

WHY THE FEDERAL GOVERNMENT FAILED TO PROSECUTE THE KILLERS OF EMMETT TILL

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INTRODUCTION

The savage 1955 murder of Emmett Till has enormous cultural, political, and historical resonance. Till's killing profoundly influenced many civil rights activists, including such luminaries as Rosa Parks, John Lewis, and Julian Bond.¹

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¹ See JEANNE THEOHARIS, *THE REBELLIOUS LIFE OF MRS. ROSA PARKS* 43, 63 (2013); JOHN LEWIS WITH MICHAEL D'ORSO, *WALKING WITH THE WIND* 57–58 (1998); TIMOTHY B. TYSON, *THE BLOOD OF EMMETT TILL* 211–12 (2017); see also JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 57–58 (1994); SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* 410 (1988); JOANNE GRANT, *ELLA BAKER: FREEDOM BOUND* 114 (1998); DAVID HALBERSTAM, *THE CHILDREN* 483 (1998); DAVID MARGOLICK, *ELIZABETH AND HAZEL: TWO WOMEN OF*

Congress has passed multiple civil rights-related laws that are named for Till.² And President Biden recently established a national monument in Till's memory.³

The essential facts of the Till tragedy are well-known. In August 1955, a fourteen-year-old African American boy from Chicago traveled to visit relatives in the Mississippi Delta. A few evenings later, on Wednesday, August 24, he and some cousins went to Bryant's Grocery and Meat Market in the nearby town of Money, where Till bought two cents' worth of bubble gum from Carolyn Bryant, the attractive twenty-one-year-old wife of the white store owner. Precisely what happened next remains uncertain: she said that he wolf-whistled at her and propositioned her, although Ms. Bryant many years later reportedly recanted the latter claim.⁴ In any event, young Till violated the unwritten racial and sexual etiquette that had long governed social interactions in the South.⁵ At around 2 a.m. on Sunday, August

LITTLE ROCK 25 (2011); CHARLES MARSH, *GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS* 155 (1997).

² See, e.g., Emmett Till Antilynching Act, Pub. L. No. 117–107, 136 Stat. 1125 (2022) (codified at 18 U.S.C. § 249(a)(5)–(6)); Emmett Till Unsolved Civil Rights Crimes Act of 2007, Pub. L. No. 110–344, 122 Stat. 3934 (codified at 28 U.S.C. § 509 note), *amended by* Emmett Till Unsolved Civil Rights Crimes Reauthorization Act of 2016, Pub. L. No. 114–325, 130 Stat. 1965 (codified at 28 U.S.C. § 509 note).

³ Proclamation No. 10602, Establishment of the Emmett Till and Mamie Till-Mobley National Monument, 88 Fed. Reg. 48705 (July 25, 2023). The Till murder also has had cultural significance; for example, it has inspired several novels. See, e.g., BEBE MOORE CAMPBELL, *YOUR BLUES AIN'T LIKE MINE* (1992); PERCIVAL EVERETT, *THE TREES: A NOVEL* (2021); BERNICE L. MCFADDEN, *GATHERING OF WATERS* (2012); LEWIS NORDAN, *WOLF WHISTLE: A NOVEL* (1993).

⁴ See TYSON, *supra* note 1, at 6–7, 52–55, 165. Bryant later reaffirmed her allegations against Emmett Till. See DeNeen L. Brown, *In Unpublished Memoir, Emmett Till's Accuser Calls Herself 'a Victim,'* WASH. POST (July 18, 2022), <https://www.washingtonpost.com/history/2022/07/18/caroyln-bryant-memoir-emmett-till/> [<https://perma.cc/RH4W-C6M4>]; Margalit Fox, *Carolyn Bryant Donham Dies at 88; Her Words Doomed Emmett Till*, N.Y. TIMES (May 2, 2023), <https://www.nytimes.com/2023/04/27/us/carolyn-bryant-donham-dead.html> [<https://perma.cc/W3SL-Y5UZ>].

⁵ Southern whites were not the only critics. One feminist writer described Emmett Till's wolf whistle as “a deliberate insult just short of [a] physical assault, a last reminder to Carolyn Bryant that this black boy, Till, had in mind to possess her.” SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 247 (1975). She condemned Till's murder for its “sheer outrageousness,” *id.* at 245, but also questioned why “white women in particular have to bear the white man's burden of making amends for Southern racism[.]” *Id.* at 248.

28, Till was taken from the house where he had been staying with his uncle, Moses Wright, and other relatives, and savagely beaten to death. He was then thrown into the Tallahatchie River, weighted down by a 150-pound fan that was wired to his body. His grossly disfigured corpse was discovered floating in the river three days afterward, identifiable primarily from the ring he was wearing that had once belonged to his father. The body was returned to Chicago, where his mother, then known as Mamie Till Bradley and later known as Mamie Till-Mobley, insisted on an open-casket viewing and funeral so that the world would recognize the ghastly reality of her son's death.⁶ Roy Bryant, Carolyn's husband, and J.W. Milam, his half-brother, were acquitted of murder by an all-white Tallahatchie County jury that deliberated for just over an hour; one of the jurors said that they would have finished sooner but paused for soft drinks to stretch out the process.⁷

Many important details of the Emmett Till murder remain uncertain or contested. Beyond the question of whether Carolyn Bryant ever recanted her most inflammatory allegations about what exactly took place in the store in Money,⁸ other remaining ambiguities include when and how Roy Bryant found out about the incident involving his wife, whether Carolyn Bryant was in the vehicle when Emmett Till was taken from Moses Wright's home in the wee hours of the following Sunday morning, who else

⁶ See DEVERY S. ANDERSON, *EMMETT TILL: THE MURDER THAT SHOCKED THE WORLD AND PROPELLED THE CIVIL RIGHTS MOVEMENT* 26–34, 35–38, 45–47, 54–59 (2015); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 422–26 (2002); MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, *DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA* 98–102, 113–14, 116, 122–25, 129–36, 139–44 (2003); TYSON, *supra* note 1, at 8–12, 60–68, 69–75; STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 15–23 (1989); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965*, at 39–44 (1987).

⁷ See *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* 44–113 (Christopher Metress ed., 2002) [hereinafter *THE LYNCHING OF EMMETT TILL*]; ANDERSON, *supra* note 6, at 85–163; TILL-MOBLEY & BENSON, *supra* note 6, at 158–90; TYSON, *supra* note 1, at 122–79; WHITFIELD, *supra* note 6, at 33–44; *see also* DRAY, *supra* note 6, at 427–30. Not long after the murder trial, a grand jury in neighboring Leflore County (where Emmett Till had been seized from his Uncle Moses Wright's home) declined to indict Roy Bryant and J.W. Milam for kidnapping. *See* ANDERSON, *supra* note 6, at 203–04, 205–06, 207–08; WHITFIELD, *supra* note 6, at 47–48.

⁸ *See supra* note 4 and accompanying text.

was riding with Till in the back of the truck in which he was placed after being kidnapped, where Till was taken by his captors, when those captors decided to kill him, and where they actually murdered him.⁹

Those are important questions, but from a legal perspective, another salient issue stands out: why did the federal government make no effort to prosecute anyone involved in the Till murder? Federal inaction was not an oversight. At the time, Mamie Till Bradley and others implored the Department of Justice to act, but those efforts were unavailing. Many years later, the federal government did in fact reopen the Till investigation. But by then, the trail had gone cold and most potential targets were no longer living.¹⁰ This article focuses on the federal government's inaction on the Till murder at the time. Indeed, after the Department of Justice contemporaneously announced that it would take no action, the state-acquitted defendants, Roy Bryant and J.W. Milam, sold what purported to be their story to journalist William Bradford Huie, who published a controversial article several months later in which they admitted to seizing and killing Emmett Till.¹¹

⁹ See ANDERSON, *supra* note 6, at 361–80; DAVE TELL, REMEMBERING EMMETT TILL 33–77 (2019); TYSON, *supra* note 1, at 203–07.

¹⁰ See, e.g., OFF. OF PUB. AFFS., *Federal Officials Close Cold Case Re-Investigation of Murder of Emmett Till*, U.S. DEPT OF JUST. (Feb. 6, 2025), <https://www.justice.gov/opa/pr/federal-officials-close-cold-case-re-investigation-murder-emmett-till> [<https://perma.cc/99VF-62EC>] (summarizing 21st century investigations of the Till case); Devlin Barrett, *Justice Department Closes Emmett Till Investigation Without Filing Charges*, WASH. POST (Dec. 7, 2021), https://www.washingtonpost.com/national-security/emmett-till-carolyn-bryant-investigation/2021/12/06/8f5e8490-56d1-11ec-9a18-a506cf3aa31d_story.html [<https://perma.cc/4MU3-MHXX>]; Audra D.S. Burch & Tariro Mzezewa, *Justice Department Closes Emmett Till Investigation Without Charges*, N.Y. TIMES (Dec. 6, 2021), <https://www.nytimes.com/2021/12/06/us/emmett-till-investigation-closed.html> [<https://perma.cc/2EJ3-MZRB>].

¹¹ William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, LOOK, Jan. 24, 1956, at 46, *reprinted in* THE LYNCHING OF EMMETT TILL, *supra* note 7, at 200. Huie published a follow-up story the following year. See William Bradford Huie, *What's Happened to Emmett Till's Killers?*, LOOK, Jan. 22, 1957, at 63, *reprinted in* THE LYNCHING OF EMMETT TILL, *supra* note 7, at 208. Huie subsequently used these articles as the basis for part of a long out-of-print paperback book. WILLIAM BRADFORD HUIE, WOLF WHISTLE AND OTHER STORIES (1959), *reprinted in* THE LYNCHING OF EMMETT TILL, *supra* note 7, at 235. His work was widely criticized at the time, in part because Bryant and Milam did not implicate anyone else in their crimes, and the recent

Federal inaction in the Till case was no aberration. The Department of Justice typically deferred to state authorities on civil rights matters at that time.¹² Two other 1955 civil rights episodes in Mississippi, one occurring shortly before Till's murder and the other occurring not long afterward, illustrate the point. Herbert Lee and Lamar Smith were separately and brazenly murdered in front of eyewitnesses in reprisal for their work to promote Black voting rights; local authorities took no action; and the federal government did nothing.¹³ The Till case attracted considerably more attention than those others, so understanding federal reticence there can provide insight into the more general lack of federal action in response to other civil rights violations.

This article explores some of the reasons why the federal government chose not to pursue the Till case at the time that it happened. Some of those reasons involved political considerations, and others apparently reflected the insensitivity of President Eisenhower and some other officials in his administration to the concerns of African Americans. Parts I and II address these factors, suggesting that they can provide, at best, only partial explanations for federal inaction. Part III focuses on the state of legal doctrine at the time, showing that the federal government might not have had the authority to proceed under existing statutes. Part IV explores how an administration that made civil rights a higher priority might have pressed for more expansive application of existing federal law. In the end, the article addresses how Emmett Till's murder contributed to the process by

disclosure that Huie's research notes contained evidence that others besides Bryant and Milam were involved tends to corroborate some of that criticism. See Gillian Brockell, *Journalist Withheld Information About Emmett Till's Murder, Documents Show*, WASH. POST (Aug. 29, 2024), <https://www.washingtonpost.com/history/2024/08/26/emmett-till-william-bradford-huie-carolyn-bryant-civil-rights/> [https://perma.cc/FH4Y-VH72].

