

2005

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Recommended Citation

Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 Fordham L. Rev. 2055 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss5/3>

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Cover Page Footnote

Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc. This Essay is dedicated to the Tulia defendants and their families, as well as to the formidable Tulia legal team, which included George Kendall, Laura Fernandez, Jennifer Klar, Des Hogan, Adam Levin, Mitch Zamoff, Lori Searcy, Tara Hammonds, Jeff Blackburn, Ted Killory, Winston King, and Bill White. Special thanks to Jennifer Klar for reviewing and providing comments for this Essay and her friendship. I would also like to thank the Fordham Law Review for hosting this Symposium. This Essay represents a lightly edited and footnoted version of my remarks at this Symposium.

CRITICAL RACE LAWYERING IN TULIA, TEXAS

*Vanita Gupta**

INTRODUCTION

This election week has been demoralizing for anyone who cares about racial justice. With an increasingly conservative and activist bench, one that is likely to become more so over the next four years, both at the level of the federal appeals courts and the United States Supreme Court, it is hard to imagine how we are going to fight for racial justice in the courts. We now have to be more mindful about which cases we take to court. But the need for thoughtful, careful, and strategic critical race lawyering may be more important now than ever before.

Critical race theory, as an analytical tool, helps us understand that underneath the insidious veneer of such code words and mottos as “the rule of law,” “colorblindness,” “equal justice for all,” and “equal protection,” the law is contingent upon the social and political realities of inequality and racial power. These code words that once expressed the hopes and aspirations of the civil rights movement have now been distorted and redefined by politically motivated activists to become the central battleground in litigation that is aimed at rolling back the gains of that struggle. This will only be more the case as our courts become increasingly conservative and polarized. If critical race theory is to be relevant in these difficult times, it has to be more than an analytical tool that describes how the law has been used to perpetuate white supremacy in this country.¹

Critical race theory and practice must also be a tool for protecting the lives, liberty, and dignity of communities of color, because those are what are literally at stake now. And it must also be a tool for

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1. *Introduction, in Critical Race Theory: The Key Writings that Formed the Movement* xiv (Kimberlé Crenshaw et al. eds., 1995).

reforming and transforming, through careful, strategic, thoughtful advocacy, the very systems in place that are destroying our communities and maintaining the subordination of people of color.

When I initially began thinking about my presentation for this conference, it struck me that while critical race theory has certainly shaped my understanding of race, inequality, and the law, it has not really played a role in my racial justice litigation. Despite the fact that I work at a litigation organization, the NAACP Legal Defense & Educational Fund, Inc. (“LDF”), whose core mission is racial justice,² a chasm exists for practitioners when it comes to incorporating the theory into practice. In fact, in preparation for my remarks for this conference, I pulled out the well-known, red-covered critical race theory reader,³ and re-read the seminal pieces within. The book remained on my desk for a couple of weeks, and periodically, lawyers and law students who passed my office noticed and asked me, sometimes mockingly, why I had “that” theory book on my desk, and whether I was rushing into academia. Apparently, there could be no other reason for that text to be on a racial justice lawyer’s desk. In the same vein, when critical race scholars ponder at conferences why practitioners are not citing their scholarship, or why racial justice practitioners seem disdainful at best and ignorant at worst of their articles, they need to understand that there are very real reasons for this professional divide.

As an initial matter, the language that scholars use can put an automatic distance between academics and practitioners. When I was

2. The LDF is an organization that is committed to working for racial equality and social justice through the law. Since its inception, LDF has used litigation to make our nation’s constitutional and statutory guarantees of equal treatment and civil rights a reality for African-Americans and other disenfranchised groups. As the nation’s first civil rights and public interest law firm, LDF is recognized for its pioneering and long-standing advocacy. LDF is not part of the NAACP although LDF was founded by the NAACP and shares its commitment to equal rights. Since 1957, LDF has been a completely separate organization. LDF’s current docket reflects its continued commitment to combating race discrimination and its effects, ensuring equality of opportunity, and promoting inclusion of those who have been excluded from full participation, on account of race. Its primary program areas are education, criminal justice, political participation, and economic justice. Recent LDF cases include *Gratz v. Bollinger*, 539 U.S. 244 (2004), and *Grutter v. Bollinger*, 539 U.S. 306 (2004) (the University of Michigan affirmative action cases); *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (a landmark Connecticut school desegregation case); *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 WL 1335921, at *1 (S.D.N.Y. June 14, 2004) (New York felon disfranchisement suit); Joint Notice of Motion and Motion for Order Granting Preliminary Approval of Proposed Consent Decree, *Gonzalez v. Abercrombie & Fitch Co.* (Nos. 03-2817 SI, 04-4730, 04-4731) (employment discrimination suit against national retailer); and *Williams v. State*, No. 07-03-0237-CR, 2005 WL 275620, at *1 (Tex. App Feb. 4, 2005) (the Tulia, Texas drug cases). See NAACPLDF, Cases, at <http://www.naacpldf.org/landing.aspx?context=3> (last visited Feb. 16, 2005).

3. See Critical Race Theory: The Key Writings that Formed the Movement, *supra* note 1.

invited to speak at this conference on a panel entitled “Critical Race ‘Praxis,’” I was not sure I understood what “praxis” meant. I assumed that it must have something to do with “practice” but also assumed I was missing something. Otherwise, why would critical race scholars use a Latin word to convey a concept that has a simple, one-word English equivalent? Even as I sought a clear meaning for “Critical Race ‘Praxis,’” I was having a hard time defining a critical race practitioner and understanding how she might differ from any other social justice lawyer.

