Aug. 30, 2010). I would like to thank Susan Glisson and Patrick Weems of the William Winter Institute for Racial Reconciliation Institute for their invaluable insights on the institutional history of the project.

137. See MISSISSIPPI TRUTH PROJECT DECLARATION OF INTENT, Section 1, available at <http://www.mississippitrueth.org/pages/declaration.htm> (last visited April 4, 2011).

138. Mandatory desegregation began in the military shortly after World War II. On the role of WWII in the sea-change in race relations in America, see *The South and the Second World War*, in MAJOR PROBLEMS IN THE HISTORY OF THE AMERICAN SOUTH 412-460 (Paul Escott & David Goldfield eds., 1990).

139. The date 1975 was chosen by the organizers of the truth commission so that local resistance to school desegregation would be encompassed by the Commission's mandate. I am grateful to Susan Glisson for this point. Interview with Susan Glisson (Jan. 6, 2009).

ganizers came to the logical conclusion that events predating the end of World War II would not be dealt with adequately by a project slated to launch over 65 years later. This decision — seemingly self-explanatory — conceals a more complicated reality, however.

The timeframe will inevitably pose delicate questions about the objectives and limitations of truth-seeking.<sup>140</sup> Any investigation into the history of racial oppression in Mississippi — or anywhere else in the United States — raises the question of where the past begins and, equally problematic, where the past ends. Why should victims of crimes committed after 1945 have a ‘better’ right to acknowledgment of past suffering? How does one examine discriminatory government policies in education or housing, whose roots can be traced to well before the seemingly arbitrary cut-off date? Because the ultimate objective of truth-seeking is forward-looking—fostering reconciliation for future generations—it is nearly impossible, from a conceptual standpoint, to separate past discrimination from its impact on today’s society, including continuing disparities in access to education, healthcare, and income.<sup>141</sup> The TRC should be cognizant of these concerns and should be ready to explain the practical constraints behind its choice of timeframe. As will be discussed later, these issues are particularly sensitive in the context of reparations.<sup>142</sup>

The truth project’s “unofficial” status may yet turn out to be its defining characteristic.<sup>143</sup> The TRC is being created through the grassroots ef-

---

140. Mahmood Mamdani describes the difficulties arising out of a mandate’s unfortunate drafting, including the chosen timeframe, in the context of the South African Truth and Reconciliation Commission. See Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa*, *DIACRITICS*, Fall-Winter 2002, at 33-37. See also Madeleine Fullard, *Dis-Placing Race: The South African Truth and Reconciliation Commission and Interpretations of Violence*, in *RACE AND CITIZENSHIP IN TRANSITION SERIES*, 2004, available at <http://www.csvr.org.za/docs/racism/displacingrace.pdf> (last visited July 31, 2010) (discussing the difficulties surrounding the time period chosen for the South African TRC).

141. This problem will be discussed *infra* Part IV.3

142. This debate is well-known in the context of African American slavery, not just within the United States but also on the international scene. Scholars and activists have debated for some time whether compensation is owed to the heirs of slaves. The main difficulty arising out of — and for many, the main argument against — such claims is the time separating past from present, i.e. lack of perpetrators and indirect link with purported victims. For the US, see generally Charles Ogletree, *The Current Reparations Debate*, 36 U.C. DAVIS L.REVIEW 1051 (2003); Lee A. Harris, ‘Reparations’ as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409 (2003). For a comprehensive overview, see generally RAYMOND WINBUSH, *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (2003).

143. From a purely theoretical standpoint, this fact coupled with the proposed timeframe mean that Mississippi’s exercise in transitional justice should not be labeled a “truth commission” in the traditional sense of the term, but rather a “historical (truth) commission”. See Mark Freeman & Priscilla B. Hayner, *Truth-Telling*, in *RECONCILIATION AFTER VIOLENT CONFLICT, A HANDBOOK* 123 (David Bloomfield et al. eds., 2004):

In contrast to truth commissions, historical commissions are not established as part of a political transition and may not even pertain to today’s political leadership or practices. Instead, they serve to clarify historical truths and pay respect to previously unrecognized victims or their descendants. Another distinction is that, in contrast to truth commissions, historical commissions

forts of local communities, with limited help from the Mississippi government.<sup>144</sup> The implication is that the State of Mississippi — the official state government — does not formally support the project. On the contrary, up to now it seems quite clear that the government openly disapproves of the whole endeavor.<sup>145</sup> Though the TRC's unofficial status, which means it is an unofficial truth-seeking body, is not mentioned anywhere in the Declaration of Intent, this does have rather significant ramifications for the process of truth and reconciliation.<sup>146</sup>

The financial and logistical resources available to the Commission will inevitably be smaller.<sup>147</sup> An unofficial truth commission does not have the authority to take official, state-sanctioned statements from victims, which

---

have generally not investigated instances of widespread political repression but have instead focused on practices that may have affected specific ethnic, racial or other groups.

See also Priscilla B. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 17-19 (2001). See generally Louis Bickford, *Unofficial Truth Projects*, 29 HUM. RTS. Q., 994 (2007).

144. The International Center for Transitional Justice, based in New York City, is providing support to the organizers, but the truth project remains an entirely locally-driven process. On the role of civil society in truth processes see generally International Center for Transitional Justice, *Truth Commissions and NGOs: The Essential Relationship*, 2004; available at: <http://www.ictj.org/images/content/1/0/106.pdf>. It is worth mentioning that another recent truth process — the Greensboro TRC — functioned on a somewhat similar basis. See generally GREENSBORO TRUTH & RECONCILIATION COMMISSION, <http://www.greensborotrc.org/> (last visited Apr. 30, 2010); *United States: Greensboro, NC*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE <http://www.ictj.org/en/where/region2/3180.html> (last visited Apr. 2, 2010).
145. In some ways, it is perhaps noteworthy that the reconciliation process has even gotten this far. As discussed before, the state legislature has repeatedly blocked efforts to set up a state-backed commission of inquiry into the past. See discussion *supra* Part IV.1. The Governor, Haley Barbour, and other top ranking officials have demonstrated time and time again that they do not share the concerns of the organizers of the truth project. See examples cited in Letter from Rita L. Bender, *supra* note 95. See also ASSOCIATED PRESS, *Barbour: Confederate Flag not Worth "Diddly"*, NATCHEZ DEMOCRAT, April 12, 2010, available at <http://www.natchezdemocrat.com/news/2010/apr/12/barbour-confederate-flap-worth-diddly/> (last visited July 31, 2010). Barbour argues that slavery is not an important topic in the context of the Civil War.
146. Lack of broad public support is one of the main reasons such "unofficial" initiatives sometimes fail. Governments are usually — though not always — better at mobilizing the public in support of such efforts, and official projects usually have more resources and a readily available infrastructure at their disposal. This is not to say that community-driven initiatives are doomed, or even more likely, to fail. On the contrary, many such initiatives have flourished. See, e.g., *The Recovery of Historical Memory Project*, Guatemala - REMHI (1995-1998); *Northern Ireland: Ardoyne Commemoration Project* (2002); *Greensboro, North Carolina* (2004-2006). While unofficial truth projects give rise to different challenges commentators mostly agree that the support of civil society in both official and unofficial truth projects is of critical importance. See International Center for Transitional Justice, *supra* note 104. See generally Bickford, *supra* note 143.
147. The resources available to a commission are very important. See Bickford, *supra* note 143, at 1007. Commentators note that the South African TRC's success was partly predicated on its easy access to resources. See Madeleine Fullard, *Dis-Placing Race. The South African Truth and Reconciliation Commission and Interpretations of Violence*, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, 3 (2004), <http://www.csvr.org.za/docs/racism/displacingrace.pdf>. But see Pigou, *supra* note 100, at 42.

suggests that testimony about the past does not have the same value as governmental documents.<sup>148</sup> This also means that the Commission's recommendations will not be binding on any state-sponsored entity in Mississippi, thereby making enforcement of reparations more cumbersome.<sup>149</sup> The practical consequences of these distinctions will be discussed later in the article.<sup>150</sup>

The choice of people to lead the Commission determines to a large extent whether the project will be a success.<sup>151</sup> The Mississippi truth project has not yet specified how many commissioners are to be seated, or who they will be. Given the state government's unwillingness to endorse the TRC, the choice of individuals for this task is crucial. The Commission must convey a sense of impartiality and inclusion to all Mississippians, and so it would be highly advisable for the organizers to ensure a balanced representation of political, religious and ideological factions. The Republican Party should be represented, even if the party's main state representatives refuse to support the project. The Commissioners must include people of both races — black and white — and they should be evenly distributed to convey impartiality. Failure to nominate a representative group of Commissioners would open up the process of "discovering truth" to accusations of bias and partisanship, and thwart its ability to foster reconciliation through a shared historical narrative.

In a broader sense, the choice of Commissioners is intertwined with the procedural and organizational powers of the TRC. Thus far, the organizers have wisely engaged a large chunk of civil society, especially the state's faith-based communities, in drawing up the truth project's priorities.<sup>152</sup> But several important issues have not yet been decided. The Declaration of Intent does not set out whether people's testimonies about the past will be taken in private, through public hearings, or with the help of mass media.<sup>153</sup> Televised screenings of people's emotional stories of past suffering have a profound impact on how people internalize a commission's findings. Observers are generally less inclined to deny facts after seeing firsthand evidence of them, and for obvious reasons, written depositions do not arouse the same level of emotion and compassion.<sup>154</sup> Public hearings also allow greater outreach to the general population. But there are also drawbacks: the Commissioners do not exert the same level of

---

148. See generally Bickford, *supra* note 143.

149. See Freeman & Hayner, *supra* note 143, at 135.

150. See discussion *infra* Part IV.6.

151. See BLOOMFIELD ET AL., *supra* note 98, at 129. The Kenyan Truth, Justice and Reconciliation Commission almost had to disband because of the row surrounding its President, Bethuel Kiplagat. In the end, Kiplagat resigned, and thus made it possible for the Commission to continue its work. See Kenya Truth commission chief Kiplagat steps aside, BBC NEWS AFRICA (November 2, 2010), available at <http://www.bbc.co.uk/news/world-africa-11678835> (last visited April 4, 2011).

152. See discussion *supra* Part IV.1.

153. Since the South African TRC, a trend seems to be developing in favor of public hearings. That said, the final decision always depends on the circumstances of a particular commission. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 83-84 (2002).

154. See HAYNER, *supra* note 99, at 22, 218-220.

control over public proceedings, and so there is more room for inflammatory live testimony and breaches of procedural rules.

The TRC's mandate and procedures, including rules on how to administer hearings, will need to be decided before truth-seeking can begin. These procedural points will of course have implications for the pursuit of truth, some of which will be teased out in this article.<sup>155</sup> At the same time, the TRC must also grapple with a number of substantive challenges, many of which could determine the long-term feasibility of racial reconciliation in Mississippi. I now turn to these topics.