¹² See MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 34–36 (new ed. 1995). Federal passivity was standard policy for many years before 1955. For example, the Department of Justice took no action against those involved in the notorious 1921 racially motivated massacre in the Greenwood section of Tulsa, Oklahoma. See CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUST., *REVIEW AND EVALUATION: TULSA RACE MASSACRE* (Jan. 9, 2025), <https://www.justice.gov/crt/media/1383756/dl> [https://perma.cc/GSB3-6QW3].

¹³ See CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 39–40, 123 (1995); TYSON, *supra* note 1, at 115, 120.

which the federal government began to prosecute racially motivated crimes as civil rights violations and evaluates the prospects for more creative approaches to existing laws.

I. POLITICAL CONSIDERATIONS

A major background factor in the Till case was politics. The end of Reconstruction and the disenfranchisement of African Americans that followed meant that the Democratic Party had a monopoly on power in the Solid South. Although there were some isolated Republican pockets and the few African Americans who were allowed to vote supported the GOP,¹⁴ Republican presidential candidates were virtually shut out in the electoral college before 1952. The only meaningful exception occurred in 1928, at the height of Prohibition, when much of the Protestant, dry, and disproportionately rural South rejected the Catholic, wet, and urban Democratic candidate, Governor Alfred E. Smith of New York; the winning GOP candidate, Herbert C. Hoover, carried five southern states and almost won two others.¹⁵

By 1952, some Republicans saw hopeful signs in the old Confederacy. Southern support for the Democratic Party seemed to be slipping, at least in presidential elections. In 1948, die-hard segregationists who opposed the civil rights plank in the party's platform walked out of the national convention and ran the then-Democratic South Carolina Governor J. Strom Thurmond as the so-called Dixiecrat candidate against President Harry S. Truman. Although Thurmond's ticket failed to achieve its goal of deadlocking the election, the Dixiecrats carried four states. Moreover, the emergence of so-called "presidential Republicans"—Southern voters who supported GOP candidates for the White House—seemed to offer a foundation for building a stronger party

¹⁴ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 280–91 (1949); ALEXANDER HEARD, *A TWO-PARTY SOUTH?* 37–53, 220–26 (1952).

¹⁵ See KEY, *supra* note 14, at 318–29; HEARD, *supra* note 14, at 6–7; RICHARD K. SCHER, *POLITICS IN THE NEW SOUTH: REPUBLICANISM, RACE AND LEADERSHIP IN THE TWENTIETH CENTURY* 90–95 (2d ed. 1997). Republican candidate Warren G. Harding narrowly carried Tennessee in his 1920 landslide victory, the only other time that a GOP presidential candidate had carried a southern state since 1876. See HEARD, *supra* note 14, at 7; SCHER, *supra*, at 90.

that could compete for state and local offices, as well as for seats in Congress if the party could find a way to finesse racial issues.¹⁶

Of particular significance, candidate Dwight D. Eisenhower rejected the suggestions of many political advisors and refused to concede the South to the Democrats in 1952. Ike actively campaigned in the region, making trips to Alabama, Arkansas, Georgia, Louisiana, North Carolina, Tennessee, Texas, and Virginia.¹⁷ Moreover, several prominent Democrats endorsed him, including Governors James F. Byrnes of South Carolina and Robert F. Kennon of Louisiana, as well as two Texas officials, Governor R. Allan Shivers and Attorney General M. Price Daniel (who would be elected to the U.S. Senate that year). Another influential Democrat, Senator Harry F. Byrd Sr. of Virginia, announced his neutrality in the presidential election.¹⁸

Eisenhower's efforts paid ample dividends, as he carried Florida, Tennessee, Texas, and Virginia while barely losing South Carolina and gaining a higher proportion of the Southern presidential vote than any Republican since the end of Reconstruction on his way to an easy victory.¹⁹ Eisenhower must have understood the implications of civil rights for the future of the Republican Party in the South. Even before Emmett Till's killing, the Supreme Court in June 1953 invited the administration to offer its views in the pending school segregation

¹⁶ On the 1948 election, see KARI FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932–1968*, at 118–86 (2001); KEY, *supra* note 14, at 329–44; SCHER, *supra* note 15, at 95–97; JOSEPH CRESPINO, *STROM THURMOND'S AMERICA* 66–82 (2012). On contemporaneous assessments of Republican prospects in the South, see HEARD, *supra* note 14, at 133–56; KEY, *supra* note 14, at 278–80, 672–75.

¹⁷ DWIGHT D. EISENHOWER, *MANDATE FOR CHANGE, 1953–1956*, at 54–56, 69–71 (1963) [hereinafter EISENHOWER, *MANDATE FOR CHANGE*]; HERBERT S. PARMET, *EISENHOWER AND THE AMERICAN CRUSADES* 108 (1972); EMMET JOHN HUGHES, *THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS* 201 (1963).

¹⁸ EISENHOWER, *MANDATE FOR CHANGE*, *supra* note 17, at 70–71; PARMET, *supra* note 17, at 108–09, 133; CHESTER J. PACH, JR. & ELMO RICHARDSON, *THE PRESIDENCY OF DWIGHT D. EISENHOWER* 138–39 (rev. ed. 1991); JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE* 16 (1976).

¹⁹ EISENHOWER, *MANDATE FOR CHANGE*, *supra* note 17, at 75; SCHER, *supra* note 15, at 91–94.

cases.²⁰ Southern officials who had supported Eisenhower's election, including Governors Byrnes and Shivers, urged him to tell the Court to leave the issues to state and local officials and not to support a judicial ruling that would require integration.²¹

Of course, the Justices ruled the following year that segregated schools are unconstitutional in *Brown v. Board of Education*.²² Despite the Court's low-key remedial order a year later calling for desegregation "with all deliberate speed[.]"²³ *Brown* undercut GOP hopes for a Southern resurgence. The unanimous opinion was written by Chief Justice Earl Warren, a prominent Republican whom Eisenhower had appointed. To make matters worse from a political standpoint, Attorney General Herbert Brownell had filed a brief on behalf of the administration urging the Court to reject segregation. Many Southern whites therefore blamed Eisenhower and his party for a ruling they abhorred. That raised questions about his ability to maintain, let alone extend, his regional support in connection with his expected reelection bid in 1956 and left the handful of Southern Republicans in Congress vulnerable to Democratic challengers.²⁴ From a strictly partisan perspective, then, federal intervention in the Till case might have further eroded Republican inroads in the South by suggesting that the Eisenhower administration intended to undermine the region's traditional racial order.

Such a bald political explanation is not entirely persuasive, though, for a couple of reasons. For one thing, the initial reaction to Emmett Till's killing among Mississippi whites was one of outrage. Governor Hugh White denounced the crime, as did

²⁰ See *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953) (mem.) (inviting the Attorney General to participate in oral argument on behalf of the United States as *amicus curiae* and to file a brief reflecting the federal government's views).

²¹ See STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 126–27, 142–43 (1984); JAMES C. DURAM, *A MODERATE AMONG EXTREMISTS: DWIGHT D. EISENHOWER AND THE SCHOOL DESEGREGATION CRISIS* 60–61 (1981); DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS MOVEMENT* 53 (2007); JAMES F. SIMON, *EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND CIVIL LIBERTIES* 128 (2018).

²² See 347 U.S. 483, 493–96 (1954).

²³ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

²⁴ See DURAM, *supra* note 21, at 105–07; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 398 (2004); SCHER, *supra* note 15, at 97–98.

several newspapers in the Magnolia State that normally took a strongly segregationist editorial position.²⁵ Even the Mississippi head of the Citizens' Council expressed his regret and made clear that neither Roy Bryant nor J.W. Milam belonged to his organization.²⁶ And Attorney General James P. Coleman, who had recently won the Democratic nomination for governor in a five-way primary, dispatched one of his top aides to assist the Tallahatchie County prosecutor in the investigation and trial.²⁷

Before long, however, sensitivity to outside criticism led to a backlash among whites, and not only the hard-core segregationists. Even some white moderates denounced the NAACP and other "outsiders" who sought to convert the case from an aberrant murder by a few folks who had overreacted to an unfortunate incident into a hate crime that put the whole region on trial.²⁸ The entire local bar—five politically important white men, one of them a cousin of a powerful member of the Mississippi congressional delegation—soon volunteered to represent Roy Bryant and J.W. Milam, and the sheriff testified for the defense.²⁹

In other words, federal intervention following the acquittal in a state murder trial might have alienated Southern whites. Nevertheless, too blatant a Southern Strategy could have caused other political problems for the GOP. Such an approach threatened to erode support among Blacks in the North and West, who held the balance of power in several swing states that the Republicans needed to carry in federal elections. Persuasive evidence about the significance of the African American vote came from the 1948 election. That year Black support enabled President Truman to carry California, Illinois, and Ohio, without which he would have been defeated; meanwhile, Republican challenger

²⁵ See ANDERSON, *supra* note 6, at 50–51; TYSON, *supra* note 1, at 125; WHITFIELD, *supra* note 6, at 24–26; DRAY, *supra* note 6, at 426; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 61 (1997).

²⁶ See ANDERSON, *supra* note 6, at 51; TYSON, *supra* note 1, at 101; WHITFIELD, *supra* note 6, at 26.

²⁷ See ANDERSON, *supra* note 6, at 72; TILL-MOBLEY & BENSON, *supra* note 6, at 161; WHITFIELD, *supra* note 6, at 30–31.

²⁸ ANDERSON, *supra* note 6, at 65–69; TYSON, *supra* note 1, at 126–27; KENNEDY, *supra* note 25, at 61; WILLIAMS, *supra* note 6, at 44.

²⁹ See ANDERSON, *supra* note 6, at 60, 73–74, 137–39, 141; TILL-MOBLEY & BENSON, *supra* note 6, at 160–61, 187; WHITFIELD, *supra* note 6, at 30, 41.

Thomas E. Dewey took Delaware, Indiana, and Maryland on the basis of the Black vote. African Americans potentially held the balance of power in places like New York and Pennsylvania as well.³⁰ Consequently, the Eisenhower administration did not want to sacrifice Black support even as it sought to crack the Solid South. Evidence favoring this strategy came from a published study that circulated quickly among White House political advisors analyzing the 1954 midterm congressional election. The study showed that African American voters outside Dixie could provide the margin of victory in more than sixty districts and that mobilizing Black support could enable the Republicans to capture control of both the House and the Senate.³¹

As tempting as it might be to attribute the federal government's decision to stay out of the Till case to politics pure and simple, therefore, this explanation is at best incomplete. Whatever benefits might accrue to the Republican Party from leaving the matter to the tender mercies of the Mississippi authorities, the political risks of this strategy threatened to reduce or even negate the gains in the South with losses in the rest of the country.

II. ADMINISTRATION RACIAL ATTITUDES

If politics cannot fully explain the federal government's decision to stay out of the Till case, perhaps hostility or insensitivity to Black interests can. One of President Eisenhower's advisors, former Under Secretary of Labor Arthur Larson, reported that the Chief Executive thought that the Supreme Court's *Brown* decision banning segregated schools was "wrong," an opinion he privately expressed on other occasions as well.³² Another former aide, speech writer Emmet John Hughes, recounted Ike's view that the Court's ruling had "*set back* [racial]

³⁰ See WILLIAM C. BERMAN, *THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION* 129–31 (1970); STEVEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, at 41–43 (4th ed. 2015); MICHAEL R. GARDNER, *HARRY TRUMAN AND CIVIL RIGHTS: MORAL COURAGE AND POLITICAL RISKS* 144–45 (2002); KLARMAN, *supra* note 24, at 180–81.