But beyond the semantics issue, there is also the customary skepticism of lawyer-practitioners towards theoreticians and academics. This skepticism, however, does not have to exist. The impediment to the relevance of critical race theory in practitioners’ lives is not that theory does not matter—indeed, it does matter, and it is deeply important. The dissonance arises out of an incorrect conception of the relationship between theory and practice. To have a real critical race praxis, racial justice lawyering must not be contorted to fit theory, but theory must derive from practice. When I looked “praxis” up in the dictionary, the definition I found was “a hard theory put into practice.”⁴ I propose that we reverse that and look at how successful practice can be put into theory, thus making theory relevant and useful for future practitioners.

I. THE TULIA, TEXAS LITIGATION

A. *The First Story: A Pre-Critical Race Lawyering Narrative*

Let me begin with a story.⁵ I am going to title this story the “pre-critical race lawyering story.” It goes as follows. On July 23, 1999, a gentleman by the name of Freddie Brookins, Jr. was arrested for selling between one and four grams of powder cocaine to undercover narcotics agent Tom Coleman during Coleman’s eighteen-month undercover sting operation in Tulia. Mr. Brookins was represented by a court-appointed trial attorney from Amarillo who met with Mr. Brookins once before trial to inform him of the fact that he had been

4. Princeton, WordNet 2.0 (2003), at <http://dictionary.reference.com/search?q=praxis>.

5. I discovered the Tulia story through the investigations conducted in connection with the litigation described below. The facts of the case as described in Part II of this Essay are memorialized in the Findings of Fact and Conclusions of Law of Judge Ron Chapman, and the habeas corpus petitions of Jason Jerome Williams and Freddie Brookins, Jr. See Joint Stipulated Findings of Fact and Conclusions of Law, *Allen v. State* (B-3223-99-07-CR) (242d Dist. Ct. Swisher County and Tex. Crim. App. May 1, 2003) (on file with author); Application for Post-Conviction Writ of Habeas Corpus, *Brookins v. State*, No. B-3276-99-07 (242d Dist. Ct. Swisher County and Tex. Crim. App. filed May 31, 2002) (on file with author); Amended Petition for Writ of Habeas Corpus, *Williams v. Cockrell*, No. 2:02-CV-0286 (N.D. Tex. filed Dec. 18, 2002) (on file with author).

offered a plea bargain of five years in prison, and that if he went to trial, he would face a twenty-year prison sentence. Based on the advice of his father, Mr. Brookins refused the plea deal because he claimed he was innocent and wanted to go to trial to prove it. There was no corroboration for any of Coleman's allegations: it was Coleman's word against Mr. Brookins', if he elected to testify. Mr. Brookins' trial lasted just a few hours, and he was quickly convicted and sentenced to twenty years hard time.

Now, this sounds like one of a million stories from our criminal justice system. In this narrative, there is deliberately no mention of the race of the defendant, the trial lawyer, or the police officer because all that is supposed to matter is that a crime was allegedly committed by a bad man by the name of Freddie Brookins, Jr., that law enforcement got him, and that his conviction can help us sleep more peacefully at night because it represents just one of hundreds of such daily victories around the country, small though they may be, in our relentless "War on Drugs." And more than likely, anyway, in the public's mind's eye, people picture that the defendant is African-American, the lawyer is white, the judge is white, and the narcotics officer is probably white. And more than likely, these assumptions would prove correct on all counts. We have read this "just the crime facts" narrative in one form or another in the newspaper, seen it on the local news, or heard it on the local radio. This is the same narrative that usually introduces a judicial opinion confronting constitutional and civil rights arguments—the crime facts first, devoid of any context, racial or otherwise.

In fact, I could repeat such a story for each of the Tulia defendants: Jason Jerome Williams, Christopher Eugene Jackson, Kizzie White, Joe Moore, Cleveland Joe Henderson, and on and on. It could be like a "mad-lib"—I would just leave the name of the defendant blank, the name of the attorney and the prison sentence blank, and fill them in one by one as I recount each defendant's individual story in the case. And because there were forty-five other arrests of defendants in the same drug sting that resulted in the arrest of Mr. Brookins, one might herald this sting as a big coup for law enforcement and for the well-being of society.

B. The Second Story: A Post-Critical Race Lawyering Narrative

Now, I am going to retell Freddie Brookins, Jr.'s story. I am going to call this second story a "post-critical race lawyering" narrative. This is the narrative that came to light after critical race lawyers and activists, as I define them, got involved and recast this story so that it became a narrative quite unlike the generic criminal justice piece that is so prevalent on the local news. The narrative is a bit longer and goes as follows.

On July 23, 1999, over twelve percent of Tulia, Texas's African-American population was arrested on the word of one white undercover narcotics officer with a troubled history in law enforcement, Tom Coleman. Coleman alleged that forty-six Tulia residents sold him drugs. Tulia's population is 5000 people. Forty of those arrested were African-American, from a total black population of less than 400 persons. Freddie Brookins was one of the African-American individuals arrested that day. Three others were Mexican, and the remaining three had biracial children, or had other close social or marital ties to the African-American community.