### 3. *Institutional racism*

One of the more difficult challenges awaiting the TRC is determining the role of official government policy in the preservation and promotion of racism. Serious truth-seeking in the Magnolia State must confront, once and for all, the deeply-embedded institutional racism and hierarchical discrimination perpetuated by its governmental actors, ranging from rank-and-file public officials to leading politicians. As one scholar has noted:

The truth . . . is that systematic racial or ethnic violence cannot flourish without the active participation and support of a community's institutions and institutional actors. The individual actor is emboldened because he believes that his community's institutions—its legal system, the media, and the business community—will ultimately support or condone his actions.<sup>156</sup>

The Commission must examine the complicity of state, county, and municipal governments as well as of private businesses, the legal system, the health sector, the media, the prison system, and even of faith communities.<sup>157</sup> All these institutions — public or private, large or small — formed the societal context for individual acts of racism under Jim Crow. Their role in Mississippi's history of racism must be acknowledged if the citizens' trust in these institutions is to be renewed. This is a daunting task with far-ranging implications for the logistics of truth-seeking, all the more so in Mississippi where there is as yet no guarantee that any of the state's public institutions will cooperate with the project.

The problem of institutional racism speaks to a much larger dilemma other states and communities should also address, and not just in the

---

155. There are many factors contributing to the success, or alternatively, failure of truth commissions or truth projects. See Freeman & Hayner, *supra* note 143, at 127. Without going into a protracted debate on what constitutes "failure" and "success" in this context, there are many commissions that did in fact fail, in one way or another, to live up to expectations. To name but a few: Haiti (1994), Burundi (1996), Ecuador (1997), or the Democratic Republic of Congo (2003-2007). For a theoretical evaluation of some of the variables involved in determining success or failure, see generally Joanna R. Quinn, *Haiti's Failed Truth Commission: Lessons in Transitional Justice*, 8 J. HUM. RTS, 265 (2009).

156. IFILL, *supra* note 37, at 155.

157. For the role of the media, and their complicity in racially oppressive practices, see Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2120-122 (2004-2005).

South.<sup>158</sup> That said, the Mississippi experiment is also singular in some ways. The vehemence with which the State Sovereignty Commission defied the advances of the Civil Rights Movement is a case in point. Yasuhiro Katagiri, the author of the only comprehensive study on the topic, concluded that the Commission “became the most active pro-segregation and pro-states’ rights governmental agency throughout the South.”<sup>159</sup> The Sovereignty Commission’s archives, which were declassified only recently, and academic studies have proven beyond any doubt the extent to which public officials collaborated with the KKK.<sup>160</sup> Collusion extended to the most radical manifestations of Klan violence, including public lynchings and murders of civil rights leaders.<sup>161</sup> This was the point made by the Philadelphia Coalition in the wake of the Edgar Killen trial:

These three brave young men were not murdered by a lone individual. While a vigilante group may have fired the gun, the State of Mississippi loaded and aimed the weapon. The Mississippi State Sovereignty Commission monitored and intimidated civil rights activists to prevent black voter registration. The White Citizens’ Councils enforced white supremacy through economic oppression.<sup>162</sup>

The charges leveled at the state and the White Citizen’s Council in the excerpt above are equally applicable to the Mississippi legal system. Ac-

---

158. For an important book discussing the far-reaching ramifications of Jim Crow, see JAMES LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005).

159. See KATAGIRI, *supra* note 26, at xiii.

160. See DITTMER, *supra* note 31, at 215-218, 250-252, 303-308; Michael Newton, *THE KU KLUX KLAN IN MISSISSIPPI: A HISTORY* (2010), especially p. 127-152; NOSSITER, *supra* note 5, at 93-97. In her letter to Governor Barbour, Rita Bender wrote:

There was no secret that the Klan and the police, sheriffs’ departments, and state highway patrol officers were often one and the same . . . the [State Sovereignty] Commission investigated the jury panel in the first trial of Byron de la Beckwith for the murder of Medgar Evers in 1964. The Commission reported back to the defense its findings as to which members of the panel were not expected to be favorable to de la Beckwith. The defense was then in a position to eliminate these jurors from the panel. An arm of the state was assisting the defense in a case the state was supposed to be prosecuting. This is a grotesque perversion of the criminal justice system . . . . The Commission provided its investigative reports to the Clarion Ledger and other newspapers in the state until 1967, which reports were then used by the newspapers to distort and defame the civil rights movement.

Letter from Rita L. Bender, *supra* note 95.

161. The full extent of state involvement in upholding segregation, including the violence that came with it, is still not clear. For Mississippi, see generally KATAGIRI, *supra* note 26; EAGLES, *supra* note 31 (describing in detail how the state and the university were complicit in excluding blacks). For Alabama, see S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 480-482 (2008) (describing how the state government in Alabama thwarted the FBI investigation into the bombings by launching its own inquiry into a token misdemeanor charge (possession of dynamite) against the suspects).

162. See 2005 Statement, THE PHILADELPHIA COALITION RECOGNITION, RESOLUTION, REDEMPTION: UNITING FOR JUSTICE (June 21, 2005) <http://www.neshobajustice.com/pages/2005stmt.htm>.

quittals and hung juries made the administration of justice impossible, again and again, during the worst racial violence of the 1950s and 1960s.<sup>163</sup> Repeatedly, charges would inexplicably be dropped against crime suspects, or worse yet, they would walk free despite overwhelming evidence of guilt.<sup>164</sup>

Critics have correctly singled out the pernicious role played by the jury system in this state of affairs.<sup>165</sup> Discriminatory acquittals in criminal trials by all-white, racially prejudiced jurors in majority white counties became almost “natural” during the Civil Rights Era. That said, it would be far too easy to rationalize this pattern of miscarriages of justice by focusing on the obstinacy of racially-prejudiced white juries.<sup>166</sup> Blaming Edgar Killen’s hung jury in 1967 on the woman who, at the time, argued she couldn’t convict a preacher, obfuscates a more complex reality.<sup>167</sup> After all, relocating trials to majority white counties, where jurors refused to convict white defendants, was permitted and often encouraged by judges and prosecutors.<sup>168</sup> They, as well as defense attorneys, knew full well that a change of venue would usually make a conviction far less likely than in majority black counties.<sup>169</sup> This made the entire legal profession, more often than not, a willing participant or at least a passive spectator in the general mockery of justice taking place. A chilling illustration of this is Judge Cox’s infamous statement in which he — after meting out sentences in the *Mississippi Burning* murders — described the defendants in the following terms: “They killed one nigger, one Jew, and a white man. I gave them all what I thought they deserved.”<sup>170</sup> This is just one example, but it speaks to a much larger and hitherto ill-explained phenomenon of how Mississippi’s “justice” system, especially its criminal arm, colluded in de-

---

163. See discussion *supra* Part III regarding De La Beckwith’s two mistrials in 1963 and the 1967 *Mississippi Burning* federal trial. See also *infra* note 165.

164. The problem was particularly acute in state courts, but—as will be described below—federal courts encountered their fair share of difficulties with racial prejudice. The nomination process for Judge Cox, a federal judge in Mississippi, is described in JERE NASH, ANDY TAGGART, & JOHN GRISHAM, *MISSISSIPPI POLITICS: THE STRUGGLE FOR POWER*, 1976-2008 111-113 (2009).

165. Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS J. 75, 76-88, 95-96 (2009).

166. The declassification of the State Sovereignty Commission has shed light, among other things, on the extent of the government’s involvement in Klan activities. It is now thought that the state government passively hindered (at best) or actively thwarted (at worst) the prosecutions of De La Beckwith, Bowers, and Killen. See Joseph Gill, *Mississippi Justice at Last: The Trials and Convictions of Beckwith, Bowers and Killen*, PROSECUTOR, J. OF THE NAT’L DIST. ATT’Y ASS’N., July-Aug. 2007, at 27-38. See also Letter from Rita L. Bender, *supra* note 95.

167. See discussion *supra* Part III.

168. See NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 197-223 (1990).

169. *Id.* at 211-12.

170. BALL, *Murder in Mississippi*, *supra* note 49, at 134.

priving blacks of their fundamental rights.<sup>171</sup> This story, not uncommon in the United States under Jim Crow, still needs to be written.<sup>172</sup>

The TRC offers a unique opportunity to examine such issues. The limitations of criminal trials are laid bare in this context. It is perhaps unrealistic to expect today's courts, administering the trials of a handful of Klansmen, to conduct a thorough investigation of their predecessors' alleged collaboration with a wider group of pro-segregationists, violent protesters or even killers. An inbuilt conflict of interest is plain to see.<sup>173</sup> It is possible judges will be loath to ascribe blame to their predecessors, some of whom they may still remember in person as their mentors. It is more convenient not to say anything, or put the blame on rogue, racist jurors from the 1960s, rather than scrutinize the systemic anomalies that allowed such injustices to occur at all.

Critically, it seems that the organizers of the Mississippi truth process have spotted these systemic problems. The Declaration of Intent states: "Too often stories are told of this time focusing on individuals and not institutions . . .,"<sup>174</sup> which would imply that administrative practices in support of Jim Crow will be discussed. The TRC provides a forum for victims to speak out about their experiences of institutional oppression and, in this way, allows them to address, perhaps for the first time, the full range of discrimination suffered by them. This seems particularly important where anonymous procedures and structures lie at the root of injustice, and naming individual culprits is not possible. Victim accounts can also help shed light on practices that would usually be beyond court scrutiny because of immunities enjoyed by politicians, judges, prosecutors, and other public officials.<sup>175</sup> It is the non-court setting of the TRC that makes this possible.

---

171. Truth commissions in Chile, Uganda, El Salvador, South Africa and Argentina helped to uncover their judicial system's complicity in past atrocities. See HAYNER, *supra* note 99, at 107-09.

172. There has been surprisingly little scholarship on the American legal system's role in upholding Jim Crow. The literature tends to focus on specific cases (or case law more generally), individuals or a jurisprudential debate on the moral, legal and political motives behind decision-making. However, there is very little on the institutions—whether they be courts or law enforcement—which allowed Jim Crow to flourish.

173. The South African TRC encountered similar difficulties. In the end, the country's judiciary refused to even participate in the commission's proceedings. For an extensive study of the legal system's complicity in apartheid in South Africa, see DAVID DYZENHAUS, *JUDGING THE JUDGES JUDGING OURSELVES: TRUTH, RECONCILIATION, AND THE APARTHEID LEGAL ORDER* 33-36 (1998) (discussing of the relationship between law and justice and the role of judges in the legal system).

174. See MISSISSIPPI TRUTH PROJECT DECLARATION OF INTENT, Section 3, available at <http://www.mississippitrueth.org/pages/declaration.htm> (last visited April 4, 2011). The text goes on to say: ". . . it is also true that public officials and community leaders enabled the violence that occurred." The enumeration of actors should probably not be viewed as closed but it is notable that Mississippi's legal system has been spared any premature embarrassment.