³¹ LAWSON, *supra* note 30, at 56; PARMET, *supra* note 17, at 446–47.

³² ARTHUR LARSON, *EISENHOWER: THE PRESIDENT NOBODY KNEW* 124 (1968); AMBROSE, *supra* note 21, at 190.

progress in the South *at least fifteen years*.”³³ Yet Eisenhower himself wrote in his memoirs that “there can be no question that the judgment of the Court was right.”³⁴ Ike later came to view his appointment of Chief Justice Warren as one of his greatest mistakes, although apparently his unhappiness resulted more from Court rulings in cases involving national security and criminal procedure than civil rights.³⁵

Whatever Eisenhower actually thought about *Brown*, as President he never explicitly endorsed the ruling as correct. A sardonic Jules Feiffer drew a cartoon Eisenhower announcing: “I deplore the actions of extremists on both sides—those who blow up schools and those who want to keep them open.”³⁶ This was, of course, a caricature, but it came uncomfortably close to the Chief Executive’s actual public position. He did in fact denounce “extremists on both sides” and refused to meet either with those who denounced *Brown* or with those who favored prompt integration.³⁷ He believed that under the Constitution’s separation of powers, the President should refrain from endorsing or criticizing judicial rulings lest he be asked to comment on every case, which would “lower the dignity of government.”³⁸ Compliance with *Brown* was the responsibility of state and local governments; implementation was for the federal courts.³⁹ Indeed, so powerful was his sense of the distinctive functions of each branch that he initially bristled at the Supreme Court’s request that the Attorney General submit an *amicus curiae* brief in *Brown*. Asking the executive branch to give its views on the constitutionality of segregation, Ike feared, would intrude on the judiciary’s duty to resolve that question. Nevertheless, he acquiesced in the filing of the brief when Attorney General

³³ HUGHES, *supra* note 17, at 201.

³⁴ EISENHOWER, MANDATE FOR CHANGE, *supra* note 17, at 230.

³⁵ BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 173–74 (1983); AMBROSE, *supra* note 21, at 190; PACH & RICHARDSON, *supra* note 18, at 141.

³⁶ JULES FEIFFER, THE EXPLAINERS (1960).

³⁷ ROBERT FREDERICK BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 167 (1984); PACH & RICHARDSON, *supra* note 18, at 143.

³⁸ DWIGHT D. EISENHOWER, WAGING PEACE: THE WHITE HOUSE YEARS A PERSONAL ACCOUNT 1956–1961, at 150 (1965) [hereinafter EISENHOWER, WAGING PEACE].

³⁹ BELKNAP, *supra* note 12, at 34, 39; PACH & RICHARDSON, *supra* note 18, at 143; DURAM, *supra* note 21, at 110.

Brownell explained that the Court's request was really a command. Still, Eisenhower insisted that the brief avoid expressing a position on the validity of segregation and focus only on the specific facts necessary to answer the precise questions that the Court had propounded.⁴⁰

He also chose not to speak out against the resistance to desegregation or to criticize proponents of interposition and nullification who claimed that states could resist federal authority until, two years after Emmett Till was murdered (and after his easy reelection), he dispatched federal troops to Little Rock in response to Arkansas Governor Orval Faubus's obstruction of a court order admitting nine African American students to a previously all-white high school.⁴¹ In the immediate wake of *Brown* during his first term, for example, he remained silent about the suspension and expulsion of Autherine Lucy, the first African American student at the University of Alabama.⁴² Nor did he reprimand Governor Shivers, one of the Democrats who had endorsed him in 1952, for thwarting school desegregation in Mansfield, Texas.⁴³ When Ike did address the subject, he took a position of almost studied neutrality. Consider his reaction to the Southern Manifesto, in which the overwhelming majority of members of Congress from the South condemned *Brown* as an illegitimate judicial usurpation of power: Eisenhower refused to utter a negative word about the Manifesto and noted that its

⁴⁰ EISENHOWER, *WAGING PEACE*, *supra* note 38, at 150; AMBROSE, *supra* note 21, at 124–25; BURK, *supra* note 37, at 134–36; DURAM, *supra* note 21, at 61–64; PACH & RICHARDSON, *supra* note 18, at 142.

⁴¹ See generally *Cooper v. Aaron*, 358 U.S. 1, 7–12 (1958); TONY FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* (1984).

⁴² AMBROSE, *supra* note 21, at 306; BURK, *supra* note 37, at 159; PACH & RICHARDSON, *supra* note 18, at 145. See generally E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* 5–113 (1993).

⁴³ AMBROSE, *supra* note 21, at 336–37; BURK, *supra* note 37, at 167; Clive Webb, *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 1,7 (Clive Webb ed., 2005). See generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S*, at 146–47 (1969); J.W. PELTASON, *58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 135–46 (1961).

signatories had promised to work within the law to maintain segregation.⁴⁴

Consistent with his reluctance to address the segregation issue, President Eisenhower never spoke out against Emmett Till's killing and did not respond to a telegram from Mamie Till Bradley requesting federal action in connection with her son's death.⁴⁵ Although she never explicitly drew the connection, she did learn after the abortive trial of Bryant and Milam that General Eisenhower had signed the order authorizing the execution of her estranged husband, Louis Till, Emmett's father, in Italy after his court-martial conviction for murder and rape during the latter stages of World War II.⁴⁶ It seems unlikely that Ike's failure to respond stemmed from his memory of a unique situation. Nearly a hundred other American soldiers in Europe, almost all of them African American, were hanged for the same offenses during World War II, and he was the supreme commander who signed off on many of these cases.⁴⁷ Even if he did remember Louis Till for some reason, that fact could provide only part of the explanation for the Chief Executive's hands-off position.

At one level, Eisenhower's reticence reflected a more general approach to his office. His executive style, characterized by the political scientist Fred Greenstein as hidden-hand leadership, involved the appearance of being above conventional maneuvering, avoidance of high-flown rhetoric accompanied by the strategic use of ambiguous language, and reliance on careful delegation of responsibility to subordinates.⁴⁸ Although

⁴⁴ AMBROSE, *supra* note 21, at 336–37; BURK, *supra* note 37, at 161–62; PACH & RICHARDSON, *supra* note 18, at 145. *See generally* Declaration of Constitutional Principles, 102 CONG. REC. 4460–61 (Senate), 4515–16 (House) (1956) (full text of the Southern Manifesto); ROBERT DALLEK, *LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES 1908–1960*, at 496–97 (1991); Tony Badger, *Southerners Who Refused to Sign the Southern Manifesto*, 42 HIST. J. 517, 517–19 (1999).

⁴⁵ TILL-MOBLEY & BENSON, *supra* note 6, at 201; AMBROSE, *supra* note 21, at 305; ANDERSON, *supra* note 6, at 200, 253; BELKNAP, *supra* note 12, at 37; NICHOLS, *supra* note 21, at 117; WHITFIELD, *supra* note 6, at 74–75.

⁴⁶ TILL-MOBLEY & BENSON, *supra* note 6, at 202. *See also* ANDERSON, *supra* note 6, at 11–12; TYSON, *supra* note 1, at 29; WHITFIELD, *supra* note 6, at 117.

⁴⁷ WHITFIELD, *supra* note 6, at 116–17.

⁴⁸ *See* FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 57–99 (1982).

Greenstein did not address Eisenhower's civil rights program, he did observe that this style is better adapted to facilitating "incremental change" rather than transformative policies such as the dismantling of segregation.⁴⁹

Along these lines, Ike repeatedly emphasized that racial problems could not be resolved by excessive use of legal compulsion and that reform would ultimately come from voluntary cooperation. He viewed white Southerners as essentially decent and well-meaning people who had grown up under a system of segregation that the Supreme Court had endorsed decades earlier in *Plessy v. Ferguson*⁵⁰ and who would, if given enough time, adjust to change so long as they did not feel threatened by the external forces of the federal government or pressed too much by well-intentioned outsiders and other officious intermeddlers.⁵¹

The President's racial attitudes were profoundly ambivalent. He understood the wrongs of racial discrimination at an abstract level, but he did not comprehend the profound impact of racism on its targets. In this sense, he shared the irresolution of many whites. That should come as no surprise. Born in Texas and raised primarily in Kansas, Eisenhower spent his entire life and most of his military career in segregated environments. West Point was all-white during his student years, and his military assignments were primarily in the South and in a Washington that practiced rigid segregation. He was also briefly posted to the Canal Zone and the Philippines, where racial hierarchy was, if anything, even more blatant. And during World War II, the armed forces he led were segregated. With this background, he predictably shared many of the condescending or paternalistic racial attitudes that were commonplace among white Americans.⁵²

Eisenhower's ambivalence was reflected during and after the war. During the Battle of the Bulge, for example, he circumvented military segregation by assigning Black laborers to fill temporary vacancies in white units.⁵³ When President Truman proposed to

⁴⁹ *Id.* at 230–31.

⁵⁰ 163 U.S. 537 (1896).

⁵¹ AMBROSE, *supra* note 21, at 127, 306–07; BURK, *supra* note 37, at 152–53; DURAM, *supra* note 21, at 109–13; PACH & RICHARDSON, *supra* note 18, at 140–41.

⁵² PARMET, *supra* note 17, at 439; LARSON, *supra* note 32, at 128; AMBROSE, *supra* note 21, at 125; PACH & RICHARDSON, *supra* note 18, at 139.

⁵³ PACH & RICHARDSON, *supra* note 18, at 139.

desegregate the armed forces in 1948, however, Eisenhower hesitated. He was willing to merge Black platoons into white companies but opposed integration below that level, such as platoons and squads. African Americans, he feared, would lose out on leadership opportunities to better qualified whites who would monopolize the ranks of noncommissioned officers, which would undermine the morale of Black troops.⁵⁴ As a candidate in 1952, Eisenhower had also opposed the creation of a federal Fair Employment Practices Commission, although he supported state laws and agencies to combat job discrimination.⁵⁵ As President, Ike also tried to lobby Chief Justice Warren about the Supreme Court's impending *Brown* decision. In the spring of 1954, only a few weeks before the ruling was announced, the Chief Executive seated Warren near John W. Davis, the lead lawyer for the segregating school boards, at a White House dinner during which the President highly praised Davis. As the dinner was breaking up, Eisenhower took the Chief Justice aside and told him that white Southerners wanted only "to see that their sweet little girls are not required to sit alongside some big overgrown Negroes."⁵⁶ More than two years later, according to Arthur Larson, the President remarked while discussing a draft of his acceptance speech at the 1956 Republican National Convention that he favored legal and political equality for everyone but that this did not mean "that a Negro should court my daughter."⁵⁷

This concern about the prospect of interracial sex might suggest that Eisenhower avoided comment on the Till case because young Emmett had supposedly breached the ultimate taboo of white supremacy, whatever the actual facts might have been. This speculation receives additional support from the post-trial revelation, apparently at the behest of Mississippi's segregationist Senators James O. Eastland and John C. Stennis,

⁵⁴ BERMAN, *supra* note 30, at 204–05; GARDNER, *supra* note 30, at 212–13; PACH & RICHARDSON, *supra* note 18, at 139; PARMET, *supra* note 17, at 439.