On the day of the raid, the accused were dragged half-clothed to the Swisher County jail and paraded in front of local television cameras that the Sheriff's Department had summoned to record what would shortly thereafter be heralded as a major Texas victory in the "War On Drugs" and whose narcotics officer would be awarded "Lawman of the Year" by then attorney general, now United States Senator, John Cornyn. The day after the raid, the *Tulia Herald* cheered the town's law enforcement with the headline, "Tulia's Streets Cleared of Garbage."⁶ The names and addresses of the forty-six accused were published. The African-American community in Tulia was on lockdown. While awaiting arraignments and bail hearings in jail, parents were separated from children, suspects lost access to public housing, and cars were repossessed.

Coleman spent eighteen months allegedly making drug buys in Tulia. However, he did not wear a wire during any of the alleged transactions. No video surveillance was taken, and no second officer was available to corroborate his reports. Testifying in the first few trials, Coleman claimed to have recorded names, dates, and other pertinent facts about the buys by writing on his leg. There was only one witness at trial who could link the alleged drugs to the defendant in question: Coleman. The convictions were based exclusively on the testimony of the lone undercover narcotics agent.

The indictments on which the raid was based alleged sales of small amounts of cocaine—between one and four grams. The "bust" resulted in the conviction and incarceration of most of the arrestees, either after trials or guilty pleas. Initially, those arrested, all of whom are poor, were inclined to go to trial to prove their innocence. Nearly all of the defendants had a court-appointed lawyer, almost none of whom did any independent investigation which may have uncovered highly impeaching facts about Coleman, including his unreliability and almost pathological dishonesty. Indeed, Mr. Brookins's lawyer, for whom Mr. Brookins's family collected money to pay in the hopes of getting better representation than they assumed a court-appointed

6. Mike Garrett, *Tulia's Streets Cleared of Garbage*, *Tulia Sentinel*, Aug. 12, 1999, at 1A.

attorney would give him, did no investigation and filed not a single pre-trial motion. None of the defense lawyers who took their clients' cases to trial in the first year after the raid conferred with each other to pool together resources or facts which may have uncovered that this so-called sting was in fact a bogus operation. The guilty verdicts piled up. Sentences ranged from twenty to 361 years. The first defendant to go to trial, Joe Moore, a fifty-seven-year-old hog farmer who was accused of one count of selling cocaine to Coleman, was described as Tulia's "kingpin" and drew a ninety-year sentence. More and more of the arrestees then decided to take pleas. Their sentences ranged from one year of probation to eighteen years in prison.

It turned out that in addition to the lack of independent investigation, the prosecutor, Terry McEachern, suppressed and lied about critical impeachment information pertaining to Coleman in each of the sting-related proceedings. There was a great deal a jury could have heard during each of the defendants' trials about Coleman's law enforcement career, his character, and his methods, facts that were known to Swisher County law enforcement officials at the time of each of the trials, but which were not disclosed to defense counsel. Coleman's checkered past, it turned out, included dismissal from the neighboring Cochran County police department after the Sheriff filed a letter with the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"), the state agency that licenses peace officers, stating, "[i]t is in my opinion that an officer should uphold the law. Coleman should not be in law enforcement if he is going to do people the way he did this town."⁷ The Cochran County Sheriff was not the only former employer of Coleman's to report strongly negative information about him which should have given his Swisher County and Panhandle Regional Narcotics Trafficking Task Force employers every reason not to hire him.

The legal team later discovered that Coleman's direct supervisor, Sergeant Jerry Massengill of the Amarillo Police Department learned while conducting a pre-hiring background check that Coleman's former employers described him as in need "of constant supervision," "a discipline problem," and possessing "possible mental problems."⁸ Furthermore, during this background check, former law enforcement employers mentioned Coleman's bad debt problems, the allegation that Coleman had kidnapped his children, and that Coleman would

7. Application for Post-Conviction Writ of Habeas Corpus at 5, *Brookins v. State*, No. B-3276-99-07 (242d Dist. Ct. Swisher County and Tex. Crim. App. filed May 31, 2002).

8. *Id.* at 5-6.

“stir up shit” and then “run to his mother for help.”⁹ None of this was uncovered by defense attorneys at the time of the trials and certainly none of it was disclosed, despite a constitutional obligation to do so, by the District Attorney.¹⁰

During the course of his alleged undercover narcotics operation, Coleman was charged with theft and abuse of official capacity in a neighboring county, for which he struck a deal and paid a sum of money to dispose of the charges; these matters were suppressed. Coleman was suspended from law enforcement during his employment by the Panhandle Regional Narcotics Trafficking Task Force in Tulia, Texas because of these charges, yet made alleged buys of cocaine even while charges—and an open warrant—for these crimes of dishonesty were pending against him. Furthermore, it turned out, as we learned through discovery and depositions prior to our evidentiary hearing in March 2003, that Coleman routinely referred to black people, including the Tulia accused, as “niggers” and his supervisors were not only aware of this pattern, but allegedly reprimanded him for it, and yet allowed him to continue to target and allegedly make buys from almost exclusively black individuals, about which his supervisors claim to have expressed concern. The convicting juries heard none of this evidence.