175. In the context of Mississippi, this is still — at present — a hypothetical scenario. There have been no lawsuits seeking to implicate government figures or judicial officers for their role in upholding Jim Crow. On the international stage, the most famous case involving immunities is the trial(s) of former Chilean President, Au-

Moreover, truth-seeking also offers the potential of moving the debate beyond isolated instances of past racial inequity, and refocusing it on how institutional racism continues to perpetuate itself through anonymous structures of white privilege.<sup>176</sup> Blacks, who have historically been excluded from prominent positions in government and business, lack the tools to force their way into these conservative structures of power.<sup>177</sup> As noted by Sherrilyn Ifill, “[I]nstitutions must be pressed to examine how conceptual cloaks that appear morally neutral can mask institutional complicity with inhumanity.”<sup>178</sup> An open discussion of these issues could serve to rebuild trust in many of Mississippi’s institutions, an important benefit given their unfavorable historic reputation among the state’s black citizens.<sup>179</sup>

The TRC could also serve as a catalyst for a broader but equally delicate question, namely that of federal and national complicity in Southern racist politics. For segregation to function in the South, there had to be at least tacit support in many other parts of the country.<sup>180</sup> It is startling how often Americans forget this basic reality of the federal system. The federal government often validated or even encouraged Southern states’ segregationist policies.<sup>181</sup> The federal courts, the Supreme Court chief among them, repeatedly approved — or, more often, refused to invalidate — elements of the segregation system.<sup>182</sup> This complicity extends beyond the judicial system into the realm of private business, media, and crucially, to law enforcement.<sup>183</sup> A statement of the Philadelphia Coalition from 2008<sup>184</sup> coupled with a series of recent declarations, have made this clear yet

---

gusto Pinochet. See Brigitte Stern, *Immunities for Heads of State: Where do We Stand?*, in JUSTICE FOR CRIMES AGAINST HUMANITY 95-103 (Mark Lattimer & Philippe Sands eds., 2003).

176. Critics have argued that one of the South African TRC’s major shortcomings was its inability to tackle systemic racism. See Mamdani, *supra* note 140, at 58; Mahmood Mamdani, *When Does Reconciliation Turn Into a Denial of Justice*, in Sam Molutshungu Memorial Lectures Pretoria, HSRC Publishers, 1998.
177. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 157, 172-74, 189-220 (2d ed. 2010).
178. See IFILL *supra* note 37, at 158.
179. See also MINOW, *supra* note 106, at 58-74.
180. See *AMERICAN PASSAGES: A HISTORY OF THE UNITED STATES* 468 (Edward L. Ayers et al. eds., 4th ed. 2009). Gladys L. Knight, *Jim Crow*, in *ENCYCLOPEDIA OF AMERICAN RACE RIOTS* 308-312 (Walter C. Rucker & James N. Upton eds., 2007). The North’s—and the rest of the United States’—complicity in slavery and then Jim Crow is still not fully understood. Newer scholarship has tended to focus on the economic linkages—as opposed to just the political and legal relationships—between the North and the South.
181. See FEAGIN, *supra* note 177, at 49-52, 143-52.
182. See Michael J. Klarman, *Has the Supreme Court Been Mainly a Friend or a Foe to African Americans?*, SCOTUSBLOG, SUPREME COURT OF THE UNITED STATES BLOG (Feb. 1, 2010), <http://www.scotusblog.com/2010/02/has-the-supreme-court-been-mainly-a-friend-or-a-foe-to-african-americans/>.
183. An example of this is the Greensboro TRC that unearthed new evidence about the complicity of the FBI and local police in several Klan killings from 1979. The Commission documented how law enforcement repeatedly delayed pursuing the perpetrators, and then attempted to cover up their prior misdeeds. For the Commission’s Final Report see GREENSBORO TRUTH & RECONCILIATION COMMISSION, <http://www.greensborotrc.org/> (last visited Apr. 4, 2010). The Greensboro Commission is dis-

again. The involvement of the FBI was — and crucially — continues to be a major obstacle to the achievement of justice in many of Mississippi's unsolved crimes.<sup>185</sup>

Lastly, it should be remembered that institutional racism is not just an oddity of the past. Its legacy shapes people's lives to this day throughout the United States.<sup>186</sup> Mississippi has witnessed several powerful reminders of this in the past years. In 2002, Trent Lott, the U.S. Senator from Mississippi, lost his position as Senate Republican leader following a comment he made at Strom Thurmond's 100th birthday: "I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either."<sup>187</sup> But the lesson was clearly lost on him when just a few years later both he and Thad Cochran, the other U.S. Senator from Mississippi, declined to sponsor a bill symbolically apologizing for the U.S. Senate's refusal to pass anti-lynching legislation.<sup>188</sup> The message sent to Mississippi's voters was unmistakable: the state's political elite still does not see any problem with the government's past handling of racism.<sup>189</sup> And if these two high-profile incidents were insufficient, Hurricane Katrina ensured that the United States became attuned to the continuing resonance of not just Mississippi's, but also the entire nation's racial history.<sup>190</sup>

---

cussed at length. See LISA MAGARRELL & JOYA WESLEY, *LEARNING FROM GREENSBORO: TRUTH AND RECONCILIATION IN THE UNITED STATES* 118-131 (2010).

184. See THE PHILADELPHIA COALITION *supra* note 163; 2008 Statement, available at <http://www.neshobajustice.com/pages/2008stmt.htm> (last visited August 30, 2010).
185. See Jerry Mitchell, *King's FBI Files May Be Opened to Public*, USA TODAY, Jan. 15, 2010; *Justice Department Still Won't Release Names of Lynch Mob*, JOURNEY TO JUSTICE BLOG (Mar. 3, 2010), <http://blogs.clarionledger.com/jmitchell/2010/03/03/justice-department-still-wont-release-names-of-lynch-mob/>
186. See FEAGIN, *supra* note 177, at ix-xiv, 135-52.
187. Thomas Edsall, *Lott Decried For Part of Salute to Thurmond, GOP Senate Leader Hails Colleague's Run As Segregationist*, WASHINGTON POST, December 7, 2002, at A06.
188. Both voted in favor of the bill when it actually came up for a vote in the Senate. See William Rasberry, *A 'Sorry' Excuse from Cochran*, WASHINGTON POST, June 20, 2005.
189. See Letter from Rita L. Bender, *supra* note 95. The Council of Conservative Citizens boasts its most active chapter in Mississippi. Many leading state politicians and public officials are active members or openly sympathize with the goals of the organization. See: *Communing with the Council*, in Southern Poverty Law Center, Intelligence Report, Fall 2004, 115, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2004/fall/communing-with-the-council> (last visited August 30, 2010). See also Samuel J. Bowers, *Sealed Interview with Deborah Sepncker*, October 4, 1983 Mississippi Department of Archives, where Bowers explains the ideological continuity in the state's congressional representation from the early 20th century onwards.
190. Hurricane Katrina's landfall in 2005 is usually credited with raising awareness among Americans of the lingering effects of racial discrimination in the United States. Most of the victims of the storm in New Orleans, the largest city affected by the storm, were African-American. The impact of Hurricane Katrina is examined in SHIRLEY BETTER, *INSTITUTIONAL RACISM. A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE* 125-32 (2d ed. 2008); DAVID L. BRUNSMAN, *THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE* (2007). The impact of Hurricane Katrina on truth and reconciliation in Mississippi are briefly alluded to in Part IV.1.

The above examples point to a key challenge facing the Mississippi TRC, namely its ability to reconcile an ostensibly backward-looking temporal framework with the task of making truth-seeking relevant to Mississippians living in the twenty-first century. It is difficult to imagine racial reconciliation succeeding until today's public officials — from politicians to judges — recognize not just past discrimination, but also elements of institutional racism in present-day Mississippi.<sup>191</sup> Though the TRC's mandate is aimed at past injustices, the Commission must also find a way to address the existing state of race relations.<sup>192</sup>

#### 4. *The role of ordinary Mississippians*

Martin Luther King, Jr. once said that “the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate, who is more devoted to ‘order’ than to justice.”<sup>193</sup> It is easy to see why a proper investigation of Mississippi's ordinary citizens would be the most difficult task awaiting the TRC. The spotlight would have to shift away from acts of individual criminals or anonymous governmental structures, and focus instead on Mississippi's rank and file inhabitants and their involvement in the state's history of racism. Up to now, both scholars and the media have failed to seriously grapple with this problem, and so it seems all the more important that the TRC begin to redress this deficiency.<sup>194</sup>

The history of racism in the United States is often described in a surprisingly abstract manner, as if it were something experienced by “others” and only “elsewhere.”<sup>195</sup> Americans acknowledge that race is a persistent problem, but they frequently fail to identify its manifold and enduring expressions.<sup>196</sup> Howard Ball's book on the Killen trial is a case in point.<sup>197</sup> The author skillfully investigates the trial's many intricacies and dilemmas, and offers plentiful commentary on the convictions' broader meaning. The book even notes the delicate interplay between victims, perpetrators and the “rest of society.”<sup>198</sup> Nonetheless, though he is cognizant of these categories *per se*, Ball goes on to describe a sanitized vision of Mississippi society both when the murders took place and at the time of the successful prosecution. According to the book, there are the pepe-

---

191. See discussion *supra* relating to the Commission's mandate.

192. For the same point in Alabama, see S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 487 (2008).

193. *Letter from Birmingham City Jail*, reprinted in JAMES M. WASHINGTON, *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 295 (1990).

194. Several books in the last couple of years have begun to address this topic. See generally KEVIN KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2007); SOKOL, *THERE GOES MY EVERYTHING*, *supra* note 30; ANDERS WALKER, *THE GHOST OF JIM CROW. HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009).

195. See FEAGIN, *supra* note 177, at x.

196. *Id.* at x-xi.

197. See BALL, *JUSTICE IN MISSISSIPPI*, *supra* note 49.

198. *Id.* at 195-207.

trators, there are the victims, and there are also the “good people” of Mississippi, or the so-called “innocent bystanders.”<sup>199</sup>

This conceptualization of responsibility and accountability stems from the way retributive justice frames our understanding of such processes. Criminal trials are by their very nature adversarial, with two main actors — victims and perpetrators. The jury is then called in to answer a deceptively simple question: guilty or not guilty.<sup>200</sup> Consequently, in the traditional lexicon of criminal justice, the question of guilt not only has a misleadingly simple answer, but also artificially reduces the number of active participants.<sup>201</sup> Such an oversimplification of guilt and accountability is one of the main reasons victims become disillusioned with the adversarial system as embodied by retributive justice schemes, and pin their hopes on non-adversarial restorative justice mechanisms, such as truth-telling.<sup>202</sup>

This is not just a theoretical problem. How one frames the concept of responsibility has profound consequences for our understanding of the past and also of the present. In the context of the South African truth commission, Mahmood Mamdani observed that “[i]n highlighting the identity of perpetrators while obscuring that of beneficiaries, the TRC has given us a version of the truth which obscures the link between perpetrators and beneficiaries, and thus between racialised power and racialised privilege.”<sup>203</sup> The terminology is revealing. The author refers to beneficiaries as a sort of third category, somewhere between perpetrators and victims, precisely because they are the ones benefitting most from the status quo. Mamdani’s observations on how whites continued to benefit from apartheid, even after its overthrow, are *mutatis mutandis* applicable to the white population in post-Jim Crow Mississippi.