⁵⁵ AMBROSE, *supra* note 21, at 125; BERMAN, *supra* note 30, at 204; PACH & RICHARDSON, *supra* note 18, at 138; PARMET, *supra* note 17, at 133, 436.

⁵⁶ AMBROSE, *supra* note 21, at 190; SIMON, *supra* note 21, at 181. Another version of the story has the President saying that white segregationists wanted to avoid having "sweet little white girls next to those big sexually advanced black boys." PACH & RICHARDSON, *supra* note 18, at 142.

⁵⁷ LARSON, *supra* note 32, at 127.

of the circumstances of Louis Till's death. Perhaps the executed rapist of white women had transmitted a voracious and genetic lust to his son. At least, that is how many Southern whites and much of the Magnolia State's press saw things.⁵⁸ Indeed, the plausibility of this interpretation gains force from the Supreme Court's contemporaneous evasion of legal issues involving interracial intimacy. The Justices, less than two years after unanimously declaring school segregation unconstitutional in *Brown*, refused to entertain a challenge to Virginia's anti-miscegenation law. The Court suggested that unspecified defects in the record made the case inappropriate for plenary consideration,⁵⁹ but legal scholars generally agree that the only principled course would have been to strike down the law and that the real reason for evading the case was a desire not to further inflame segregationists who were loudly proclaiming that school integration would inevitably lead to intermarriage and the destruction of the white race.⁶⁰

Before attaching too much significance to the sexual overtones of Emmett Till's murder, we should recall that President Eisenhower failed to speak out about racial justice matters even when the issue was simple compliance with existing law during his first term. The Chief Executive objected to a proposal to withhold federal education funds to segregated school districts and declined to endorse legislation prohibiting segregation in interstate transportation.⁶¹ Moreover, in 1956 he supported a weak civil rights bill that avoided any concrete steps

⁵⁸ ANDERSON, *supra* note 6, at 193–94, 196–97; TILL-MOBLEY & BENSON, *supra* note 6, at 202; WHITFIELD, *supra* note 6, at 117.

⁵⁹ *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam) (vacating the judgment of the state supreme court and remanding for further proceedings), *motion to recall mandate denied and appeal dismissed for want of a properly presented federal question*, 350 U.S. 985 (1956) (per curiam).

⁶⁰ Compare ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71, 126, 174 (1962) (praising the Court for avoiding a contentious issue during a difficult time), with Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 11–12, 23–24 (1964) (criticizing the Court for avoiding a contentious but important constitutional question). The Court invalidated the law nearly a dozen years later. See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶¹ AMBROSE, *supra* note 21, at 303–04; BURK, *supra* note 37, at 146, 164; DURAM, *supra* note 21, at 112; PARMET, *supra* note 17, at 442–43.

toward desegregation but contained modest provisions related to voting rights and called for the creation of a commission to study racial issues; he declined to endorse stronger enforcement provisions, which he thought would aggravate, rather than ameliorate, race relations in the South.⁶² In other words, Ike's detachment from the Till case reflected his general ambivalence about racial issues.

The President's awkward approach was also consistent with the views of many of his advisors. Striking evidence on this front can be seen in the experience of Frederic Morrow, the first African American to serve on the White House staff in any administration. Morrow, a CBS executive who had worked in Eisenhower's 1952 presidential campaign, was promised a position in the new administration. After resigning from his job at the network, Morrow waited more than a year only to be posted to a minor opening in the Department of Commerce. Another year passed before he finally got to the White House, only to then find that he had few defined responsibilities, the all-white secretarial pool generally refused to work for him, and both the President's staff and advisors found it awkward to deal with him in a professional or even courteous manner.⁶³ Morrow's portfolio did not include minority affairs, a subject that fell largely by default to Maxwell Rabb, a white political operative who focused mainly on fence-mending and containment of emerging problems rather than on substantive policy issues.⁶⁴

Morrow tried unsuccessfully to persuade Eisenhower to make a public statement about the Till case. In December 1955, he wrote to Rabb and Chief of Staff Sherman Adams, warning of an impending racial catastrophe if the administration did not act and

⁶² See J.W. ANDERSON, *EISENHOWER, BROWNELL, AND THE CONGRESS: THE TANGLED ORIGINS OF THE CIVIL RIGHTS BILL OF 1956-1957*, at 34-43 (1964); ROBERT MANN, *THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS* 167-69 (1996); NICHOLS, *supra* note 21, at 126-28.

⁶³ E. FREDERIC MORROW, *BLACK MAN IN THE WHITE HOUSE: A DIARY OF THE EISENHOWER YEARS BY THE ADMINISTRATIVE OFFICER FOR SPECIAL PROJECTS, THE WHITE HOUSE, 1955-1961*, at 11-13, 17-18, 235-36 (1963); BURK, *supra* note 37, at 77-88; PACH & RICHARDSON, *supra* note 18, at 144-45. Morrow also had trouble finding an executive position in the private sector following his White House service. See NICHOLS, *supra* note 21, at 265.

⁶⁴ BURK, *supra* note 37, at 70; NICHOLS, *supra* note 21, at 25.

proposing that the White House convene an interracial group of clergymen to discuss how to combat the reign of terror being perpetrated against Mississippi's African Americans. Although the idea briefly resonated with Adams, Ike threw cold water on it. Meanwhile, Rabb called a meeting of Blacks serving in the executive branch. The meeting did not go well, as the participants lamented the administration's silence on the Mississippi situation and Rabb, who said he was under pressure for being too sympathetic to civil rights, warned them against taking too aggressive a stance. Another presidential aide accused African Americans of being ungrateful for the efforts that the President had made toward desegregation in the District of Columbia and in federal facilities around the country.⁶⁵ Part of the administration's skepticism reflected unduly optimistic hopes for attracting increased white political support in the South, but much of the hostile reaction reflected the view that African Americans should accept gradual progress rather than press what skeptics regarded as an unseemly push for prompt and sweeping changes.⁶⁶

As this brief account suggests, the Eisenhower administration put a low priority on civil rights. It did so for a combination of reasons, including political calculation, racial insensitivity, and genuine conviction. Even if the federal government had a greater commitment to racial justice, however, there were significant legal obstacles to pursuing a case against the killers of Emmett Till.

III. LEGAL CONSIDERATIONS

While the White House was silent, the Department of Justice briefly considered intervening in the Till case after the acquittal of Roy Bryant and J.W. Milam in the Tallahatchie County murder trial but a month later announced that it would not do so. According to Attorney General Brownell, the federal government had no jurisdiction over the matter.⁶⁷ Evaluating this conclusion

⁶⁵ MORROW, *supra* note 63, at 27–31, 46.

⁶⁶ *Id.* at 29–30, 47–48; AMBROSE, *supra* note 21, at 305; BURK, *supra* note 37, at 84; PARMET, *supra* note 17, at 441.

⁶⁷ HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 204 (1993); ANDERSON, *supra* note 6, at 214; WHITFIELD, *supra* note 6, at 74.

requires an understanding of a few basic legal principles about the powers of the federal government and the relationship between national and state authority.

We can eliminate one potential barrier to federal action in the Till affair: the constitutional protection against double jeopardy.⁶⁸ There was no double-jeopardy barrier to a federal prosecution in the wake of the acquittal at the state trial. It is important to make this point because even the author of an otherwise valuable study of the 1959 lynching of Mack Parker in Poplarville, Mississippi, got this concept wrong.⁶⁹ The Supreme Court, in a long line of cases with its roots in several pre-Civil War decisions (one of them, ironically, a fugitive slave case), has employed what it calls the dual-sovereignty doctrine. Under this doctrine, double jeopardy does not apply to successive prosecutions by different sovereigns—the federal government and a state, or two different states—provided that each sovereign has independent authority to act.⁷⁰ Indeed, the Court has reaffirmed the dual-sovereignty doctrine several times in the past decade.⁷¹ The crucial question, therefore, was whether the federal government had authority to act irrespective of what happened in the Mississippi courts.

Under the Constitution, the federal government does not have general police powers.⁷² Accordingly, most criminal law in the United States is the province of the states. This means that Emmett Till's murder was a crime under Mississippi law, but the Department of Justice could not have prosecuted his killers for

⁶⁸ “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb” U.S. CONST. amend. V.

⁶⁹ See HOWARD SMEAD, *BLOOD JUSTICE: THE LYNCHING OF MACK CHARLES PARKER* 102 (1986).

⁷⁰ See, e.g., *Heath v. Alabama*, 474 U.S. 82, 87–91 (1985); *Bartkus v. Illinois*, 359 U.S. 121, 132–33 (1959); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19–20 (1852) (the fugitive-slave case); *United States v. Marigold*, 50 U.S. (9 How.) 560, 569–70 (1850); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434–35 (1847).

⁷¹ See *Denezpi v. United States*, 596 U.S. 591, 597–99 (2022); *Gamble v. United States*, 587 U.S. 678, 691–707 (2019); *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 66–72 (2016).

⁷² See, e.g., *Bond v. United States*, 572 U.S. 844, 854 (2014); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 559 U.S. 519, 535–36 (2012); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

murder. There is a federal kidnapping statute, the so-called Lindbergh Law, but it covers only cases in which the victim is taken across state lines.⁷³ In fact, uncertainty about whether Mack Parker was taken out of Mississippi alive led the federal government to drop its quest for a kidnapping charge against the members of his lynching party four years after Emmett Till was killed.⁷⁴ If there was uncertainty on that score in the Parker case, it was absolutely clear that Emmett Till's kidnappers had not taken him across state lines.⁷⁵ Because he had been kidnapped and kept only in Mississippi, the United States could not press charges for this offense.

The only alternative federal charge involved conspiracy to violate Emmett Till's civil rights. A law originally enacted in 1870, often referred to as Section 241, made it a crime for "two or more persons" to "conspire to injure, oppress, threaten, or intimidate any person" exercising "any right or privilege secured to him by the Constitution or laws of the United States."⁷⁶ This law can best be understood in relation to another one originally enacted four years earlier. That measure, often called Section 242, makes it a federal crime for any person "under color of any law" to deprive another person of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."⁷⁷

Observe that Section 241 forbids conspiracies to violate federal rights, whereas Section 242 forbids actual violations of federal rights. In addition, Section 241—the conspiracy statute—can apply to any person, whereas Section 242—the substantive statute—applies only to persons who act "under color of law." There is a large body of jurisprudence and legal scholarship on the meaning of the latter requirement. For present purposes, it suffices to say that "under color of law" means either a public official (such as a sheriff or police officer) or someone acting in

⁷³ See 18 U.S.C. § 1201(a)(1).

⁷⁴ See SMEAD, *supra* note 69, at 152, 206–07.

⁷⁵ Although precisely where Roy Bryant, J.W. Milam, and the persons who assisted them actually took Till has generated disagreement, see TELL, *supra* note 9, at 33–77, everyone agrees that all of the events took place within Mississippi.

⁷⁶ Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141 (codified as amended at 18 U.S.C. § 241).