Freddie Brookins was one of 46 individuals whose family and community was ripped apart because of one corrupt officer, his many supervisors, and a system of justice predicated upon the warehousing of black and brown individuals. The more arrests made, the more successful the “War on Drugs,” no matter the pervasive official misconduct, racial bias, overt racism, and lack of standards and accountability. In these cases, as in most criminal cases, the judge was white, the prosecutor was white, the testifying police officers (including Coleman’s supervisors) were white, the court marshals were white, the Sheriff was white, and all but one of the jurors in the sting-based trials were white. But almost all of the defendants including Mr. Brookins, were African-American; of the few who were not, they were either Hispanic or had intimate relationships with African-Americans.

C. Critical Race Lawyering at Work

This second narrative is markedly different than the first. In the second narrative, Mr. Brookins’s case is connected to a community; one can detect the racial bias and prosecutorial misconduct as part of

9. See Mar. 17-21 Hearing, Exhibit 107 filed in *Brookins v. State*, No. B-3276-99-07 (242d Dist. Ct. Swisher County and Tex. Crim. App.) (Massengill handwritten notes) (on file with author).

10. See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecution’s suppression of evidence favorable to the accused is a violation of due process rights where the evidence is material to guilt or punishment).

a pattern and practice of law enforcement and criminal justice in Tulia. The transformation of Mr. Brookins's case from the first narrative to the second is what critical race lawyering is all about. In Part II, I will discuss the tools that the legal team used to shift the first narrative, which is the narrative that we are all used to hearing over and over again, and which has allowed us to become very complacent about the numbers that we hear about in our criminal justice system today, into the second narrative, which now has become the symbol for all that is wrong in the American criminal justice system.

II. CRITICAL RACE LAWYERING: TRANSFORMING STORY ONE INTO STORY TWO

The LDF got involved in the Tulia cases more than two years after the sting actually occurred. I made my first trip down to Tulia in early November 2001, after viewing a very troubling twelve-minute documentary by the William Moses Kunstler Fund for Racial Justice ("WMK Fund"), which described the raid and the fact that Coleman himself had been arrested while employed as an undercover narcotics officer in Swisher County.¹¹ The documentary did not make clear whether there were any lawyers representing the defendants, so I went down to investigate. What would become my first trip of many over the following two years was spent meeting the defendants' family members, and learning from them what happened to their community. I met with Alan Bean, Gary Gardner, and Thelma Johnson, who were members of the Friends of Justice, a brave local activist group of concerned Tulia residents mobilized to support family members left in Tulia in the aftermath of the sting. I met with family members themselves and heard first hand the stories of the arrest of their son, daughter, husband, or wife. I was introduced to a charismatic local civil rights lawyer, who seemed to be the only such individual around in the panhandle region, who would later become LDF's co-counsel, Jeff Blackburn,¹² as well as Randy Credico of the WMK Fund, whose early organizing and media work in Tulia had brought the case to the attention of national groups like LDF.

I learned from these meetings that there were no lawyers representing any of the defendants whose convictions had been affirmed on direct appeal by the state's highest criminal court, the Texas Court of Criminal Appeals. These defendants were languishing in prison with no representation. Individual appellate attorneys had filed appeals based on claims that were not linked to the cases of any other Tulia defendants. After learning that there was no central

11. See William Moses Kunstler Fund for Racial Justice, Projects, at <http://www.kunstler.org/projects.html> (last visited Feb. 17, 2005).

12. Jeff Blackburn was involved in the case at the time, representing Zury Bosset and Tonya White, the last two of the Tulia defendants to go to trial.

warehouse where legal information on the cases had been gathered, processed, and organized, I traveled to the Swisher County courthouse and spent two full days in its case file room, pulling every file on every defendant to glean information about his or her race, trial attorney, case adjudication, crimes charged, and sentence received. I bought an extra suitcase from Walmart, filled it up with the hundreds of pages of copies of the defendants' court files, and made my way back to New York City, uncertain of how all of this would turn out, but certain that LDF had to get involved.

My initial goal upon returning to New York City was to make a chart that compiled all of the sting cases with columns for each of the categories of information that I needed. I proceeded to call up every trial counsel listed, as well as the state district and appellate courts to map out exactly where each case was legally. I sometimes called a court three or four times to make sure that the dates the clerks were giving me were absolutely accurate since any defendant could have permanently been out of federal court if the state court gave me the wrong date. I also began sifting through documents I gleaned from the offices of Jeff Blackburn, Gary Gardner, and Paul Halloway, one of the Tulia trial lawyers who conducted initial investigations into Coleman's past. I read transcript after transcript, and made charts comparing testimony from the various trials. I also read all of the press articles published on the cases. Of particular note were the articles by Nate Blakeslee, an outstanding investigative reporter who printed the first story revealing Coleman's sordid history.¹³

Despite all of the particular details regarding the name of trial counsel, the date of the court adjudications, all of the cases were intimately connected. They were connected not only by the fact that the only evidence in each case linking the defendants to the actual crime was the uncorroborated word of a single corrupt officer, but also that the vast majority of the indictments issued against the defendants accused them of selling drugs within 1000 feet of a school or park, thus raising the upper limit of the sentencing range significantly upon conviction, and that almost all of the allegations were for sales of between one and four grams of powder cocaine. Nearly all of the cases were presided over by the same judge, Ed Self, and the same district attorney, Terry McEachern. And, of course, the column containing the defendant's race was pretty much a cut and paste job: "black," "black," "black." To aid my knowledge about each defendant's case were letters from the defendants themselves, which began flooding in once I contacted each of them by phone or by mail and told them about LDF's commitment to getting them all out

13. See, e.g., Nate Blakeslee, *The Color of Justice*, *Tex. Observer*, June 23, 2000, at 8, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=611> (breaking the story); Nate Blakeslee, *Round Two in Tulia*, *Tex. Observer*, Oct. 20, 2000, at 4, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=719>.

of prison and released from state custody. In my communications with the defendants, I explained that to LDF, their cases were all linked and were really about a community that had been brought down on the word of a racially biased criminal justice system.