The Mississippi TRC must address this issue. It must examine the wider societal context of race relations throughout the state’s history, which includes not just isolated crimes but also the role of ordinary Mississippians in upholding segregation and — after the overthrow of *de jure* Jim Crow — maintaining white privilege. To do otherwise would obscure the basic reality that sustaining two separate spheres of life — one black and one white — was a dialectic process in which everyone, white and black, though for entirely different reasons, participated. As Ben Chaney pointedly said in 2005, immediately after the Killen verdict: “In the six-

---

199. *Id.* at 4, 11, 202. The role of bystanders is also discussed in in MINOW, *supra* note 106, at ix (foreword by Judge Richard J. Goldstone). For the use of the term “good people”, see also William J. Baxley’s words about the prosecution in 1977 of the bombings in Birmingham, in S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 483 (2008).

200. See also Anderson, *The Past on Trial*, 96 CALIF. L. REV. at 473-475.

201. See BLOOMFIELD ET AL., *supra* note 98, at 104.

202. *Id.*

203. Mahmood Mamdani’s compelling critique of the South African TRC stems from the unclear distinction drawn in the mandate between victims and perpetrators. See Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa*, DIACRITICS, Fall-Winter 2002, at 33-37.

ties, good people did nothing.”<sup>204</sup> This is a powerful indictment targeting the complicity of the general population not just in the many heinous civil rights crimes, but also its unwillingness to confront segregation and other civil rights abuses.<sup>205</sup>

The Declaration of Intent is right to isolate this as a distinct problem when it refers to practices that “. . . consciously and unconsciously oppressed a large segment of the population”, and then goes on to say that these practices “resulted in . . . conspiracies of silence.”<sup>206</sup> The crucial point is that “conspiracies of silence” have expressly been singled out in the document (though it would probably be more accurate to say that these practices also “resulted from” such conspiracies). In line with this, the TRC should attempt to reframe the debate around race in Mississippi. The spotlight should in due course shift from instances of extreme violence and hate — as embodied in the criminal trials of Klansmen — and center on ordinary people’s experiences with racism under Jim Crow. Discrimination and oppression transpired in a variety of everyday activities, from public accommodations segregated by race, through stores purposely serving their black clients last, to restaurants insisting on giving blacks the worst seats.<sup>207</sup> The TRC should aim to elicit accounts of how this deeply ingrained culture of oppression functioned, oftentimes superficially hidden under the guise of neutral practices. In this vein, the Declaration of Intent again correctly emphasizes the role of story-telling:

There are still living eyewitnesses from this era who can help Mississippi face and tell its own stories in an honest, unflinching fashion . . . . A Mississippi Truth and Reconciliation Commission will allow the state to constructively engage the confusion, division and bitter feelings related to this time period.<sup>208</sup>

The wording is not accidental. The Declaration draws on the experiences of the Mississippi Coalition for Racial Justice and the Welcome Table project.<sup>209</sup> The TRC should continue and develop the work of these initiatives by creating a forum where people can openly talk about race and the various attitudes and perceptions that have molded ordinary people’s experience of racism. It should by no means concentrate on the victims of violence, but rather those affected by its more subtle, everyday

---

204. See Donna Ladd, *After Killen, What’s Next for Mississippi?*, JACKSON FREE PRESS, June 22, 2005.

205. For a discussion of how the media and local businesses in Birmingham tried to portray the Sixteenth Street bombing as a one-off event and refused to endorse calls for justice, see Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. at 481.

206. MISSISSIPPI TRUTH PROJECT DECLARATION OF INTENT, available at <http://www.mississippitrueth.org/pages/declaration.htm> (last visited April 4, 2011).

207. The everyday experiences of African Americans under Jim Crow are well documented in books such as: LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998). See also REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH (William H. Chafe, Raymond Gavins, Robert Korstad eds., 2008).

208. MISSISSIPPI TRUTH PROJECT DECLARATION OF INTENT, available at <http://www.mississippitrueth.org/pages/declaration.htm> (last visited April 4, 2011).

209. *Id.*

expressions in housing, employment and education. The goal in the longer term is that a public debate around people's experiences with racism will have the double effect of dispelling long-held myths about race and empowering victims through the externalization of their fears.<sup>210</sup>

Truth-seeking, by its very nature, is a dialectic process requiring not just the passive participation of victims and oppressors, but also their active contribution through testimonies and confessions. The organizational structure of a truth commission allows everyone to be heard, even if the procedural details may vary.<sup>211</sup> However, the biggest practical hurdle facing any truth project is how to secure the involvement — passive and active — of both sides.<sup>212</sup> It promises to be no different in Mississippi.

Convincing white Mississippians to follow the proceedings of the TRC may be difficult in its own right, but finding a way to induce confessions about how they witnessed, or even partook in Jim Crow, is the real challenge.<sup>213</sup> Few people will have Virginia Durr's courage, when she publicly stated, to the shock of friends and relatives, that "[w]e were all sons-of-bitches growing up in Alabama . . . . Most of us were passive sons of bitches. We didn't kill or beat blacks, we just accepted."<sup>214</sup> It is easy to see why such testimony would upset white observers, test the patience of blacks, and possibly even lead to re-victimization. Though truth-telling can have therapeutic value for victims<sup>215</sup> — by allowing them to retrieve their own language and giving them new strength to find their place within society — it should not be forgotten that re-visiting the past can also be traumatic and deeply unsettling.<sup>216</sup> Younger generations of black Mississippians may struggle to accept the injustices suffered by their forbears, while younger whites may have a hard time accepting that their elders were complicit in the events of the past. This could take the drastic form of discovering that one's family member was a Klansman. For some it could mean finding out that one's family benefited from state-spon-

---

210. Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POLICY & LAW 195, 204-11 (2000).

211. As discussed above, the procedural mechanisms behind the Mississippi TRC have yet to be decided. It remains unclear whether testimony will be recorded in private or in public.

212. See BLOOMFIELD ET AL., *supra* note 98, at 136.

213. Tellingly, the truth project's on-going efforts (Coalition for Racial Justice and the Welcome Table) have met with enthusiasm primarily among black Mississippians. This would have to change under a TRC.

214. Durr announced this at the 100th Anniversary Celebration of the Life of Supreme Court Justice Hugo L. Black, hosted at the University of Alabama Law School. Hugo Black had famously been a member of the 1920s Ku Klux Klan before he became a prosecutor, politician, and finally, a Supreme Court Justice. See BALL, *JUSTICE IN MISSISSIPPI*, *supra* note 49, at 75.

215. See THERESA PHELPS, *SHATTERED VOICES: LANGUAGE, VIOLENCE AND THE WORK OF TRUTH COMMISSIONS* 55 (2004). Phelps splits the advantages of victim story-telling into two categories: (1) benefits accruing to victims (2) benefits accruing to the oppressor, i.e. the state. See also van Zyl, *supra* note 104, at 659.

216. Adequate emotional counseling and psychiatric support should be made available throughout the truth-seeking process. For an example of the positive effects of truth-telling, see Jerry Mitchell, *Brother of Slain Teenager Talks of His Faith*, in JOURNEY TO JUSTICE BLOG, March 14, 2010, available at <http://blogs.clarionledger.com/jmitchell/tag/james-ford-seale/> (last visited July 31, 2010).

sored segregation.<sup>217</sup> For others it would concern the more subtle forms of racial discrimination, such as contributions to the economic, legal or social submission of blacks. Whatever the permutations, the organizers must find a way to design a commission capable of eliciting these everyday experiences of discrimination in an intelligible way, and from such a large section of the population.<sup>218</sup>

It is important to emphasize, however, that the TRC's aim is not the "re-discovery" or "re-construction" of an academically verifiable account of the past. Truth in the transitional justice lexicon does not mean that stories, testimony and confessions can or should be corroborated according to standards of procedural criminal law or even according to general methods of historical inquiry.<sup>219</sup> On the contrary, truth-telling merely aims to foster a mutually acceptable and acknowledgeable version of the past through the confrontation of diverging viewpoints. Facts and versions of events do not have to be proven "beyond reasonable doubt," because the aim is no longer the preparation of a criminal trial or of an academic publication. Instead, truth-telling hopes to persuade victims and beneficiaries to partake in reassessing their shared past. As many authors have noted, it is the centrality of dialogue in this exercise which can foster mutual respect for one's differences and, in the long run, lead to reconciliation.<sup>220</sup>

Though truth-telling has many strengths and advantages, these are never smooth processes and generating one 'truth', acceptable to all parties, is never really possible.<sup>221</sup> TRCs harbor pitfalls, which may, if not dealt with properly, undermine the reconciliation process. Given the non-judicial and wholly voluntary nature of testimony, as well as the non-academic aspirations to historical accuracy, the Commission's proponents need to expect pointed questions about its work methods, professionalism, and accountability.<sup>222</sup>

A recurrent dilemma for truth projects is the so-called "naming names" problem.<sup>223</sup> What standards can and should be used to allow identification of transgressors of ethical, societal and moral imperatives, as opposed to purely legal norms? Allegations may range from very gen-

---

217. Ifill describes the 'ordinariness' of lynchings through the presence of average whites. See IFILL, *supra* note 37, at xi, xviii, xx.

218. This issue is discussed further *infra* Part IV.6, particularly with respect to white Mississippians' participation.

219. The concept of truth is examined in Deborah Posel and Graeme Simpson, *The Power of Truth: South Africa's Truth and Reconciliation Commission in Context*, in COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 1-13 (2002).

220. For a discussion of some of these themes, see IFILL, *supra* note 37, at 132-53; and BLOOMFIELD ET AL., *supra* note 98, at 122.

221. For a discussion of these themes in the context of a separate truth project in the United States, see generally ALFRED B. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921. RACE, REPARATIONS AND RECONCILIATION* 234-250 (2003).

222. See Pigou, *supra* note 100 at 38-40.

223. See HAYNER, *supra* note 99, at 121-144. Hayner examines how this was dealt with by truth commissions in Argentina, Chile, El Salvador, Haiti, Chad, Guatemala, South Africa, Peru and Liberia.

eral claims of racial bias or discrimination to those implicating people in unlawful acts, crimes or gross human rights violations. This is particularly challenging with respect to deceased political figures and public officials, whose good name may be tarnished in the course of testimony, without any opportunity to respond.<sup>224</sup> The decision to publish the names of such individuals in the final report is particularly controversial.<sup>225</sup> Two opposing principles — the goal of spontaneous and authentic witness testimony on the one hand, and the need to ensure respect of privacy and due process on the other — are in tension.<sup>226</sup> The mandate should be clear on several questions: in what circumstances can claims and accusations be made against individuals? How does one verify the accuracy of such allegations? At what point should such allegations be made public? Do people accused of transgressions have an obligation to respond to such charges? Should the procedure vary depending on the severity of the alleged transgression? How does one deal with allegations against deceased persons?<sup>227</sup>

These questions will probably be of special importance in the context of an unofficial truth-seeking body such as the Mississippi TRC. The Commissioners must ensure that truth-telling does not turn into unsubstantiated story-telling. Striking the right balance between victims' expectations and the ethical and legal constraints surrounding the pursuit of truth and reconciliation will not be easy. Nonetheless, it seems that the success of the Mississippi TRC depends largely on the Commission's ability to frame the debate around individual experiences with racism.<sup>228</sup> Sherrilyn Ifill has argued that "[r]econciliation efforts must get not only at the men who killed but at the communities who created killers and who condoned violence by permitting these violent murderers to live free in their midst for decades."<sup>229</sup> The contrast between Ifill's conceptual framework and the depiction of justice-seeking in Ball's account is worth highlighting. Ball's vision of Mississippi society is one where, until Killen's verdict, the good people of Neshoba County had effectively been frightened into an inert tolerance of the *status quo*. In Ifill's account, truth-seeking asks pointed and uncomfortable questions of these passive bystanders. Though it remains to be seen which trope the TRC opts to pur-

---

224. *Id.*

225. *Id.*

226. *Id.*

227. For a discussion of these issues, see BLOOMFIELD ET AL., *supra* note 98, at 135; Margaret Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1255-61 (2003).