⁷⁷ Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242).

concert with an official.⁷⁸ Nobody has ever suggested that any law enforcement personnel were involved in Emmett Till's killing, either directly or indirectly. For this reason, the only basis for federal prosecution was Section 241, the conspiracy statute.

At the time, however, the precise meaning and even the constitutionality of this measure were unclear. A series of Supreme Court rulings running from the end of Reconstruction to only four years before the Till murder can explain why. The key legal issue in these cases was the scope of the rights secured by the Constitution and laws of the United States. As we shall see, even an administration that was strongly committed to protecting African Americans might have concluded that prosecuting Emmett Till's killers would face substantial legal hurdles.

The earliest of these rulings, *United States v. Cruikshank*,⁷⁹ arose out of the Colfax Massacre of April 1873, which has been described as "the bloodiest single act of carnage in all of Reconstruction."⁸⁰ Following the disputed 1872 Louisiana gubernatorial election, supporters of the white Democratic candidate stormed the Grant Parish courthouse and slaughtered supporters of the Republican candidate who had been trying to hold them off.⁸¹ Most of the casualties were former slaves; estimates of the number of African American victims run between 60 and 280.⁸² It took two trials for federal prosecutors to obtain

⁷⁸ See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Monroe v. Pape*, 365 U.S. 167, 183–87 (1961), *overruled in part on other grounds by*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663, 700–01 (1978); *Williams v. United States*, 341 U.S. 97, 99–100 (1951); 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3573.2 (3d ed. 2008); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

⁷⁹ 92 U.S. 542 (1876).

⁸⁰ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION*, 1863–1877, at 530 (1988).

⁸¹ See generally LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* (2008); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008); NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 12–20* (2006); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896*, at 279–81, 284–85 (2017).

⁸² See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876*, at 142 (2005); KEITH, *supra* note 81, at 109; KENNEDY, *supra* note 25, at 50; LANE, *supra* note 81, at 265–66; LEMANN, *supra* note 81, at 22.

guilty verdicts under the original version of Section 241, which was substantively identical with the current version, against three of the ninety-seven persons who had been indicted.⁸³ The Supreme Court threw out the convictions.

The main counts charging the defendants in general terms with violating the victims' constitutional rights failed to specify precisely which rights had been affected. The gaps in the indictments required that those charges be dismissed.⁸⁴ Similarly, the counts charging the defendants with interfering with the victims' right to vote did not specify that the defendants had acted on account of race and therefore were fatally defective as a matter

⁸³ KACZOROWSKI, *supra* note 82, at 143–45; LANE, *supra* note 81, at 159–87, 189–90, 193–204.

The current language of Section 241 differs slightly from the version originally enacted in 1870, but the substance of the statute remains the same. The original version provided in relevant part:

And be it further enacted, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent . . . to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony

Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141.
The current version provides in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be [punished as herein provided].

18 U.S.C. § 241.

⁸⁴ *Cruikshank*, 92 U.S. at 557–59.

of drafting.⁸⁵ The Court's discussion of the legal infirmities of the remaining charges strongly implied that Section 241 was unconstitutional for impermissibly authorizing the federal government to exercise police power over activities over which the states have exclusive authority, although the opinion stopped short of that conclusion.⁸⁶ Even so, the permissible scope of the statute was strikingly narrow.

Of particular concern, the Court held that the Constitution secured only a limited range of rights and that it protected those rights only against abuse by the federal government. Some of the rights specifically mentioned in the Constitution, such as the right of peaceable assembly and the right not to be denied life, liberty, or property without due process of law, were natural rights. Accordingly, they were not created by the Constitution and hence were not secured by it. It followed that Section 241 did not prohibit violations of such natural rights.⁸⁷ Nor was this the only problem with using the statute in this case. There was no evidence that the defendants had interfered with any of the victims' federally protected rights, such as the First Amendment right to seek redress from the national government.⁸⁸ It would take nearly half a century for the Court to suggest that the First Amendment applies to the states,⁸⁹ but even that would not have changed the outcome in *Cruikshank*. This is so because of another restrictive interpretation of the Constitution. Although the Due Process Clause of the Fourteenth Amendment did protect against state abuses, the Colfax Massacre was treated as a purely private conflict. Only governmental action could violate constitutional rights, so the carnage in Grant Parish could not provide the basis for federal charges. The crimes committed were exclusively for the Louisiana authorities to prosecute.⁹⁰

⁸⁵ *Id.* at 556–57.

⁸⁶ *See id.* at 549–51.

⁸⁷ *Id.* at 551, 553.

⁸⁸ *Id.* at 552–53.

⁸⁹ *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from infringement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

⁹⁰ *Cruikshank*, 92 U.S. at 553–54.

Cruikshank suggests some of the potential obstacles to federal action against Emmett Till's killers. First, his right to life, being a natural right, was not secured by the Constitution and, therefore, did not come within the scope of Section 241. Second, even if one of his constitutional rights was denied, the perpetrators were private parties. In the absence of state action, the federal government had no authority to intrude on the powers of the sovereign state of Mississippi, even if the Magnolia State had defaulted on its responsibilities.

Nor was *Cruikshank* exceptional in its limited view of federal authority to protect civil rights. In *United States v. Reese*,⁹¹ a ruling handed down the same day, the Supreme Court invalidated two other provisions of the 1870 law that contained the original version of Section 241. The case arose when Kentucky officials refused to allow African Americans to vote in a municipal election.⁹² The statutory provisions at issue were intended to implement the Fifteenth Amendment's prohibitions against racial discrimination in voting, but the Court concluded that they were not limited to race-based election violations and, therefore, went beyond the national government's powers.⁹³ As late as 1941 the Court had difficulty mustering more than a bare majority in *United States v. Classic*⁹⁴ for the proposition that Sections 241 and 242 could be used to prosecute election officials for altering ballots in a congressional primary election,⁹⁵ and the dissenters were among the most liberal ever to serve.⁹⁶

Perhaps the most troublesome precedent was *Screws v. United States*,⁹⁷ which was decided only a decade before Emmett

⁹¹ 92 U.S. 214 (1876).

⁹² *Id.* at 215.

⁹³ *See id.* at 216, 220–22. *Reese* and *Cruikshank* continued the Court's cramped interpretation of the Fourteenth Amendment. The very first case under that provision effectively eviscerated the amendment's Privileges or Immunities Clause. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1873) (narrowly construing the privileges and immunities of citizens of the United States); *see also Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (rejecting a constitutional challenge to the exclusion of women from membership in the bar because the right to practice law is not a privilege or immunity of national citizenship).

⁹⁴ 313 U.S. 299 (1941).

⁹⁵ *Id.* at 316–20.

⁹⁶ *See id.* at 329–41 (Douglas, J., joined by Black & Murphy, JJ., dissenting).

⁹⁷ 325 U.S. 91 (1945).

Till was murdered and suggested the virtual impossibility of obtaining a federal conviction. This “shocking and revolting” case arose from a Georgia sheriff’s beating to death of Robert Hall, an African American against whom he had a longstanding grudge.⁹⁸ Sheriff Claude Screws was convicted under Section 242, but the Supreme Court’s discussion of that provision had obvious implications for Section 241 as well. Three Justices thought that the law was unconstitutional because the federal government had no authority to prosecute crimes such as homicide and assault that were the exclusive responsibility of the states.⁹⁹ Four other Justices voted to uphold Section 242, but only insofar as it punished persons who acted with the purpose of depriving an individual of a specific constitutional right.¹⁰⁰ Because the jury had not been instructed to this effect, Sheriff Screws was entitled to a new trial.¹⁰¹ Two other Justices believed that the conviction should stand.¹⁰² But this division would have left the Court deadlocked: four Justices favoring a new trial, two Justices favoring affirming the conviction, and three Justices advocating for dismissal of all charges on constitutional grounds, with no majority for any disposition of the case. To avoid such an institutional failure, one of the two Justices who favored affirming the conviction reluctantly joined with the four-member plurality in calling for a new trial, at which the government would have to prove that Screws intended to deny Hall his day in court when the sheriff beat him to death in the course of arresting him on a minor charge.¹⁰³ Screws was acquitted at his retrial and soon afterward was elected to the Georgia legislature.¹⁰⁴

⁹⁸ *Id.* at 92. For more details, see ROBERT K. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 105–08 (1947); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 *TULANE L. REV.* 2113, 2171–79 (1993).

⁹⁹ *Screws*, 325 U.S. at 138–39 (Roberts, J., joined by Frankfurter & Jackson, JJ., dissenting).

¹⁰⁰ *Id.* at 104–05 (Douglas, J., joined by Stone, C.J., and Black & Reed, JJ.).

¹⁰¹ *Id.* at 107, 113.

¹⁰² *See id.* at 113–34 (Rutledge, J., concurring in the result); *id.* at 134–38 (Murphy, J., dissenting).

¹⁰³ *Id.* at 134 (Rutledge, J., concurring in the result).

¹⁰⁴ LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 285–86 (1966).

The *Screws* case further underscores the potential legal difficulties that the federal government might have faced in moving against Emmett Till's killers. Although *Screws* involved a substantive violation under Section 242 rather than a conspiracy charge under Section 241, the problems identified by the various opinions in *Screws* would have applied to a Section 241 conspiracy prosecution in connection with the Till tragedy. Only two Justices believed that the conviction in *Screws* should stand. Three Justices thought that Section 242 was unconstitutional because the federal government could not prosecute racially motivated assaults or homicides, and four others believed that a conviction required proof beyond a reasonable doubt that the defendant actually intended to deny the victim a specifically enumerated constitutional right. Because *Cruikshank* had ruled that the right to life is a natural right rather than one secured by the Constitution, merely intending to kill Emmett Till would not have been sufficient to obtain a guilty verdict under Section 241.

One last case in this line deserves mention. *United States v. Williams*,¹⁰⁵ decided only four years before the Till murder, also construed Section 241 in a restrictive fashion that would have precluded a federal prosecution of his killers. *Williams* involved some Miami private detectives who tortured several people suspected of stealing from their employer.¹⁰⁶ The Supreme Court, in a 5–4 ruling that failed to generate a majority opinion, overturned the convictions. The plurality opinion by Justice Frankfurter, who had dissented in *Screws* because he thought Section 242 was unconstitutional, reasoned that Section 241 did not cover the conduct at issue. The rights protected by the conspiracy statute had to do with a person's relationship to the federal government, such as the right to vote in national elections.¹⁰⁷ Because the bar against subjecting people to the third degree applied only to state action, the federal government had no authority to prosecute private parties such as Williams and the

¹⁰⁵ 341 U.S. 70 (1951).

¹⁰⁶ See *id.* at 71 (plurality opinion); *id.* at 85 (Black, J., concurring in the result).

¹⁰⁷ *Id.* at 77 (plurality opinion).

other private detectives who engaged in brutal treatment of their fellow citizens.¹⁰⁸

The implications of this reasoning for a federal prosecution of Emmett Till's killers were ominous. Whatever the rationale for his murder, his killers had perpetrated a private outrage, so Section 241 did not encompass what had happened to him. The line of decisions discussed here gave little basis for hope that the federal government could prosecute in the Till case. Emmett Till's right to life was not one secured by the Constitution but rather was a natural right. His life had been taken not by a local official but by private parties, and his death had nothing to do with his relationship with the federal government or a federal election. From *Cruikshank* to *Williams*, therefore, this looked like a crime over which only the state had jurisdiction.