Within weeks of my return to New York City, I discovered that I needed to file a habeas corpus petition immediately on behalf of the first defendant to have his direct appeal denied, Jason Jerome Williams. It was on the basis of the matrix, Blakeslee's articles, and the papers I brought back with me from Tulia that I drafted the first habeas petition in the cases. The petition read as a narrative of Coleman's troubled past in law enforcement and ended with whatever of his misdeeds was known at the time. After laying out in great detail a timeline of Coleman's history as a police officer up till his employment in Swisher County, the petition claimed that the State suppressed copious amounts of exculpatory and impeachment information on Coleman and its other witnesses, that the State knowingly failed to correct and elicited perjured testimony from its key witness, that the State engaged in many other acts of misconduct, and that Mr. Williams received ineffective assistance of counsel during his trial and appeal, among other things. The petition put law enforcement on trial.

The aim was to use this petition as a template for post-conviction relief on behalf of an entire community of color that had been brought down on the word of one officer who had an extensive corrupt history in law enforcement, and whose supervisors said and did nothing despite their knowledge of his past and present misconduct. The opening paragraphs of the petition recast the story away from a single defendant and his alleged crime to the tale of a community of color whom law enforcement preyed upon, deceived, and devastated through misconduct. The race of every player in this saga was mentioned up front and center because it had everything to do with the allegations themselves. No longer could it be the "elephant in the room."

I quickly discovered that I could not litigate all forty-six of these cases alone. I put together a one-page pitch and call for assistance and, with the help of the New York Lawyers for the Public Interest, I distributed the pitch to law firms all over New York City and Washington D.C. The response of the firms was overwhelming: within just a couple of days of sending the pitch out, I had calls from close to a dozen firms. The first law firm to contact me was Hogan & Hartson in D.C. The second was Wilmer, Cutler & Pickering in D.C. These two firms would go above and beyond the call of duty in representing their clients. I assigned each firm a defendant, sent them copies of every sheet of paper I had on the cases, and set them to work.

While I had gathered a strong legal team, there was little doubt in my mind that without something extra in these cases, our clients' habeas petitions would be thrown out by the Texas Court of Criminal Appeals. This court had already affirmed our clients' criminal convictions once before. This is where the dramatic facts of the case worked in our favor. Bob Herbert of *The New York Times* became interested in the cases and called me up at LDF to get copies of the legal filings, more of the facts, and more information about the clients. *The New York Times* printed his first Tulia column on July 29, 2002.¹⁴ While Herbert could have been satisfied with one column on the matter, he was intrigued and outraged about the cases, and asked for more and more information. I laid out various angles he could take on the case: the human cost, Coleman's modus operandi, the prosecutor's behavior, the federally financed task forces—all of these angles were the links that tied the Tulia defendants' cases together. The cases were not about individuals having been done wrong, but were instead about how a community had been brought down by law enforcement misconduct. When Herbert returned from a brief visit to Tulia, he realized that he could not help but write about these cases until the injustice was rectified. During the month of August 2002, he wrote five more columns.¹⁵

All of a sudden, the Texas media that had been asleep at the wheel for three years roared awake—while it had just one or two years before heralded the Tulia drug bust as a big Texas victory, it now covered the story as an injustice that had an entire community of color on lockdown.¹⁶ I was very deliberate about the messaging on this case: certain themes were repeated and emphasized to reporters. I developed relationships with the reporters and op-ed writers and presented the case in the context of systemic failures so that Tulia could not simply be discounted as an aberrational event. Instead, Tulia was the tip of the iceberg. The story was not anymore about a large number of individual drug dealers being caught by wily law enforcement. Texas reporters swarmed the story and the politicians responsible. Then Texas Attorney General, now U.S. Senator John

14. Bob Herbert, *Kafka in Tulia*, N.Y. Times, July 29, 2002, at A19.

15. See Bob Herbert, *A Confused Inquiry*, N.Y. Times, Aug. 22, 2002, at A23; Bob Herbert, *Justice Goes Into Hiding*, N.Y. Times, Aug. 12, 2002, at A15; Bob Herbert, "Lawman of the Year," N.Y. Times, Aug. 1, 2002, at A25; Bob Herbert, *Railroaded in Texas*, N.Y. Times, Aug. 8, 2002, at A25; Bob Herbert, *Tulia Shattered Lives*, N.Y. Times, Aug. 5, 2002, at A15. Bob Herbert continued to write articles on the Tulia cases through June 2003. See Bob Herbert, *A Good Day*, N.Y. Times, June 19, 2003, at A25; Bob Herbert, N.Y. Times, *The Latest from Tulia*, Dec. 26, 2002, at A39; Bob Herbert, *Partway to Freedom*, N.Y. Times, June 16, 2003, at A19; Bob Herbert, N.Y. Times, *The Tulia Story Isn't Over Yet*, Apr. 28, 2003, at A23.