228. A chief criticism of the South African reconciliation process has been the fact that the mandate targeted only a narrow group of politically motivated gross violations of human rights, while ignoring the everyday manifestations of "apartheid". In this view, the South African TRC's findings were heavily skewed toward isolated incidents of violence, leaving untouched the oppression of most blacks. For more, see Graeme Simpson, *A Snake Gives Birth to a Snake: Politics and Crime in the Transition to Democracy in Africa*, in JUSTICE GAINED? CRIME AND CRIME CONTROL IN SOUTH AFRICA'S TRANSITION (Bill Dixon & Elrena van der Spuy eds., 2004); Mahmoud Mamdani, *The Truth According to the TRC*, in THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE 176-183 (Ifi Amadiume & Abdullahi A. An-Na'im eds., 2000).

229. IFILL, *supra* note 37, at 130.

sue, the Declaration of Intent is right, at this stage, to leave open the possibility of examining the role played by ordinary Mississippians in upholding state-sponsored racism, segregation, and the *de facto* separation of spheres of life between whites and blacks, during and after Jim Crow.

##### 5. *Truth-seeking in relation to other justice mechanisms*

The relationship between the Mississippi truth project and other justice-seeking mechanisms is rapidly gaining in importance. At present, individuals, communities and institutions are pursuing justice in the context of at least four entirely autonomous undertakings: the re-opened cases of Klansmen, cold cases investigated under a federal law called the “Till Bill,” independent efforts led by investigative journalists, and, lastly, efforts to create the TRC.<sup>230</sup> Though each of these avenues presents its own strengths and weaknesses, it is becoming increasingly important to coordinate the scope of their activities so as to avoid undermining the greater good of racial justice in Mississippi.

The Emmett Till Unsolved Civil Rights Crime Act of 2007 (“Till Bill”),<sup>231</sup> signed into law by President George W. Bush on October 7, 2008, gave the federal government new and sweeping powers to (re)-investigate unsolved crimes of the past. It created an Unsolved Crimes Section within the Department of Justice and an Unsolved Civil Rights Crime Investigative Office at the FBI.<sup>232</sup> Ten million dollars a year are earmarked for investigating such cases.<sup>233</sup> The Till Bill enables the “prosecution of violations of criminal civil rights statutes that occurred not later than December 31, 1969, and resulted in a death.”<sup>234</sup> This is of central importance to the viability of further criminal prosecutions of KKK members, as many of them are now beyond the law’s reach for a variety of legal reasons, such as statutes of limitations, out-of-court settlements, the prohibition of double jeopardy, or *res judicata*.<sup>235</sup> The Till Bill offers new promise in cases which have already been re-opened by the Mississippi Justice

230. These four undertakings are discussed at various points in this article. The re-opened cases were discussed in Part III. The Till Bill and independent investigations are discussed in this section. The TRC is discussed throughout the article.

231. Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934 (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-923> (last visited March 10, 2010).

232. The DOJ had actually requested that such special units not be created as they constrain their flexibility in dealing with such cases. See *DOJ Statement of Grace Chung Becker on the Emmett Till Unsolved Civil Rights Crime Act*, June 12, 2007, available at [http://www.justice.gov/crt/speeches/gcb\\_070626.pdf](http://www.justice.gov/crt/speeches/gcb_070626.pdf) (last visited July 31, 2010).

233. *Id.*

234. Pub. L. No. 110-344, 122 Stat. 3934, § 3(c)(1)(A). The 1969 cut-off date was chosen because unsolved race crimes are usually prosecuted under two clauses—18 U.S.C. § 245 and 42 U.S.C. § 3631—passed in 1968. The Act also has an inbuilt sunset clause—it cannot serve as a basis for prosecutions beyond 2017.

235. See Margaret Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1255-1261 (2003). See also Jerry Mitchell, *Answers to Legal Questions on Cold Cases*, in JOURNEY TO JUSTICE BLOG, (February 21, 2010), <http://blogs.clarionledger.com/jmitchell/2010/02/21/answers-to-legal-questions-on-cold-cases/> (last visited April 2, 2011).

Department, but have since stalled either for legal reasons, or due to insufficient human and financial resources.<sup>236</sup>

Despite the Till Bill's indisputable potential for commencing new prosecutions,<sup>237</sup> it also gives rise to subtle problems relating to the status of the Mississippi truth project. It is not unlikely that the TRC will examine events or acts that overlap with ongoing criminal investigations, whether under the authority of the Till Bill or not. The competencies of these entities should be circumscribed in order to prevent or minimize interference. The TRC's mandate needs to address, *inter alia*, the following questions: should prosecutors be able to use the findings of the truth commission, and if so, to what extent? Should there be active cooperation in some areas to minimize loss of resources? Is there any hierarchy between the two mechanisms — should prosecutions be considered a priority and truth-seeking a sideshow, or the other way around? If they are to be viewed as co-equal partners, what neutral body can resolve conflicts of interest? What role would the state play in such conflicts, and how would this influence the perception of the Commission's impartiality?

These are not purely hypothetical or academic divagations. The history of investigative reporting on Mississippi's civil rights murders provides examples not just of the opportunities, but also of the risks created by overlapping justice-seeking endeavors. Though all of Mississippi's successful prosecutions of Klansmen have, in one way or another, been the byproduct of investigative journalism<sup>238</sup>—the proliferation, especially in recent years, of reporting on Mississippi's unsolved crimes also creates new challenges. This is illustrated by a “near miss” in the James Seale trial.<sup>239</sup> The case was based largely on the confessions of Seale's fellow Klansman, Charles Marcus Edwards, who received immunity in return for his testimony.<sup>240</sup> During the trial Seale's defense team managed to raise serious doubts about the first-handedness of Edwards' knowledge of the murders, because the press had circulated so much information in

---

236. See Lara Jakes Jordan, *FBI Re-Opens 100 Civil Rights Era Cases*, THE WASHINGTON POST, Feb. 27, 2007.

237. For a recent negative assessment of the FBI's efforts, see Shaila Dewan, *Scant Progress in Efforts to Solve Racial Killings*, N.Y. TIMES, August 23, 2010, at A1.

238. The crucial role of journalists in reopening these cases cannot be stressed enough. See Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecution of Unsolved Civil Rights Murders*, 34 OHIO N.U. L. REV. 797, 800-817 (2008). See also Margaret Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2128 (2005). See generally HARRY N. MCLEAN, *THE PAST IS NEVER DEAD: THE TRIAL OF JAMES FORD SEALE AND MISSISSIPPI'S STRUGGLE FOR REDEMPTION* (2009). Jerry Mitchell's relentless quest to unearth facts and confirm anonymous tips deserves special mention in this context. A short biography is available on the MacArthur Foundation's website, [http://www.macfound.org/site/c.lkLXJ8MQKrH/b.5458023/k.86C0/Jerry\\_Mitchell.htm](http://www.macfound.org/site/c.lkLXJ8MQKrH/b.5458023/k.86C0/Jerry_Mitchell.htm) (last visited Apr. 2, 2011). See also Clarion Ledger biography, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/99999999/SPECIAL17/60416008/> (last visited Apr. 2, 2011).

239. See Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecution of Unsolved Civil Rights Murders*, 34 OHIO N.U. L. REV. 797, 817-20 (2008).

240. Jerry Mitchell, Brenda Goodman, *Ex-Klansman is Sentenced to Life for Killings in 1964*, N.Y. TIMES, August 25, 2007.

advance of the proceedings.<sup>241</sup> To make matters worse, on the eve of the verdict, a television documentary about the case was aired within Mississippi, raising further objections from the defense as to the jury's impartiality and the source of Edwards' information.<sup>242</sup> Though the prosecution ultimately succeeded in rebutting these claims, this incident should serve as a warning that the media's potential over-involvement in criminal justice can be problematic.<sup>243</sup> The integrity of the criminal process and the demands of truth-seeking must be reconciled.

Unfortunately, such problems will only increase with the growing pervasiveness of the media, and especially the spread of Internet technology. A recently launched website-blog called "Civil Rights Cold Case Project" is another case in point.<sup>244</sup> Despite the blog's endorsement by a number of respected journalists, several blog entries in the first couple of months of the blog's existence hinted that criminal justice may have become a form of journalistic theatre, with little regard for confidentiality of information and procedural requirements of criminal law.<sup>245</sup> Since strict procedural standards of objective truth do not apply before truth commissions, such widespread circulation of sensitive information about past crimes and controversial events gives rise to serious dilemmas for truth-seeking. It will be very hard to convince doubters<sup>246</sup> that any kind of truth, let alone historical truth, is the main objective of a reconciliation process that does not take account of these difficulties.<sup>247</sup>

Striking the "right balance" between the various justice-seeking mechanisms is of critical importance. The interplay between them will influence the substantive outcomes of both criminal prosecutions and the integrity of truth-telling. Multiple questioning of the same witnesses may lead to discrepancies in their accounts, which can then be used by defense

---

241. See Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecution of Unsolved Civil Rights Murders*, 34 OHIO N.U. L. REV. 797, 800-817 (2008).

242. *Id.*

243. The case also raised important legal questions regarding reporters' privilege. See McDonald, *supra* note 239, at 825.

244. The CIVIL RIGHTS COLD CASE PROJECT, <http://coldcases.org> (last visited Apr. 2, 2011). The site was launched in December 2009.

245. See, e.g. Ben Greenberg, *What the FBI Showed Him*, CIVIL RIGHTS COLD CASE PROJECT (February 14, 2010), <http://coldcases.org/blogs/what-fbi-showed-him>. The nature and tone of these blog entries smacks of journalistic theatre. The posts are often cross-posted to other websites, such as Facebook, where fans (and random guests) can give a thumbs up (like!) to the next journalistic revelation. It is perhaps important to remember that these are, after all, criminal prosecutions of murder cases, with potential victims, witnesses and perpetrators. This means that, in order to secure a jury conviction, evidence adduced at trial must satisfy the highest standard of proof (beyond a reasonable doubt).

246. Of course, some may argue that doubters will remain unconvinced by the work of the TRC anyway. The point is well taken, but this in no way diminishes the TRC's obligation to perform its duties properly.