Before proceeding further, we should keep in mind that this cramped view of federal authority was not confined to those who lacked sympathy for the rights of African Americans. That view was endorsed by such liberal stalwarts as Justices Hugo L. Black and William O. Douglas, who interpreted Section 242 so narrowly and restrictively in *Screws* and had dissented in *Classic*, the 1941 case that upheld federal authority to prosecute election fraud in a congressional primary;¹⁰⁹ it was also endorsed by Justice Felix Frankfurter, who had been a staunch civil libertarian before his appointment but took the position in *Screws* that Section 242 was unconstitutional and wrote the lead opinion in *Williams* that effectively eviscerated Section 241.¹¹⁰ Even stronger evidence of

¹⁰⁸ *Id.* at 77–78 (plurality opinion). Justice Black agreed that the convictions should be overturned, but on a different legal theory. The defendants had originally been tried for both conspiracy and substantive charges, and the jury acquitted most of the defendants on the substantive charges while deadlocking on the conspiracy counts. Black believed that the government therefore was precluded from retrying the defendants for conspiracy because the jury in the first trial had acquitted most of them of the substantive charges. *Id.* at 85–86 (Black, J., concurring in the result). Only *Williams* was originally convicted of the substantive charge. In a separate decision, a closely divided Supreme Court affirmed that conviction. *Williams v. United States*, 341 U.S. 97 (1951). Justice Black dissented without opinion. *Id.* at 104. Three other Justices also dissented in a brief statement that invoked the dissenting opinion in *Screws*. *See id.* (Frankfurter, Jackson & Minton, JJ., dissenting).

¹⁰⁹ *See supra* notes 94–96, 100–101 and accompanying text.

¹¹⁰ *See supra* notes 99, 107–108 and accompanying text. Among other things, Frankfurter forcefully advocated on behalf of Sacco and Vanzetti, who were controversially executed for two murders during a Boston-area armed robbery,

the pervasiveness of the view of limited federal power can be seen in the views of Moorfield Storey, the NAACP's first president and one of the leading lawyers in the nation for many years. He began his career at the time of the adoption of the Fourteenth Amendment as an aide to Senator Charles Sumner, the Massachusetts abolitionist and one of the leading advocates of Black rights during Reconstruction.¹¹¹ Storey later persuaded the Supreme Court to strike down a racial zoning ordinance that effectively mandated residential segregation.¹¹² Storey abhorred lynching, which was one of the NAACP's primary concerns, but he initially doubted that the federal government had authority to outlaw the practice.¹¹³ He later overcame those doubts, but they were shared by other liberal and progressive lawyers.¹¹⁴

Despite the pessimistic legal picture sketched out so far, there were grounds for a more optimistic view. For example, much of the language in *Cruikshank* about the federal government's limited constitutional power was dictum, statements that were not necessary to the decision. In reality, the Court emphasized that the indictments had not been drafted with sufficient precision and therefore the charges had to be dismissed.¹¹⁵ Similarly, in *Screws* the Justices were hopelessly divided; there was no majority

condemned the unlawful deportation of hundreds of striking copper miners in Arizona, and spoke out against the unjust prosecution of an IWW leader in California. See generally BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 90–95, 160–83 (2022); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 81–101, 176–86 (1982); H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 55–57, 90–94 (1981); LIVA BAKER, FELIX FRANKFURTER 66–74, 117–30 (1969). He also was a longtime member of the NAACP and the American Civil Liberties Union before he joined the Supreme Court. BAKER, *supra*, at 108, 235; SNYDER, *supra*, at 6. To rebut accusations of radicalism, Frankfurter became one of the first Supreme Court nominees to testify before the Senate Judiciary Committee. SNYDER, *supra*, at 313–28; HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 174 (5th ed. 2008).

¹¹¹ WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 11–16 (1972); ZAAKIR TAMEEZ, CHARLES SUMNER: CONSCIENCE OF A NATION 391–95, 402, 465 (2025).

¹¹² *Buchanan v. Warley*, 245 U.S. 60, 61 (1917); see HIXSON, *supra* note 111, at 139–42.

¹¹³ HIXSON, *supra* note 111, at 164–65.

¹¹⁴ *Id.* at 165–69; see also ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950, at 24–25, 60, 212 (1980).

¹¹⁵ See *United States v. Cruikshank*, 92 U.S. 542, 554–59 (1876).

opinion, and only the strategic vote of one member provided the necessary fifth vote for any disposition of the case.¹¹⁶ Finally, only four Justices in *Williams* took the restrictive view of the rights protected by Section 241.¹¹⁷ Four others dissented, specifically rejecting that narrow approach,¹¹⁸ and the crucial fifth vote to overturn the conviction in that case was based on a procedural concern that had nothing to do with the scope of Section 241.¹¹⁹

In other words, a national administration that had a stronger commitment to civil rights than the Eisenhower team could have used these gaps and ambiguities to act more aggressively in the Till case. Such an approach might have failed, of course, but the law on the subject was not clearly settled against federal authority. Moreover, as hesitant as President Eisenhower and Attorney General Brownell appeared, the administration of Presidents John F. Kennedy and Lyndon B. Johnson also proceeded with great caution. Burke Marshall, the Assistant Attorney General for Civil Rights during the first four years of the Kennedy-Johnson era, consistently resisted pleas for federal displacement of state authority, a position that reflected White House policy until the summer of 1964.¹²⁰ The final part of this article addresses what this change in policy meant for the development of legal doctrine as well as new legislation that was designed to clarify and expand federal authority to enforce civil rights.

IV. A STRATEGY FOR THE EISENHOWER ADMINISTRATION

The Eisenhower administration might have taken a more expansive view of the legal tools for prosecuting Emmett Till's killers in the wake of the failure of the state murder trial. The strategy discussed here relies on some optimistic assumptions about the Supreme Court's interpretation of the civil rights laws that were already on the books, although the Court ultimately

¹¹⁶ See *supra* notes 99–103 and accompanying text.

¹¹⁷ See *supra* text accompanying note 107.

¹¹⁸ *United States v. Williams*, 341 U.S. 70, 87 (1951) (Douglas, J., joined by Reed, Burton & Clark, JJ., dissenting).

¹¹⁹ See *supra* note 108.

¹²⁰ See BURKE MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964); BELKNAP, *supra* note 12, at 70–127.

took an expansive view of those laws a few years later. Therefore, it is worth considering this possibility.

A. The Political Aftermath

The Till case continued to reverberate politically. It loomed prominently in the background to the debate surrounding the Civil Rights Act of 1957,¹²¹ the first federal law in that field since Reconstruction.¹²² Nothing in the 1957 legislation actually addressed the Till case, but both supporters and opponents invoked Emmett Till's memory for their own purposes. For example, Representative Charles C. Diggs, Jr., of Michigan, who attended the trial, cited Tallahatchie County as one of the overwhelmingly African American areas where not a single Black voter was registered and noted that voter registration was a requirement for jury eligibility in Mississippi.¹²³ Senator Paul H. Douglas of Illinois also noted the lack of Black representation in Tallahatchie County as evidence of the need for federal action.¹²⁴ Similarly, Representative Marguerite Stitt Church of Illinois invoked the Till trial in opposing a proposal to allow jury trials on contempt charges in civil rights cases since Blacks for practical purposes could not serve as jurors.¹²⁵ On the other side, Representative Jamie L. Whitten of Mississippi, whose cousin served on the legal defense team at the trial of Roy Bryant and J.W. Milam,¹²⁶ endorsed the actions of state and local authorities in dealing with "one of those tragedies that all right-thinking

¹²¹ Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 28 U.S.C. §§ 1343(a)(4), 1861; 42 U.S.C. §§ 1975-1975f, 1995; 52 U.S.C. § 10101).

¹²² The substantive provisions of that earlier law, the Civil Rights Act of 1875, ch. 114, 18 Stat. 335, were declared unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹²³ 103 CONG. REC. 8705 (1957) (remarks of Rep. Diggs). On Diggs's difficulties in securing admission to the courtroom during the Till trial and his assignment to a segregated table reserved for Blacks, see ANDERSON, *supra* note 6, at 99; TILL-MOBLEY & BENSON, *supra* note 6, at 164-65; TYSON, *supra* note 1, at 140-41; WHITFIELD, *supra* note 6, at 37-38.

¹²⁴ 103 CONG. REC. 13338 (1957) (remarks of Sen. Douglas).

¹²⁵ 103 CONG. REC. 9189 (1957) (remarks of Rep. Church). The jury-trial amendment was adopted and is codified at 42 U.S.C. § 1995. See generally MANN, *supra* note 62, at 206-18.

¹²⁶ See ANDERSON, *supra* note 6, at 60, 73-74; TILL-MOBLEY & BENSON, *supra* note 6, at 160; WHITFIELD, *supra* note 6, at 30; *supra* note 29 and accompanying text.

people, white and colored, deplore,” but added that “I could point to what I read has happened in Chicago, what I read has happened in New York every day.”¹²⁷ Later, he responded to Representative Church that, as district attorney in a neighboring county, he had vigorously prosecuted a white man for killing an African American and cited this as evidence of “what southern juries do when the facts are sufficient to warrant a guilty verdict.”¹²⁸ His South Carolina colleague L. Mendel Rivers criticized Representative Church for “a very vicious speech against southern people” and claimed that “it is much easier to get a conviction by a southern jury of a white man charged with a crime against a Negro than it is to get a conviction of a Negro in the District of Columbia charged with a crime against a white woman.”¹²⁹ Finally, Senator Sam J. Ervin, Jr., of North Carolina, who later became something of a folk hero in connection with the Senate’s Watergate hearings, dismissed the case for federal voting rights legislation by noting that Emmett Till, whose name had been bandied about by civil rights supporters, had not been seeking to vote in Mississippi.¹³⁰

Not until 1965, in the wake of Bloody Sunday and the murder of Viola Liuzzo following the conclusion of the Selma-Montgomery voting rights march, did the federal government seriously seek to outlaw racist violence against civil rights advocates.¹³¹ Title V of the originally proposed measure contained a detailed list of “protected activities” and would have made it a federal offense to attack any person who was engaging or had engaged in those activities. Although a diluted version of the bill eventually passed the House, it was killed in the Senate, largely due to the efforts of Senator Ervin in committee and a filibuster on the floor.¹³² Not until the Civil Rights Act of 1968, which is more notable for its prohibition on housing discrimination and its provisions

¹²⁷ 103 CONG. REC. 8644 (1957) (remarks of Rep. Whitten).

¹²⁸ 103 CONG. REC. 9194 (1957) (remarks of Rep. Whitten).

¹²⁹ 103 CONG. REC. 9211 (1957) (remarks of Rep. Rivers).

¹³⁰ 103 CONG. REC. 10998 (1957) (remarks of Sen. Ervin). On Ervin’s Watergate-related celebrity, see FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 360 (1994); STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 258 (1990).

¹³¹ See BELKNAP, *supra* note 12, at 208.

¹³² See *id.* at 211–19.

concerning rioting, would there be a federal law protecting individuals against racially motivated violence in connection with specified activities.¹³³ Would that measure have provided a basis for federal prosecution in the Till case?