16. See Greg Cunningham, *Tulia Cases Returned to Trial Courts*, Amarillo Globe-News, Oct. 10, 2002, at 5C; *Officer's Role in Tulia Trial Is Subject of Court Inquiry/Judges Ask If Testimony Was Key to Tulia Convictions*, Houston Chronicle, Oct. 13, 2002, at 41.

Cornyn, began to face questions from reporters about his office's inaction with regard to the bust. Senators Hillary Clinton and Charles Schumer wrote letters to Attorney General John Ashcroft about how the Tulia drug bust evoked the keystone cops of decades past.¹⁷ *People Magazine* called to do a story on Mattie White, the mother of four children who were arrested in the bust; *The O'Reilly Factor* of Fox News wanted to cover the story and ended up doing three segments on the cases.¹⁸ The case went from being a huge injustice that very few had ever heard of to being a household name for injustice and racism in the twenty first century.

I have no doubt in my mind that the burgeoning public outcry about the Tulia convictions led the Texas Court of Criminal Appeals—a court that has distinguished itself by sanctioning some of the most egregious police and prosecutorial misconduct as well as indigent defense practices that federal courts, including the United States Supreme Court, have later held unconstitutional¹⁹—to remand the habeas petitions filed by LDF and two law firms on behalf of four of the Tulia defendants back to the same district court that had convicted the defendants in question for further fact-finding. The court stated that if the claims presented in the habeas petitions were true, our clients might be entitled to relief. But for the public outcry, it is hard to imagine that the Texas Court of Criminal Appeals would have done this, particularly since this court had already affirmed every single one of the convictions on direct appeal.²⁰

Before the legal team could begin to comply with the court's deadline for fact-finding, we filed papers to recuse the convicting court judge, Judge Ed Self, from presiding over the fact-finding on the grounds that he was biased against our clients in these cases and had already determined the outcome of the proceedings before even allowing any meaningful fact-finding. As proof, we submitted comments he made to the press, including a letter to the editor in *The Tulia Herald*, that indicated quite clearly that he believed that the

17. See Herbert, *A Confused Inquiry*, *supra* note 15 (noting the letters written by Senators Clinton and Schumer).

18. See J.D. Heyman et al., *Trouble in Tulia*, *People Magazine*, Sept. 30, 2002, at 79; Fox News Channel, *Guests and Topics* Sept. 9, available at <http://www.foxnews.com/story/0,2933,62616,00.html> (last visited Feb. 17, 2005).

19. See, e.g., *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000) (vacating conviction of capital murder defendant after finding, contrary to the Texas Court of Criminal Appeals, that he was constructively denied counsel where lawyer slept through portions of his trial on merits); see also *Saldano v. Texas*, 530 U.S. 1212 (2000), remanded to *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002) (United States Supreme Court ordering the Texas Court of Criminal Appeals to reconsider its prior affirmation of defendant's conviction where prosecutor in capital murder case argued that defendant's race was a factor for determining defendant's future dangerousness).

20. See, e.g., *Brookins v. State*, No. 07-00-0159-CR, 2000 Tex. App. LEXIS 1680 (Tex. Ct. App. March 13, 2001); *Jackson v. State*, Nos. 07-00-0074-CR, 07-00-0075-CR, 07-00-0076-CR, 2000 Tex. App. LEXIS 7834 (Tex. Ct. App. Nov. 16, 2000).

habeas claims were not meritorious, that he stood by all of his trial decisions, and that he did not feel the need to give us a hearing.²¹ A new judge from Dallas, Judge Ron Chapman, was assigned to the matter, and we began discovery proceedings that led up to a week-long evidentiary hearing in March 2003.

The purpose of that evidentiary hearing was to provide a counter-narrative of what happened in Tulia. The legal team had to shift the cases from being individual stories about alleged and distinct crimes to a narrative about the police officers and prosecutor involved in the sting, the racial bias in the so-called investigations and prosecutions, and ultimately, about what the white law enforcement community did to the African-American community in Tulia. In preparation for the hearing, Des Hogan of Hogan & Hartson organized a team at his firm to travel down to Texas to retrace Coleman's employment history, meet with every former employer who was interested in talking to them, and whoever else in Coleman's past life came their way. The team returned with twelve juicy affidavits filled with tales of Coleman's past misdeeds and unsavory racial attitudes. These anecdotes were critical to support our habeas claims on behalf of every Tulia arrestee. We called several of these law enforcement witnesses during the first day of the hearing who had worked with Coleman in prior employment positions, and who testified to Coleman's persistent inability to tell the truth, his racialized language, and his violent and erratic behavior. We then called Coleman's supervisors with the Panhandle Regional Narcotics Trafficking Task Force who testified to their knowledge of Coleman's use of the word "nigger," the racial demographics of his alleged sellers, and his highly questionable recording tactics. Finally, Swisher County's Sheriff, Larry Stewart, and Coleman himself testified. The testimony of both was incredible, particularly since the sheriff somehow could not remember most details except those that were innocuous, which he recalled in great detail, and since Coleman committed blatant perjury on dozens of occasions.