247. It is perhaps worth noting that investigative reporters, including the Civil Rights Cold Case project, make absolutely no mention of the truth project. This is a deliberate strategy adopted by the truth project's organizers so as not to influence the ongoing grassroots experiment with story-telling, which should in turn serve as a springboard for the work of the truth commission. I am grateful to Patrick Weems for this point. Interview with Patrick Weems, (May 10, 2010).

attorneys to thwart the prospects of successful prosecutions. Worse yet, an ambiguous legal situation as to the competencies of the respective bodies — government-sanctioned criminal investigations, community-driven truth-seeking, and freelance investigative-reporting — may lead to complete confusion among Mississippians, and even make them reluctant to cooperate with the whole “bungled” concept of truth-seeking.<sup>248</sup> The Mississippi TRC would be well advised to consider these risks.<sup>249</sup>

#### 6. *Symbolism, reparations and other problems of restorative justice*

One of the most contentious topics in the past decade has been the status of the Confederate flag in many Southern states. In 2000, in the wake of intense discussions on the meaning of the Confederate flag in South Carolina,<sup>250</sup> the then-governor of Mississippi, Ronnie Musgrove, proposed to remove the Confederate naval jack from his state’s official flag, and replace it with a new and neutral design.<sup>251</sup> After a heated public debate, an overwhelming majority of the state’s population — over 65% — voted in a statewide referendum to keep the old design.<sup>252</sup> As of 2003, Mississippi is the last state in the country to incorporate the Confederate emblem into its state flag.<sup>253</sup>

248. In Sierra Leone, victims said that one of the main difficulties arising out of the simultaneous co-existence of a special war crimes court and a TRC was their inability to understand which institution was responsible for what. See Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 40-43 (2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>.

249. Here again, the experience of foreign countries in dealing with similar situations may provide guidance. Much research has been done on Sierra Leone’s experiment with a criminal court and a TRC. See Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COL. L. REV. 730, 730-67 (2004); William Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 J. INT’L CRIM. JUST. 1082, 1082-99 (2004); William Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone* HUM. RTS. Q. 1035, 1035-1066 (2003). See generally *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, UN Doc. S/2002/246, (March 2002); Priscilla Hayner et al., *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone* (24 June 2002), <http://www.ictj.org/images/content/0/8/084.pdf>. For East Timor, see Christopher T. Totten, *The International Criminal Court and Truth Commissions: A Framework for Cross-Interactions in the Sudan and Beyond*, 7 NW. J. INT’L HUM. RTS. 1 (2009).

250. See JOHN M. COSKI, *THE CONFEDERATE BATTLE FLAG, AMERICA’S MOST EMBATTLED EMBLEM* 244-52 (2006). See also Associated Press, *Most South Carolina Governor Candidates Stand Firm on Flying Confederate Flag*, May 31, 2010, available at [http://www.huffingtonpost.com/2010/05/31/confederate-flag-south-ca\\_n\\_595256.html](http://www.huffingtonpost.com/2010/05/31/confederate-flag-south-ca_n_595256.html) (last visited April 4, 2011).

251. See COSKI, *supra* note 250, at 263-71.

252. Official results are available at <http://www.sos.state.ms.us/elections/FlagVote/CountyScans/CertStateResults.pdf> See also *Mississippi Keeps Confederate Flag*, BBC NEWS, (April 18, 2001), available at <http://news.bbc.co.uk/1/hi/world/americas/1282784.stm>.

253. As of 2003, Georgia no longer incorporates the Confederate flag into its official state flag. The Confederate battle flag had featured in the previous two state flags (1956-2001, 2001-2003). The design adopted in 2003 managed to generate renewed controversy because it is based on the layout of the Stars and Bars, the official flag of the

The Confederate flag raises difficult questions about symbolism, and how the past informs present understandings of identity. The 2001 referendum laid bare the deeply divergent meanings evoked by the flag among Mississippians. In a poll conducted at the time of the referendum by the *Clarion Ledger*, a Jackson-based newspaper, over 79% of whites in the state responded that “[t]he Confederate battle symbol is a part of the state’s proud history and traditions, and therefore should not be removed from the flag.” At the same time, approximately 69% of blacks stated that “the Confederate battle symbol is offensive and divisive to some groups and should be removed.”<sup>254</sup> This is probably one of the more striking examples of racially polarized voting in contemporary American politics.<sup>255</sup>

The 2008 elections for the U.S. Senate yet again demonstrated the lasting effect of the flag’s symbolism.<sup>256</sup> During the election campaign, the Republican candidate, Roger Wicker, publicly admonished the Democratic candidate, Ronnie Musgrove, for his 2001 project to abolish the state flag.<sup>257</sup> Wicker went on comfortably to win the Senate seat in what was otherwise a year of unprecedented Democratic gains. The NCAA and NAACP have separate bans in place since 2000, punishing both sports teams and businesses hosting events in Mississippi.<sup>258</sup> Rita Bender’s 2005 letter to Governor Barber, which can be viewed as the beginning of work toward restorative justice in the state, also emphasized the continuing resonance of the flag.<sup>259</sup> There are also periodic calls for the flag’s removal by major national organizations.<sup>260</sup>

The issue of symbols and symbolism speaks to the wider issue of reparations as a tool of transitional justice. Symbolic statements and gestures

---

Confederate States of America. As a result, the NAACP has called for the new flag’s removal anyway. See also COSKI, *supra* note 250, at 263-71.

254. Figures are quoted from Byron d’Andra Orey, *White Racial Attitudes and Support for the Mississippi State Flag*, Univ. Nebraska-Lincoln, <http://digitalcommons.unl.edu/polisicifacpub/3>.
255. The problem is more complicated than can be explored in this article. For a relatively balanced view of the matter, see *Mississippi Votes for its Flag*, THE ECONOMIST, April 19, 2001. But see Christopher Cooper & H. Knotts, *Beyond Dixie: Race, Region, and Support for the South Carolina Confederate Flag*, SOC. SCI. Q., 142-154 (2006). See also Robert Stacy McCain, *Flag Wins, Opponents Get Coverage*, WASHINGTON TIMES, April 20, 2001.
256. It has to be said, however, that the issue has largely died down since the 2001 referendum. Periodically there are calls to change the Mississippi state flag, but there is no concerted effort at the state level to effect such a change.
257. Natalie Chandler, *Musgrove Concedes Senate Seat to Wicker*, CLARION-LEDGER, November 6, 2008.
258. Steve Wieberg, *NCAA Revisits Confederate Flag Policy*, USA TODAY, January 18, 2007. See also ACC Moves 3 Future Baseball Tournaments, ESPN, (July 6, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4309688>.
259. See Letter from Rita L. Bender, *supra* note 95.
260. See Joshua Rhett Miller, *NAACP Branch Readies for Confederate Flag Fight*, FOX NEWS, (May 27, 2009), [http://www.foxnews.com/story/0,2933,522203,00.html?test=latest\\_news](http://www.foxnews.com/story/0,2933,522203,00.html?test=latest_news); *Little Support for New NAACP Flag Boycott*, MSNBC, (July 18, 2008), <http://www.msnbc.msn.com/id/25739056/>; *The Confederate Flag Debate is Back!*, <http://www.fitsnews.com/2009/11/19/the-confederate-flag-debate-is-back/>; *With Colonel Reb Out at Ole Miss, Draft William Faulkner*, AOL NEWS, (Feb. 24, 2010), <http://ncaa-football.fanhouse.com/2010/02/24/with-colonel-reb-out-at-ole-miss-draft-william-faulkner/>.

are indeed alternative ways in which past wrongs can be acknowledged and “repaired.”<sup>261</sup> And though it is still too early to tell whether the Mississippi TRC will address the status of the Confederate flag as a problem in its own right, the Declaration of Intent intimates that reparations should be an important objective of truth-seeking: “The establishment of the MS TRC will allow us to develop appropriate remedies and to create a culture of equity, harmony, and prosperity.”<sup>262</sup> One of the TRC’s main tasks will be recommending practicable forms of reparation for the Magnolia state.

Reparations exemplify the forward-looking aims of restorative justice as opposed to backward-looking retributive methods. Reparation schemes commonly contemplated by international and domestic law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>263</sup> Under international law, governments have a duty to compensate victims of past abuses.<sup>264</sup> Given the deep complicity of the Mississippi state government in the racist crimes of the past, a very strong moral and, regrettably, a much weaker normative case exists for individual and collective reparations on the part of the current administration.<sup>265</sup> What is more, the unofficial status of the TRC in the Magnolia State means its recommendations will not even formally be binding on the state,<sup>266</sup> making enforcement — particularly in the case of financial reparations — more difficult. This will raise theoretical and practical

261. See Lisa Magarrell, *Reparations in Theory and Practice*, INTERNATIONAL CENTER OF TRANSITIONAL JUSTICE 4, available at <http://www.ictj.org/static/Reparations/0710.Reparations.pdf> (last visited July 31, 2010).

262. MISSISSIPPI TRUTH PROJECT DECLARATION OF INTENT, Section 5, available at <http://www.mississippitruth.org/pages/declaration.htm> (last visited April 4, 2011).

263. See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147 Annex ¶ 18, U.N. Doc. A/RES/60/147 (Dec. 15, 2005), available at <http://www2.ohchr.org/english/law/remedy.htm>.

264. A number of international treaties establish a duty to compensate victims of state-approved violations. See *American Convention on Human Rights*, *International Covenant on Civil and Political Rights*, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *International Convention on the Elimination of All Forms of Racial Discrimination* art. 6, Dec. 21, 1965, 660 U.N.T.S. 195, 199 (requiring state parties to guarantee effective protection against racial discrimination for every person in the states’ jurisdiction), available at <http://www2.ohchr.org/english/law/cerd.htm> (last visited July 31, 2010).

265. The word “normative” is important in this context. The State of Mississippi is not a national government, and as such is not a signatory to any of the treaties mentioned above. This situation poses interesting legal and moral questions — Mississippi clearly must abide by the general norms in these treaties, but it is not clear whether it actually has a duty to compensate. For instance, the ICERD treaty was only ratified by the United States in 1993 and so it does not apply to earlier events. This is true for the other treaties as well, none of which apply to the events encompassed by the truth project’s timeframe. Therefore, though in legal terms, today’s government is the successor of both the rights and obligations of its predecessors, it would seem there is only a compelling moral case for compensation.

266. It is not clear what role, if any, the federal government could play in enforcing the Commission’s recommendations — the organizers would be well advised to explore ways of acquiring federal support for the project, especially since there has been so little enthusiasm for it at the state level.

questions for the Commissioners, who must find a way to balance the expectations of victims with what can realistically be achieved.<sup>267</sup>

This is especially true of financial compensation, which is usually the most controversial element of any restorative justice package. Critics argue that is impossible to quantify the cost of death, loss of health, emotional trauma, or suffering.<sup>268</sup> It is far from clear what criteria should be used to determine who is eligible, what emotional bond justifies staking a claim, or what classes of transgression qualify for monetary indemnification. It remains to be seen how this will be dealt with in the context of events dating back several decades, where only indirect victims still survive. In the end, whatever choices are made in this respect by the TRC, invariably some victims will feel shortchanged. The decision to publish the names of people identified as transgressors of ethical or legal norms is particularly sensitive, since it could give rise to damages suits in civil proceedings and open up an entirely unregulated market for litigation.<sup>269</sup> Therefore, it is important to adopt a coherent strategy on all these points. It seems advisable that the TRC should advocate a viable compensation scheme, while simultaneously circumscribing the class of victims eligible for compensation. This would have the added benefit of pre-empting a chaotic legal situation in the aftermath of the final report's publication.