There are two problems with the 1968 measure that would have prevented it from being used against Emmett Till's killers. First, the list of protected activities covered matters relating to voting, employment, jury service, school integration, public accommodations, or government benefits. Emmett Till was not involved in any of these activities: he was just a teenage boy from Illinois visiting relatives in Mississippi. To be sure, the list also included interstate travel, but even if he could have been viewed as having been engaged in interstate travel at the time of his kidnapping and murder, a second insurmountable difficulty would have prevented prosecution under this law. The 1968 provision was not on the books when Emmett Till was murdered, so trying his killers under that measure would have violated the constitutional prohibition against *ex post facto* laws.¹³⁴ Any charges in the case, therefore, would have to have been based on criminal statutes that were in effect in August 1955.

B. Using Section 241

As it turns out, there was such a law: the same Section 241 conspiracy provision that was discussed earlier.¹³⁵ The availability of this statute was clarified by two Supreme Court decisions involving racially motivated murders that occurred during the summer of 1964. Those events precipitated a more aggressive federal approach. One was the notorious murders of James Chaney, Andrew Goodman, and Michael Schwerner outside Philadelphia, Mississippi, in June of that year.¹³⁶ The other, and ultimately more significant for the development of legal doctrine, was the killing three weeks later of Lemuel Penn, an Army

¹³³ Civil Rights Act of 1968, Pub. L. No. 90-284, § 101(a), 82 Stat. 73, 73-75 (codified as amended at 18 U.S.C. § 245). *See also id.* § 104, 82 Stat. at 75-77 (codified as amended at 18 U.S.C. §§ 2101-2102) (riot provisions); *id.* §§ 801-819, 82 Stat. at 81-89 (codified as amended at 42 U.S.C. §§ 3601-3619) (fair housing).

¹³⁴ U.S. CONST. art. I, § 9, cl. 3.

¹³⁵ *See supra* note 76 and accompanying text.

¹³⁶ *See generally* CAGIN & DRAY, *supra* note 1.

Reserve officer who was driving home from annual training when he was shot to death outside Athens, Georgia.¹³⁷

In *United States v. Price*,¹³⁸ the Mississippi case, the Court held that Section 241 encompassed conspiracies to violate rights protected by the Fourteenth Amendment, such as the right to due process of law. Chaney, Goodman, and Schwerner had been lynched when local law enforcement officials released them from jail after having arrested them for speeding and other dubious charges.¹³⁹ Section 241 therefore could provide the basis for prosecuting those involved in the killing of these three civil rights workers.¹⁴⁰ The Justices unanimously refused to limit the reach of Section 241 to conspiracies affecting a person's relationship with the federal government, as the 1951 *Williams* decision apparently had done. Justice Fortas explained that only four Justices had taken such a cramped view of Section 241 in that case; the fifth vote to affirm the dismissal of charges there was based on an entirely unrelated ground, and that fifth Justice specifically declined to address the scope of the statute.¹⁴¹

Price effectively repudiated the broad language in *Cruikshank* about Section 241's inapplicability to natural rights and its coverage of only federal violations as well as the *Williams* plurality's notion that the measure was limited to conspiracies affecting a person's relationship with the federal government. Nevertheless, that decision alone did not remove all obstacles to

¹³⁷ See BELKNAP, *supra* note 12, at 147–48.

¹³⁸ 383 U.S. 787 (1966).

¹³⁹ See CAGIN & DRAY, *supra* note 1, at 8–14. The Supreme Court did not identify the charges for which the three civil rights workers had been arrested. See *Price*, 383 U.S. at 790.

¹⁴⁰ *Price*, 383 U.S. at 799. Chaney, Goodman, and Schwerner were part of the Mississippi Summer Project that brought hundreds of mostly white volunteers to the Magnolia State in the summer of 1964. They disappeared during the orientation period for those volunteers. CAGIN & DRAY, *supra* note 1, at 218–21, 224–30; see generally DOUG MCADAM, FREEDOM SUMMER (1988); BRUCE WATSON, FREEDOM SUMMER: THE SAVAGE SEASON OF 1964 THAT MADE MISSISSIPPI BURN AND MADE AMERICA A DEMOCRACY (2010); CALVIN TRILLIN, JACKSON, 1964: AND OTHER DISPATCHES FROM FIFTY YEARS OF REPORTING ON RACE IN AMERICA 3–34 (2016).

¹⁴¹ *Price*, 383 U.S. at 797–98. Justice Black, who provided the crucial fifth vote in *Williams*, reiterated his opposition to the decisions in all of the *Williams* cases, see *supra* note 108, and declined to join the *Price* opinion to the extent that it could be taken as endorsing any of those decisions but otherwise concurred in the judgment. *Price*, 383 U.S. at 807.

prosecuting Emmett Till's killers. The people who murdered Emmett Till were private citizens, but the Fourteenth Amendment's guarantees of due process of law and equal protection of the laws apply only against governmental action. This was not a problem in *Price*, where the members of the lynch mob had been charged with acting in concert with the local sheriff, deputy sheriff, and a police officer, which sufficed to constitute the required "state action."¹⁴²

The ruling handed down the same day in *United States v. Guest*,¹⁴³ the case involving the murder of Lemuel Penn, suggested that Section 241 could properly be used to prosecute private parties for conspiring to deprive someone of Fourteenth Amendment rights.¹⁴⁴ The suggestion draws support from two concurring opinions subscribed to by six of the nine Justices. Those concurrences said that Section 241 could properly reach any conspiracy to violate Fourteenth Amendment rights even if there were no governmental involvement in the conspiracy.¹⁴⁵ The majority opinion, somewhat creatively, found that the indictment could be read to allege sufficient governmental involvement in the broader conspiracy of which the Penn killing was just a part and, therefore, to represent state action.¹⁴⁶

Under the approach endorsed in the *Guest* concurrences, the federal government could have prosecuted Emmett Till's murderers under Section 241 for conspiracy to violate his federal rights despite the lack of official involvement in the crime. The strongest basis for a federal prosecution under Section 241 is the Fourteenth Amendment's guarantee of due process of law. Assuming that Emmett Till somehow could be seen to have violated Mississippi law in his brief dealings with Carolyn Bryant,

¹⁴² *Price*, 383 U.S. at 794–95, 794–95 n.7, 798–99.

¹⁴³ 383 U.S. 745 (1966).

¹⁴⁴ The federal case arose after a Georgia jury acquitted three Ku Klux Klansmen of state homicide charges. The federal government then indicted those three men and three others under Section 241. BELKNAP, *supra* note 12, at 159–63.

¹⁴⁵ *Guest*, 383 U.S. at 762 (Clark, J., joined by Black & Fortas, JJ., concurring); *id.* at 777 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part and dissenting in part).

¹⁴⁶ *Guest*, 383 U.S. at 756–57 (acknowledging that this reading was "contrary to the argument of the litigants"); BELKNAP, *supra* note 12, at 178–79 (describing the opinion in this respect as having "a fairy-tale quality").

he should have been charged with some type of juvenile offense. Instead, his killers seized him in the middle of the night and brutally beat and killed him, thereby denying him an opportunity to face the charges in a fair trial in an appropriate court. Indeed, this was the basis for the Supreme Court's ruling in *Price* allowing the Section 241 conspiracy charges to go to trial.¹⁴⁷

The killers also could have been charged under Section 241 with conspiring to violate Emmett Till's right to equal protection of the laws under the Fourteenth Amendment. The theory here would be that no white youth would have been treated as Till was for whatever untoward conduct actually took place. Such a charge would have relied on contemporary legal scholarship demonstrating that the Equal Protection Clause embodied the fundamental principle that all persons, regardless of their race, enjoy natural rights that states must safeguard.¹⁴⁸ Moreover, the charge would be based on his having been killed because of his race, even if that killing reflected unwritten norms of race relations that had prevailed in Mississippi for a very long time.¹⁴⁹

A third possibility, based on Till's residence in Illinois and killing in Mississippi, implicates the denial of his right to interstate travel. This was one basis for the indictment in *Guest*.¹⁵⁰ The situations differ in that Lemuel Penn was driving on the highway en route from his reserve training in Fort Benning, Georgia, to his home in Washington, D.C., whereas Emmett Till was not actually traveling interstate when he was killed, even though he had taken the train from Illinois to Mississippi and was planning to take another train back to Chicago. This difference would not necessarily affect the federal government's power to prosecute, however, because there is ample evidence that his killers knew he was from out of state and acted in part because

¹⁴⁷ See *Price*, 383 U.S. at 799.

¹⁴⁸ See JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 96–98, 221–22 (1951); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 136–41, 164–65 (1950).

¹⁴⁹ Cf. *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) (rejecting an equal protection to a death sentence based only on a statistical study suggesting that race affects the imposition of the death penalty when the record contained no other evidence that race influenced the decision to impose the death penalty in that specific case).

¹⁵⁰ See *Guest*, 383 U.S. at 757.

the young outsider had violated local racial etiquette, which in turn prevented him from returning to his home in another state and, thereby, interfered with his right to interstate travel. At the same time, reliance on the right to travel might seem artificial, like relying on the Commerce Clause to justify the public accommodations provisions of the Civil Rights Act of 1964 when those provisions sought to address the affront to human dignity when private businesses refused to serve Black customers.¹⁵¹ Nevertheless, the Commerce Clause rationale was legally sufficient to uphold the public accommodations provisions and might well have supported a Section 241 prosecution of Till's killers.¹⁵²

Importantly, charges brought under Section 241 would not run afoul of the ban on ex post facto laws because the civil rights conspiracy statute was on the books at the time of Emmett Till's murder.¹⁵³ Whether the Supreme Court would have construed the statute as expansively as it did in *Guest* and *Price*, which were decided more than a decade after he was killed, is less clear. Five of the six Justices who subscribed to the concurring opinions in *Guest* were on the Court in 1956, the earliest date that a case raising the issue could have been heard. On the other hand, Justice Frankfurter, a powerful proponent of a narrow construction of both Section 241 and Section 242, was still on the Court then and almost certainly would have argued strenuously against the position taken in the *Guest* concurrences. In addition to Frankfurter's restrictive views about those provisions, there is reason to believe that many Justices were outraged by the

¹⁵¹ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 279–80 (1964) (Douglas, J., concurring); *id.* at 291 (Goldberg, J., concurring).

¹⁵² Congress relied on the Commerce Clause in the 1964 Act because the Supreme Court had struck down the Civil Rights Act of 1875, which also prohibited racial discrimination by places of public accommodation on the theory that such discrimination was private action that was not prohibited by the Fourteenth Amendment. *The Civil Rights Cases*, 109 U.S. 3 (1883). See *Heart of Atlanta*, 379 U.S. at 245; see also *supra* note 122. The Court did not revisit the *Civil Rights Cases*, emphasizing instead that the earlier decision had not considered any Commerce Clause issues. *Id.* at 251. But *Heart of Atlanta* also pointed out that the definition of public accommodations in the 1964 Act was narrower than the definition in the 1875 Act. *Id.* at 250–51. See also *Katzenbach v. McClung*, 379 U.S. 294 (1964) (rejecting another Commerce Clause challenge to the public accommodations provisions of the 1964 Act).

¹⁵³ See *supra* note 76 and accompanying text.