After Coleman admitted using the word "nigger" in reference to African-Americans and our clients specifically, the legal team asked for a break in the hearing, and asked the judge if he would permit us to negotiate with the State to achieve a settlement. I warned the State that I would simply do this all over again with each defendant, and we would end up with a year of evidentiary hearings on behalf of each Tulia defendant with a Coleman-based conviction. The State agreed to discuss settling the cases.

At the time, the legal team envisioned that the settlement talks would focus on the four defendants whose cases were before the court. After speaking with these four clients, they told me that they

21. *Letter to the Editor*, Tulia Herald, Oct. 31, 2002, at 2.

had been taken down as a community and that they would stay in prison for as long as it took to get everyone else relief. Any settlement would have to affect all of the Tulia defendants, not just the four individuals whose cases had been remanded by the Texas Court of Criminal Appeals. I do not know if I could have made that decision, but my clients had tremendous conviction that this would be the only just result. Mr. Brookins told me that now that he had lawyers who actually cared about his community and were looking at this fight as a campaign, he had discussed with the other three defendants that they should stand not only together but with the other wronged defendants and make decisions about the outcome of their individual cases based on the potential for community-wide justice.

We spent nine days negotiating with the State when it finally agreed to stipulate to Judge Chapman's finding that Coleman was "the most devious, non-responsive law enforcement witness this Court has witnessed in 25 years on the bench in Texas" and to jointly recommend to the Court of Criminal Appeals that any conviction based solely on Coleman's word be vacated.²² Furthermore, the prosecution agreed to not re-indict any of the defendants on Coleman's testimony. I hastily filed habeas petitions on behalf of the remaining defendants who had Coleman-based convictions, and prepared with my legal team a 122-page Findings of Fact and Conclusions of Law ("FOF/COL"), which was stipulated to by the prosecution and signed by Judge Chapman. These FOF/COL were appended to each habeas petition as grounds for relief.²³

While Judge Chapman's pronouncements in these cases were rather historic—never before had there been a mass habeas settlement—our clients remained in prison pending a decision from the Court of Criminal Appeals. Editorial pages in both state and national newspapers decried this injustice and urged the Texas Legislature to pass a law that would give Judge Chapman the authority to let the Tulia defendants out on bail. In a matter of weeks, the Tulia bail bill passed thanks to the rigorous lobbying of the Texas American Civil Liberties Union. The Tulia defendants who remained incarcerated were bench warranted back to Tulia on June 16 and walked out of prison on bail and into a media firestorm. But they were still not free.

Just one day after the bail hearing and release, the Court of Criminal Appeals punted the responsibility of having to resolve the cases immediately by ordering the team to refile the petitions because some of the defendants' habeas application forms were missing date of birth information. We refiled and waited. In tandem with these petitions, we filed applications for pardons with the Board of Pardons

22. Joint Stipulated Findings of Fact and Conclusions of Law at 10, *Allen v. State* (B-3223-99-07-CR) (242d Dist. Ct. Swisher County and Tex. Crim. App. May 1, 2003) (on file with author)

23. *See id.*

and Parole. A few months later, the Board of Pardons and Parole recommended that each of the defendants except two²⁴ be pardoned. On August 22, 2003, the Governor of Texas granted pardons for the Tulia defendants. Our clients were finally free. Tulia's African-American community had fought back as a community and won.

On the very day that the Governor issued his pardons, the legal team filed two civil rights complaints in federal court in Amarillo on behalf of Tanya White and Zury Bosset, whose cases the district attorney had dismissed prior to the habeas hearings.²⁵ We knew that we would almost definitely end up settling these cases, but White and Bosset determined that should we begin settlement talks in their cases, we should do so with the aim of a global settlement on behalf of all of the Tulia defendants with federal civil rights claims. Our clients knew that some of them had stronger claims and more injury than others, but were willing to give up some of their potential damages to obtain community-wide compensation. Again, this was not an easy decision. Named in the suit was every official responsible for the sting operation, including every one of the twenty-six counties that composed the Task Force. Ultimately, the legal team negotiated a six million dollar settlement, had the Task Force disbanded permanently, and forced the early retirement of Coleman's supervising officers.

The unfolding of the Tulia cases is an unusually happy story for our criminal justice system. There are few like it. To those who hold the Tulia victory as a symbol of a justice system that works, I say that my clients who spent four years in prison on bogus charges did not have a system that worked. And our victory came at enormous cost—both in terms of human anguish and real resources. It is a rare case that can glean as many resources as Tulia did. That it took so much time and money to right what was a fairly blatant injustice while individuals suffered is not a symbol of a machine at work, but instead of a broken system that needs to be, and can be, fixed where there is political will to do so. It is a system where race and racism feature at every point, and where society's failure to acknowledge this reality results in a pervasive complacency yielding the astonishing race statistics of our criminal justice system.

III. LESSONS FROM TULIA: FROM PRACTICE TO THEORY

The Tulia, Texas litigation represents a concrete expression of critical race lawyering in the criminal justice system. Our system tries to sanitize the existence of racial bias by atomizing communities of color so that each case is adjudicated individually (and often, by court-appointed lawyers who work in isolation and do not have the same

24. Landis and Mandis Barrow.

25. See Complaint, *White v. Coleman*, No. 2-03CV-0272J (N.D. Tex. filed Aug. 22, 2003).

support, network, or guiding principles as institutional defenders). This atomization allows for the masking of patterns of bias and inequality and to the legitimization of racism in the system.