Though, at this stage, it would be premature to rule out damages for individual victims, the process of truth and reconciliation is often more attuned to collective, as opposed to individual, claims of redress.<sup>270</sup> In line

---

267. Other countries' experiences with TRCs have shown that implementation of reparations is the hardest part of the truth process. See Freeman & Hayner, *supra* note 143, at 135. This was the case in South Africa, where the government has come under severe criticism for inadequately implementing the recommendations of the TRC. See Madeleine Fullard, *Dis-Placing Race: The South African Truth and Reconciliation Commission and Interpretations of Violence*, RACE AND CITIZENSHIP IN TRANSITION SERIES, 2004, available at <http://www.csvr.org.za/docs/racism/displacingrace.pdf>. Survivors and family members of the Tulsa Race Riot have, for the most part, been unable to entice Oklahoma's legislature to pass enabling legislation and thus approve reparations in line with what the Tulsa Commission had recommended. See ALFRED B. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921: RACE, REPARATIONS AND RECONCILIATION* (2003). See also Daren Briscoe, *A Day of Reckoning. Aging Race-Riot Survivors are Pushing the Nation to Confront the Wrongs of the Past*, NEWSWEEK, Mar. 10, 2005. But, in the Rosewood Massacre, funds were allocated by the Florida legislature. See Jeanne C. Bassett, *Comments: House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 503 (1994).

268. For a recent example of how municipalities in the United States can compensate victims of past discrimination, see Susan Saulny, *With New Homes, Town Makes Amends for Its Bias*, N.Y. TIMES, March 10, 2010, at A19.

269. Recent developments suggest that victims should indeed consider the viability of monetary claims with more enthusiasm. See Jonathan Saltzman, *Justice Follows Decades of Silence*, THE BOSTON GLOBE, June 23, 2010.

270. This should not be read as implying that individuals do not benefit from such collective forms of reparation. On the contrary, collective reparations are expected to effect an improvement in the situation of individual victims. The difference is that collective reparations do not usually single out people for different kinds of reparations; instead, they apply to them uniformly without any distinction as to victims' varying needs or expectations. For an examination of collective and individual reparations. See, e.g., Lisa Magarrell, *Reparations in Theory and Practice*, in INTERNATIONAL

with the aims of restorative justice, the TRC's recommendations should put equal emphasis on collective forms of reparations, including investment in education, institutional, and legal reform, and promotion of black economic and social re-empowerment. Of course, these programs would, once again, entail substantial financial investment on the part of either the state or federal government. In the end, the TRC must weigh the pros and cons of making firm proposals for financial reparation in its final report. Talking up the prospects of monetary reparations, if no firm commitment in this respect exists from external donors or the government, may actually be detrimental to achieving reconciliation.<sup>271</sup>

Monetary indemnification may be the most apparent form of reparation, but its importance should not be overly emphasized either. Truth-seeking is often pursued as an alternative form of justice because individual retribution or piecemeal compensation is no longer appropriate or viable.<sup>272</sup> Though in theory enforcement does not depend on a commission's "official" or "unofficial" status,<sup>273</sup> the Mississippi government's reluctance to discuss the past, let alone financial compensation, might prompt the TRC to emphasize alternative forms of reparation altogether, including non-monetary solutions. A number of symbolic instruments can be used for this purpose. These include acknowledgment of historical injustices through public apologies<sup>274</sup> and commemorative spaces in public areas, education about the state's history with a view to preventing the recurrence of past inequities,<sup>275</sup> or expunging criminal records and issuing pardons, even posthumously, to those wrongly accused.<sup>276</sup> It should not be forgotten that truth *per se* can also be a form of restorative justice.

---

CENTER FOR TRANSITIONAL JUSTICE, available at <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>.

271. This problem is discussed in BROPHY, *supra* note 221. See also Alfred L. Brophy, *The Tulsa Race Riot Commission, Apology, and Reparation: Understanding the Function and Limitations of a Historical Truth Commission*, in TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION 244-245 (Elazar Barkan & Alexander Karn eds., 2006).

272. See BLOOMFIELD ET AL., *supra* note 98, at 108.

273. See discussion *supra* Part IV.1. Enforcement always depends heavily on the lobbying and persistence of NGOs and victims groups after recommendations are formally announced. The status of the Commission — official or unofficial — can only hint at the government's willingness to follow through on such recommendations, but is by no means decisive. For instance, the Tulsa Commission (discussed above) was created by the Oklahoma legislature, which then turned out extremely reluctant to allocate funding for reparations in line with the Commission's recommendations. That said, the Mississippi government's approach to reparations, thus far, argues for much caution about the enforceability of recommendations.

274. See, e.g., S. Res. 39, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=sr109-39> (last visited Aug. 30, 2010) (apologizing for the Senate's failure to pass anti-lynching legislation); Rasperry, *supra* note 188.

275. See, e.g., S.B. 2718, 2006 Reg. Sess. (Miss. 2006) (requiring the teaching of civil rights history in state schools), available at <http://www.mississippitrueth.org/pages/CR-education.htm>; Ward Schaefer, *Civil Rights Added to Schools' Curriculum*, JACKSON FREE PRESS, August 14, 2009.

276. See, e.g., ALA. CODE § 15-22-90 to 92 (2010) ("Rosa Parks Act" allowing persons to request pardons for their involvement in civil rights protests); see also *Alabama Legislature OKs Pardon for Rosa Parks, Others*, Associated Press, April 18, 2006, available at [http://www.usatoday.com/news/nation/2006-04-18-parks-pardon\\_x.htm](http://www.usatoday.com/news/nation/2006-04-18-parks-pardon_x.htm) [http://www.usatoday.com/news/nation/2006-04-18-parks-pardon\\_x.htm](http://www.usatoday.com/news/nation/2006-04-18-parks-pardon_x.htm). But see

The possible use of restorative justice in Mississippi's truth process requires a second look at other legal mechanisms viewed traditionally as the domain of retributive justice. The peculiar circumstances of truth-seeking in the Magnolia State — especially the lapse of time between the object of inquiry and the inquisitive body — inevitably lead us to examine the utility of amnesty. Amnesties are instruments which relieve — unconditionally or subject to certain conditions — perpetrators of criminal responsibility for their acts.<sup>277</sup> Though the word 'amnesty' has become anathema to the modern transitional justice vocabulary because of its conceptual proximity to "impunity",<sup>278</sup> the TRC's organizers may yet struggle with its implications.

It is easy to foresee that white Mississippians will be reluctant to share their recollections as beneficiaries of Jim Crow. Eliciting testimony about their approval of white on black oppression, let alone their passive or active participation in violence, may not be possible without guarantees of immunity from prosecution or from monetary claims. It is unrealistic to expect whites to testify about situations making them criminally liable without some sort of partial or full amnesty in place. It should be remembered that these tools have already been used before, most notably in the trial of James Seale.<sup>279</sup> At the same time, the lack of witnesses willing to come forward has been a major impediment for prosecutors in several other cases.<sup>280</sup> Immunities could be of particular benefit in bringing out confessions surrounding events of a non-violent nature, especially the activities of the State Sovereignty Commission, which remain a relatively obscure part of the state's past.<sup>281</sup>

Unqualified amnesty as such is no longer a viable option in light of developments in international criminal law and human rights law in the past decade.<sup>282</sup> The federal government and the state of Mississippi have an obligation to prosecute certain classes of atrocities, such as murder, torture, or crimes against humanity.<sup>283</sup> But the status of qualified amnes-

---

Hermene Hartman, *Pardon Me? The Rosa Parks Act Sparks New Debate*, HUFFINGTON POST (Aug. 20, 2009), [http://www.huffingtonpost.com/hermene-hartman/pardon-me-the-rosa-parks\\_b\\_262614.html](http://www.huffingtonpost.com/hermene-hartman/pardon-me-the-rosa-parks_b_262614.html) (describing the argument that such legislation is a "violation of history"); *Mayor Offers Pardons to Civil Rights Activists*, MSNBC.COM, Aug. 11, 2009, <http://www.msnbc.msn.com/id/32377612/> (reporting that many individuals have chosen to refuse the pardons).

277. See U.N. Commissioner, *Rule-of-Law Tools*, *supra* note 119, at 5-6.

278. *Id.* at 11-12. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶40, U.N. Doc. S/2004/616 (Aug. 23, 2004) (recognizing a "growing shift in the international community away from a tolerance for impunity and amnesty").

279. See discussion *supra* Parts III and IV.1.

280. See discussion *supra* Part IV.5. Several other cases have been re-opened and closed due to a lack of evidence. Others remain re-opened but no charges seem likely.

281. See Part II for a discussion on the State Sovereignty Commission's role in upholding Jim Crow.

282. See generally Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 916-920 (2009). See also U.N. Commissioner, *Rule-of-Law Tools*, *supra* note 119 at 11-12; HAYNER, *supra* note 99, at 105.

283. The "duty to prosecute" under international law is a complex topic, where distinctions must be drawn between the types of acts (genocide, crimes against humanity, war crimes, torture, and "other" human rights violations etc.) and whether the duty

ties for lesser crimes or contraventions, or the use of prosecutorial immunity for other transgressions, is less clear. Their applicability and effectiveness would have to be weighed against potential harm on a case-by-case basis, inevitably raising thorny questions about where to set the threshold for “eligible” acts.<sup>284</sup> Some of the dilemmas faced by the South African TRC could well be revisited; for instance, should there be a threshold of truth for amnesty or immunity to become applicable? Would only certain categories of transgressions or crimes be included in the amnesty or immunity procedure? If so, does the immunity apply to that act only, or would it also extend to other unrelated transgressions which transpired subsequently? Most importantly — who exactly decides whether to grant amnesty or immunity? Does the TRC only recommend, or do the Commissioners have the power to grant amnesty or immunity? What role, if any, should victims have in deciding about amnesty or immunity? What role does the state government have in such decisions?<sup>285</sup>

If any form of amnesty or immunity is to be endorsed, the TRC must define its competencies with respect to these mechanisms. The Mississippi TRC will not be an official state body, and so ironing out the legal framework surrounding truth-telling must be done in cooperation with the state. As discussed above, this could have far-reaching implications for other ongoing criminal prosecutions, whether under the authority of the Till Bill or not, and it will surely go to the heart of Mississippians’

---

applies to all perpetrators (universal jurisdiction) or only certain criminals (nationals of the court enforcing the obligation, or any national who committed an act within the territory of the enforcing authority). This subject has been made even more complex in recent years with the establishment of the International Criminal Court. These issues cannot be discussed at length here since they are only tangentially relevant to our topic. Suffice it to say that the same duty to prosecute, a general maxim of criminal law, also exists under United States federal law and Mississippi state law. For a broad overview, see ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 13-26 (2008). See also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L. J.* 2537 (1991).