Chaney, Goodman, and Schwerner killings as well as by many other acts of racial violence that occurred several years after a case arising out of the Till affair could have reached the Court. These considerations suggest that the Court might well have taken a restrictive approach to Section 241 in a case arising from the Till murder because the Justices were not yet prepared to construe that provision as broadly as it did a decade later in *Price* and *Guest*.¹⁵⁴ Evidence supporting this hypothesis comes from the position of Burke Marshall, who finally abandoned his reluctance to endorse federal prosecution of racially motivated crimes following the triple murder in Philadelphia, Mississippi.¹⁵⁵

Suppose, however, that the Eisenhower administration had been willing to press federal charges against Emmett Till's killers and that the Supreme Court had been willing to construe Section 241 as encompassing one or more of the theories outlined above. The outcome of the state murder trial suggests that it is far from clear that a federal jury in the latter half of the 1950s—which would have been drawn from a virtually all-white Mississippi jury pool—would have been any more willing to return a guilty verdict than was the Tallahatchie County panel that allowed Roy Bryant and J.W. Milam to walk free. Support for this scenario comes from the aftermath of *Price* and *Guest*, in which the Supreme Court allowed the defendants to go to trial more than a decade after the Till murder. Although some were convicted in what were widely regarded as legal landmarks, most were acquitted.¹⁵⁶

A final word about the possibility that a later national administration might have prosecuted Emmett Till's killers under Section 241. The effort to revive cold cases from the civil rights era gained strength beginning in the 1990s, four decades after the Till murder. Some notable prosecutions succeeded. For example, Byron De La Beckwith was convicted in 1994 of the 1963 murder of Medgar Evers, the field secretary of the Mississippi NAACP who played a prominent role in pursuing the original prosecution of Roy Bryant and J.W. Milam.¹⁵⁷ Bobby Frank Cherry was

¹⁵⁴ See BELKNAP, *supra* note 12, at 180.

¹⁵⁵ *Id.* at 164.

¹⁵⁶ *Id.* at 194–95, 203; CAGIN & DRAY, *supra* note 1, at 450–51.

¹⁵⁷ See generally BOBBY DELAUGHTER, NEVER TOO LATE: A PROSECUTOR'S STORY OF JUSTICE IN THE MEDGAR EVERS CASE (2001); JERRY MITCHELL, RACE AGAINST TIME: A

convicted in 2002 for his leading role in the bombing of Birmingham's Sixteenth Street Baptist Church that killed four Black girls in September 1963.¹⁵⁸ And Edgar Ray Killen was convicted in 2005 for his role in instigating the murders of Chaney, Goodman, and Schwerner at the beginning of the Mississippi Summer Project in 1964.¹⁵⁹

Unfortunately, federal authorities could not have belatedly prosecuted either Roy Bryant or J.W. Milam. By the time of the De La Beckwith, Cherry, and Killen trials, both of the principal killers of Emmett Till had died: Bryant on December 31, 1980, and Milam on September 1, 1994.¹⁶⁰ Although other people were involved in Till's murder, prosecuting them might have been problematic for various reasons beyond the evidentiary challenges of pursuing a case decades after the fact. Indeed, those obstacles ultimately led the Department of Justice not to pursue the cold case after reopening it in the twenty-first century.¹⁶¹

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We cannot know what might have happened had the Eisenhower administration more vigorously pursued federal prosecution of the persons who killed Emmett Till. The decision not to pursue a federal case might well have reflected political considerations as well as the ambivalent racial attitudes of the President and some other important executive branch officials, but there was also a respectable basis for hesitation based on the state of federal civil rights law at the time. Indeed, the Kennedy-Johnson Justice Department took a similarly narrow view of federal authority in this area. Perhaps overly aggressive action might have resulted in yet another adverse precedent.

Yet the case law was not as clear as the skeptics suggested it was, and legal developments that occurred only a few years later

REPORTER REOPENS THE UNSOLVED MURDER CASES OF THE CIVIL RIGHTS ERA 49–150 (2020); ADAM NOSSITER, *OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS* (1994).

¹⁵⁸ See generally MITCHELL, *supra* note 157, at 221–57.

¹⁵⁹ See generally HOWARD BALL, *JUSTICE IN MISSISSIPPI: THE MURDER TRIAL OF EDGAR RAY KILLEN* (2006); MITCHELL, *supra* note 157, at 3–45, 261–381. Killen had not been charged in *Price*, the Section 241 case that arose from the 1964 murders of Chaney, Goodman, and Schwerner. See *supra* notes 138–142 and accompanying text.

¹⁶⁰ ANDERSON, *supra* note 6, at 274, 281.

¹⁶¹ See *supra* note 10 and accompanying text.

imply that a more committed executive branch might have pressed for doctrinal clarification in connection with the Till murder. Such efforts might not have succeeded, of course, and that might have left the law in a worse state than it was. It is one thing to have a narrow interpretation of Section 241 because the Supreme Court could not muster a majority in favor of any construction of the statute, and quite another to have a majority endorse a restrictive view.¹⁶²

Despite the lack of contemporaneous federal action, Emmett Till's murder might have contributed to the evolution of legal doctrine under Section 241. This notion involves an analogy to *Brown v. Board of Education*.¹⁶³ It would have been imprudent, to

¹⁶² The Eisenhower Justice Department was concerned about losing a federal prosecution because there was no evidence that Emmett Till's murderers had crossed state lines rather than that taking a more aggressive approach to Section 241 might result in an adverse precedent. *See supra* note 75 and accompanying text. But lawyers often consider the implications of losing cases that could set adverse precedent. That concern shaped the NAACP's strategy in challenging segregated schools. *See infra* notes 164–165 and accompanying text. Similar considerations have arisen in other contexts. For example, the National Rifle Association initially declined to support the lawsuit that resulted in the landmark ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), because the NRA feared that the Supreme Court would reject the argument that the Second Amendment protects an individual right to keep and bear arms. Robert A. Levy, *Anatomy of a Lawsuit: District of Columbia v. Heller*, ENGAGE, Oct. 2008, at 27, 30. Some leading gay rights advocates initially opposed the idea of litigating cases arguing for constitutional protection for same-sex marriage out of concern that the Court would rebuff such a claim. WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 399–400 (2020). And most recently, civil rights advocates declined to seek Supreme Court review of *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), *reh'g denied*, 91 F.4th 967 (8th Cir. 2024), which held that private parties have no right to sue under the Voting Rights Act, out of fear that the Supreme Court would affirm that judgment and transform an adverse decision that applies in only a handful of states into a general precedent that would undermine enforcement of voting rights nationwide. *See* Courtney Cohn, *Arkansas NAACP Will Not Appeal Decision That Gutted Voting Rights Act in Seven States*, DEMOCRACY DOCKET (July 1, 2024), <https://www.democracydocket.com/analysis/arkansas-naacp-will-not-appeal-decision-that-gutted-voting-rights-act-in-seven-states/> [<https://perma.cc/4CUP-MW6P>]; Macin Graber & Joshua A. Douglas, *A Major Wrong on a Private Right of Action Under the Voting Rights Act*, 81 WASH. & LEE L. REV. 1127, 1144 (2024); Rick Hasen, *Breaking: Eighth Circuit, on 2–1 Vote, Holds Private Plaintiffs Cannot Enforce Section 2 of the Voting Rights Act Through a Section 1983 Action, a Ruling Which If Applied Nationally Would Devastate Voting Rights Act Enforcement in the United States*, ELECTION LAW BLOG (May 14, 2025, at 08:34 CT), <https://electionlawblog.org/?p=149897> [<https://perma.cc/9MJA-5TDK>].

¹⁶³ 347 U.S. 483 (1954).

say the least, for Charles Hamilton Houston, Thurgood Marshall, and their NAACP colleagues to launch a frontal assault on the separate-but-equal doctrine just a few years after the Supreme Court had unanimously described the constitutionality of segregated schools as settled.¹⁶⁴ Instead, they undertook an incremental litigation strategy that gradually eroded the foundations of separate but equal and led the Court ultimately to reject the doctrine altogether in *Brown*.¹⁶⁵

Compare that incremental approach to the impact of the murder of Emmett Till. He died very early in the modern civil rights era, just three months after the Supreme Court's remedial order in *Brown II*¹⁶⁶ and about three months before Rosa Parks was arrested for refusing to give up her seat to a white passenger, which precipitated the Montgomery Bus Boycott.¹⁶⁷ Emmett Till died shortly before the violence surrounding the desegregation of the previously all-white high school in Clinton, Tennessee;¹⁶⁸ Central High School in Little Rock, which happened only after President Eisenhower dispatched federal troops to enforce a court order;¹⁶⁹ and the University of Mississippi, which also required the dispatch of federal troops.¹⁷⁰ Till's murder also took place

¹⁶⁴ See *Gong Lum v. Rice*, 275 U.S. 78, 85–86 (1927) (“Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.”).

¹⁶⁵ See, e.g., *Pearson v. Murray*, 182 A. 590 (Md. 1936); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, *mandamus denied sub nom.*, *Fisher v. Hurst*, 333 U.S. 147 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

¹⁶⁶ See *supra* note 23 and accompanying text.

¹⁶⁷ See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63*, at 128–203 (1988); FRED D. GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* 31–96 (rev. ed. 2013); JO ANN GIBSON ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT: THE MEMOIR OF JO ANN GIBSON ROBINSON* (David J. Garrow ed., 1987).

¹⁶⁸ See generally RACHEL LOUISE MARTIN, *A MOST TOLERANT LITTLE TOWN: THE EXPLOSIVE BEGINNING OF SCHOOL DESEGREGATION* (2023).

¹⁶⁹ See *Cooper v. Aaron*, 358 U.S. 1 (1958); see generally KAREN ANDERSON, *LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL* (2010).

¹⁷⁰ See *United States v. Barnett*, 376 U.S. 681, 682–86 (1964); see generally NADINE COHODAS, *THE BAND PLAYED DIXIE: RACE AND THE LIBERAL CONSCIENCE AT OLE MISS* (1997); WILLIAM DOYLE, *AN AMERICAN INSURRECTION: THE BATTLE OF OXFORD*,

years before the sit-in demonstrations that swept across the South in 1960,¹⁷¹ the Freedom Rides of 1961,¹⁷² and the Birmingham demonstrations of 1963¹⁷³—to name just a few other high-profile events that exposed the violent underside of the Jim Crow system.

The widespread defiance of *Brown* during the era of Massive Resistance in the 1950s and early 1960s, with televised images of innocent African American children facing angry white mobs, elicited broader national support for desegregation in general and for passage of comprehensive federal civil rights legislation in particular.¹⁷⁴ Perhaps the cumulative impact of racist violence that went unpunished by state and local authorities persuaded much of the public, and members of the Supreme Court, that laws such as Section 241 should be interpreted to give the federal government greater authority to act against racially motivated crimes even before Congress began to legislate more explicitly in that field.

Whatever the cogency of this hypothesis, we can say that, in a better world, the federal government would have prosecuted Emmett Till's killers. And, in an even better world, Emmett Till would not have been killed in the first place.

MISSISSIPPI, 1962 (2001); CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* (2009).

¹⁷¹ See generally CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* (2018).

¹⁷² See generally RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2006); CHARLES PERSON WITH RICHARD ROOKER, *BUSES ARE A COMIN': MEMOIR OF A FREEDOM RIDER* (2021).

¹⁷³ See generally GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997).

¹⁷⁴ See generally Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 76, 85, 97–118, 141–49 (1994).