In the first narrative, it was hard to detect the pattern and practice of injustice in the Tulia sting cases. It was easier to see Mr. Brookins's case through the cool, so-called objective lens of the pure facts of his individual case. But critical race lawyering transformed the Tulia case narrative from what was otherwise business-as-usual in the "War on Drugs" and the criminal justice system, into a race-conscious narrative about achieving racial justice not for one individual but for an entire community of color. The Tulia litigation teaches us about the power of critical race lawyering—a form of community-focused, racial justice-oriented lawyering, which does not have to be at odds with a lawyer's duty to represent each individual client zealously, and which can actually go a long way toward fundamental and structural reform of an otherwise broken and racist system that is devastating entire communities of color.

The second version of the Tulia case is a story about how one white undercover officer was able to bring down an entire community of color in a small town thanks to the fact that at the time of the trials, the court-appointed lawyers worked in isolation and did not make the necessary connections that would be needed to transform these cases into a racial justice campaign. Nobody was culling information about the other related cases or conducting investigations to uncover the fact that all of the cases were bogus and that Tom Coleman was a racist liar.

The atomization of the community of defendants in this case and the lack of an institutional defender system allowed for the prosecution to propagate an unchallenged narrative. We went from a situation where the defendants were all separated and no links were being made to community justice where the defendants felt so strongly that their entire community had been done wrong that they were willing to spend extra days, weeks, and maybe even months in prison if the relief was only partial.

Now, of course, not every case can be Tulia. Facts like these (and cops like Coleman who do not bother to lie about their biases) do not usually fit together so nicely. But we do have a criminal justice system whose subjugation of people of color is contingent upon individualizing all cases. It is how we have managed to rationalize racism in the criminal justice system. When we do try to expose patterns of racially biased practices, we must meet the incredibly difficult threshold of proving intentional racism. So, individual acts of racial bias, even if they are occurring everyday by the same police officers in the same town, go undetected and undeterred.

While we, as criminal defense lawyers, have the critical duty to represent our individual clients zealously, we must also be able to

present counter-narratives about what is really going on in our criminal justice system. It is very difficult to provide these counter-narratives as advocates when we are not supported by institutional defenders. There are too many states that do not have any public defender system to date, and rely instead exclusively on court-appointed lawyers. Organizations like LDF can fill the void only for a small handful of community-based injustices.

While criminal defense lawyers must never lose sight of their duty to represent their individual clients zealously, we must also build connections between what is happening in a localized community of color. The same police officers may be patrolling a community unfairly; the same ineffectual court appointed lawyers may be representing people of color and just automatically pleading the defendants out because they're too lazy to do any investigation. The most effective critical race lawyering may be happening on the local level, town by town.

Critical race lawyering is about transforming business as usual in the criminal justice system—a business that is usually masked as being racially neutral, bias-free, a just-the-crime-facts-ma'am industry. We have to transform that “business as usual” into a counter-narrative about police practices, racial bias, and the irrationality of many of our criminal justice policies. We have reached a crisis point in the system that can no longer be ignored. The statistics are just horrific: though this country has only five percent of the world's population, we have twenty-five percent of the world's prison population.²⁶ The state of California, by itself, locks up more people than Cuba, France, Germany, Spain, Canada, and the Netherlands combined.²⁷ Nationwide, black men are sent to state prison on drug charges at thirteen times the rate of white men.²⁸ African-Americans comprise sixty-two percent of drug offenders admitted to state prison.²⁹ In seven states, African-Americans constitute between eighty and ninety percent of all people sent to prison on drug charges.³⁰

Most criminal substantive and procedural laws are passed as reactions to individual, often gruesome crimes. But where there is a compelling counter-narrative like Tulia that can really galvanize the public's imagination, we have to know how to use it to promote systemic reform. Reformers can use the Tulia cases to show all that is wrong with the “War on Drugs” in this country. The case is a

26. See 360 Degrees, Dynamic Data: How Many People, at <http://www.360degrees.org/360degrees.html> (last visited Feb. 17, 2005).

27. See The Sentencing Project, Facts About Prisons and the People in Them, at <http://www.sentencingproject.org> (last visited Mar. 2, 2005).

28. Human Rights Watch, A Punishment and Prejudice: Racial Disparities in War on Drugs, at <http://www.hrw.org/campaigns/drugs/war/key-facts.htm> (last visited Mar. 2, 2005).

29. *Id.*

30. *Id.*

concrete example of how the “War on Drugs” has become a war on people of color, and an excuse for low standards in law enforcement and in the courts. Tulia is really the tip of the iceberg in terms of what is going on with our criminal justice system.

The need for critical race lawyering is urgent. We are losing lives and communities. Tulia is critical race praxis at work; and I am a critical race practitioner because I believe, as Martin Luther King, Jr. said, that “[o]ur lives begin to end the day we become silent about things that matter.”³¹ Let the things that matter and the success stories we have drive the theory so that the theory is relevant and can have a prospective use for human liberation and anti-oppression work.

31. See drmartinlutherkingjr.com, MLK Quotations at www.drmartinlutherkingjr.com/mlkquotes.com (last visited Mar. 2, 2005).