284. The South African TRC is well known for the way it used amnesty to incentivize participation. It was the first truth commission to offer amnesty on a broad scale. Petitioning for amnesty was a complicated process and a series of conditions had to be met: (1) the crime had to qualify as a politically motivated act; (2) the perpetrator had to be affiliated with an organization recognized under the amnesty agreement, and (3) the acts under investigation had to be committed against the state. Several other conditions had to be met and a committee would evaluate each time whether or not the criteria had in fact been met. In other words, this was no blanket amnesty. Far from it — it applied to a very narrow spectrum of crimes, and thus *de facto* excluded a wide variety of apartheid injustices from scrutiny. See van Zyl, *supra* note 104, at 655-56.

285. These questions are drawn directly from the South African experiment with amnesty. I have deliberately avoided an extended analysis of how this could apply in Mississippi, since the applicability of amnesty depends on the circumstances of each country or region. For a discussion of how South Africa arrived at its amnesty arrangement, see van Zyl, *supra* note 104, at 648-53. See also Simpson, *supra* note 101, at 235-237. For a critical examination of amnesty in the US, see Howard Varney, *Research Brief: The Use of Amnesty in Relation to Truth-telling: A Case Study of the South African Truth and Reconciliation Commission*, INT’L CTR. FOR TRANSITIONAL JUSTICE (November 2008), available at [http://www.ictj.org/static/Americas/ICTJ\\_Research\\_Brief-The\\_South\\_African\\_use\\_of\\_amnesty\\_in\\_relation\\_to\\_truth-telling.pdf](http://www.ictj.org/static/Americas/ICTJ_Research_Brief-The_South_African_use_of_amnesty_in_relation_to_truth-telling.pdf). I am grateful to Lisa Magarrell for the last point.

involvement in the truth-telling process. If whites are to testify — a *conditio sine qua non* of the legitimacy and effectiveness of the Commission — these issues, controversial as they may be, must be dealt with appropriately. The unresolved, as yet, status of amnesty — which is nowhere mentioned in the Declaration of Intent — shows that some issues still need further discussion before the TRC can begin its operations. In spite of the growing international trend to eschew all contemplation of amnesty in transitional justice processes, I believe the Mississippi TRC would be well advised — given the circumstances described above — to consider its viability.

The past is never dead. In fact, it's not even past.

—William Faulkner, native of Oxford, Mississippi<sup>286</sup>

## V. CONCLUSION

To many Americans, the unsolved murders and lynchings of African Americans and civil rights workers personify the worst aspects of Mississippi's difficult racial history. For decades many crimes remained unexplained and unpunished, though perhaps not altogether forgotten. The state finally began confronting this vicious circle of impunity in the early 1990s, and now leads the country in prosecuting "cold cases" from the Civil Rights Era.<sup>287</sup>

But many Mississippians think this is not enough. They have come to realize that blaming a few "rogue" Klansmen for the state's entire history of racial oppression creates a distorted image of the past, and also a false understanding of the present.<sup>288</sup> Consequently, attention is shifting from the traditional pursuit of retributive justice to more innovative justice-seeking mechanisms, such as truth, reconciliation and reparations. The truth project in Mississippi — and this distinguishes it from similar processes in many other places — is a wholly community-driven, bottom-up process. It is the citizens who are clamoring for justice, not state officialdom.

George Santayana once said: "Those who forget the past are condemned to repeat it."<sup>289</sup> Given the current resurgence of right-wing movements in the United States, and the continuing controversies over race in the post-Obama era, the project's goals seem particularly timely.<sup>290</sup> The

286. WILLIAM FAULKNER, *REQUIEM FOR A NUN* (1951).

287. Arguably, this is a wholly unexpected turn of events. As noted above, Mississippi led the country in terms of its number of lynchings, and then became the venue for the violent campaign of the White Knights of the KKK. These concerns were arguably at the center of Martin L. King's vigorous denouncement of the state in his "I have a dream" speech in 1963, quoted in the article's introduction. And yet it is the same state that is now leading the country in re-trying, re-examining and contemplating crimes of this era, and now blazing an entirely new trail towards in-depth state-wide reconciliation.

288. See Donna Ladd, *After Killen, What's Next for Mississippi?*, JACKSON FREE PRESS, June 22, 2005.

289. George Santayana, *LIFE OF REASON* (1905).

290. See Mark Potok, *Rage on the Right: The Year in Hate and Extremism*. Southern Poverty Law Center Intelligence Report, available at <http://www.splcenter.org/get-in->

persistence of these problems well into the twenty-first century points to a key challenge awaiting the Commission: its ability to manage the tension between the project's backward-looking framework and forward-looking objectives. The TRC cannot and should not investigate the past just for the sake of history, because — as Faulkner so eloquently stated — in the South, the past can hardly be dissociated from the present. Importantly, the truth process's leaders have spoken to this effect:

We have come far in the South, but still there is pain associated with acknowledging those dark days. Partly that pain exists because many of these issues remain unresolved and operational in current policies and daily interactions. So we must confront that past for those wounds to heal, so we can begin to understand the legacy of racism that continues to harm us today in education, health care, housing and other indicators.<sup>291</sup>

A Truth and Reconciliation Commission in Mississippi will no doubt encounter many obstacles and criticisms. This is why it is so important to realize that its ultimate objective — reconciliation through the pursuit of truth — is not a tangible end product, whose attainment can be evaluated against an abstractly defined benchmark. “No single conversation, criminal prosecution, or form of reparation can by itself produce reconciliation,” Sherilyn Ifill has argued.<sup>292</sup> It may be too much to expect the Commission's final report to produce an accepted truth about the past, but it should encourage Mississippians to reassess their understanding of key historical events and processes. For this to happen, several pre-conditions must first be met: the commission must be viewed as a legitimate institution,<sup>293</sup> involving a cross-section of society, white and black, Republican, Independent and Democrat; it must not only secure accountability for isolated killers, but also must investigate the role of institutions and ordinary Mississippians in upholding “Jim Crow”; and, last but not least, it should propose a feasible package of reparations. Then, and only then, can the Commission's final report with recommendations be the beginning of a lengthier process of healing.<sup>294</sup>

In the greater scheme of things, the Mississippi truth project offers a unique opportunity to start a dialogue on the role of race among not only Mississippians, but all Americans. Too often the legacy of racism, slavery,

---

formed/intelligence-report/browse-all-issues/2010/spring/rage-on-the-right (Spring 2010). See also FEAGIN, *supra* note 177, at 153-54.

291. Susan Glisson, *On Truth and Freedom*, WELLSRING 5 (May 2005), available at <http://www.winterinstitute.org/documents/WellsprMay05.pdf>.

292. IFILL, *supra* note 37, at 126.

293. This raises the difficult question of how one determines “success” in the context of truth-seeking. For a theoretical evaluation of the effectiveness of truth commissions, in abstract terms, see James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123 (2009) (arguing that a commission succeeds when it achieves “societal transformation” through an accepted version of history produced by a broadly endorsed institution viewed as legitimate). See also BLOOMFIELD ET AL., *supra* note 98, at 125. As noted above, many experts on the South African TRC—commonly regarded as a model to follow—are actually quite critical of the actual work done by the Commission.

294. See BLOOMFIELD ET AL., *supra* note 98, at 122.

and discrimination is brushed away and classified as an historical artifact, or a peculiarly “Southern thing.” It is perhaps time to face up to the harsh reality that slavery was not a Southern institution, but an American one.<sup>295</sup> Legally enforced segregation may have been most pervasive in the South, but it originated in the North.<sup>296</sup> To this day, the effects of segregation — for instance in housing — frequently remain more persistent in the North than in the South.<sup>297</sup> Social isolationism of African Americans, though less devastating than legal exclusionism, often has similar effects in terms of advancement opportunities.<sup>298</sup>

The Mississippi truth and reconciliation project holds great potential for the American experience with race. The election of President Obama has proven yet again that symbolic events or gestures cannot and will not solve America’s problems with race in one quick fix.<sup>299</sup> Though the Magnolia State’s particularly violent history of racial oppression has earned it a sorry reputation in the country,<sup>300</sup> this may now act as an unlikely catalyst for good. If Mississippi, of all America’s states, engages in a genuine and comprehensive dialogue about its racial past, the rest of the country will no longer have any excuse to shirk its own moral obligation to do the same.<sup>301</sup> Perhaps then, Medgar Evers’s hopes will finally be realized, of a

- 
295. The Constitution, drafted by the Founding Fathers and ratified by the American people assembled in the states, sanctioned slavery. For an analysis of the interplay between the Constitution and slavery, see Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, in THURGOOD MARSHALL, HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, 281 (Mark V. Tushnet ed., 2001). See also Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 427-34 (1999); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION* (2009).
296. See FEAGIN, *supra* note 177, at 24. See generally C.S. MANEGOLD, *TEN HILLS FARM: THE FORGOTTEN HISTORY OF SLAVERY IN THE NORTH* (2009); JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND RACE IN NEW ENGLAND, 1780-1860* (1998); ANNE FARROW, *COMPLICITY: HOW THE NORTH PROMOTED, PROLONGED AND PROFITED FROM SLAVERY* (2005); DAVISON DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954* (2005).
297. See DOUGLAS S. MASSEY, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS*, 63-74 (1993) (discussing at length the relative segregation rates of North and South). Though no clear dichotomy emerges from these comparisons — since both regions defy generalization — a tendency toward ghettoization in the North can be observed.
298. See generally Chandra Manning, *Segregation and Jim Crow*, in 2 THE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 738 (Michael Kazin, Rebecca Edwards, Adam Rothman, eds., 2010); FEAGIN, *supra* note 177, at 57-58.
299. The controversy surrounding Jeremiah Wright, Jr., as well as the arrest of Henry Louis Gates, Jr., are the two most volatile instances of race affecting Obama’s presidency. These are issues are discussed in a series of new books offering preliminary assessments of Obama’s presidency. See, e.g., THOMAS J. SUGRUE, *NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE* (2010).
300. This was borne out by Congressman Charles Rangel’s outburst: “Who the [heck] wants to live in Mississippi anyway?” See Patrick Jonsson, *A Bid to Buff Mississippi’s Image*, CHRISTIAN SCIENCE MONITOR, Dec. 12, 2006, (alteration in original).
301. Bill Clinton is the only U.S. President who has attempted to foster a nationwide dialogue on race. In 1997 he launched One America in the 21st Century, an initiative aimed at promoting dialogue on race at the community level. The Group’s findings are available at <http://clinton2.nara.gov/Initiatives/OneAmerica/PIR.pdf> (last visited July 31, 2010).

*“future when . . . we will not have to hang our heads in shame or hold our breath when the name Mississippi is mentioned, fearing the worst. But instead, we will be anticipating the best.”*<sup>302</sup>

---

302. See *Medgar Evers Memorial Dedicated in Ceremony*, UM LAWYER, Fall/Winter 2002-03, available at <http://www.law.olemiss.edu/UM%20LAWYER/UMlaw/dedication2.htm>. The entire text reads as follows: “I love the land of my birth. I do not mean just America as a country, but Mississippi, the state in which I was born. The things that I say here tonight will be said to you in hopes of the future when. . .we will not have to hang our heads in shame or hold our breath when the name Mississippi is mentioned, fearing the worst. But instead, we will be anticipating the best.” *Id.* (omission in original).