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TULSA-GREENWOOD RACE RIOT CLAIMS ACCOUNTABILITY ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 1995

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TULSA-GREENWOOD RACE RIOT CLAIMS ACCOUNTABILITY ACT OF 2007

TUESDAY, APRIL 24, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:12 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Wasserman Schultz, Ellison, Conyers, Scott, Watt, Cohen, Jackson Lee, Waters, Franks, Pence, and Issa.

Staff present: Keenan Keller, Majority Counsel; David Lachmann, Majority Staff Director; Paul Taylor, Minority Counsel; and Susana Gutierrez, Professional Staff Member.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

I am pleased to welcome you today to this hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on the subject of the Tulsa-Greenwood Race Riot Accountability Act of 2007, which was introduced yesterday by Chairman Conyers.

[The bill, H.R. 1995, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 1995

To provide a mechanism for a determination on the merits of the claims brought by survivors and descendants of the victims of the Tulsa, Oklahoma, Race Riot of 1921 but who were denied that determination.

IN THE HOUSE OF REPRESENTATIVES

APRIL 23, 2007

Mr. CONYERS (for himself and Mr. NADLER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide a mechanism for a determination on the merits of the claims brought by survivors and descendants of the victims of the Tulsa, Oklahoma, Race Riot of 1921 but who were denied that determination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Tulsa-Greenwood Race Riot Claims Accountability Act of 2007''.

SEC. 2. FINDINGS.

The Congress makes the following findings:

(1) In 1921, Greenwood (a community in Tulsa, Oklahoma) was one of the most prosperous African American communities in the United States. Serving over 8,000 residents, Greenwood's commercial district was known nationally as the ''Negro Wall Street''. The community boasted two newspapers, over a dozen churches, and hundreds of African American-owned businesses.

(2) On the evening of May 31, 1921, the African American Greenwood community of Tulsa, Oklahoma, was ravaged by a white mob. By the conclusion of the riot at midday, June 1, virtually every building in a 42-square-block area of the community—homes, schools, churches, and businesses—was burned to the ground and thousands were left homeless. Over 1,200 homes were destroyed. Every church, school, and business in Greenwood was set on fire. Approximately 8,000 African Americans were left homeless and penniless. Unable to rebuild, thousands of residents spent the winter of 1921-1922 in tents.

(3) Credible evidence supports the belief that up to 300 African Americans were killed during the riot. As many victims were buried in unmarked graves, an exact accounting is impossible.

(4) In the wake of the white mob destruction of the Greenwood District, a State-convened grand jury officially placed responsibility for the violence on the African-American community, exonerating whites of all responsibility. Neither the State nor the city undertook any investigations or prosecutions, and documents relating to the riot vanished from State archives. Ultimately, no convictions were obtained for the incidents of murder, arson, or larceny connected with the riot.

(5) None of the more than 100 contemporaneously filed lawsuits by residents and property owners in Greenwood were successful in recovering damages from insurance companies to assist in the reconstruction of the community. After the city attempted to block their redevelopment efforts, victims were forced to rebuild with their own resources or abandon the community.

(6) State and local governments suppressed or ignored issues and claims arising from the 1921 riot, effectively excising it from collective memory, until the Oklahoma Legislature created a commission to study the event in 1997. The commission's February 28, 2001, report uncovered new information and detailed, for the first time, the extent of involvement

by the State and city government in prosecuting and erasing evidence of the riot (Okla. Stat. Tit. 74 Section 8000.1 (West 2005)).

(7) The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence, and even deputized and armed many Whites who were part of a mob that killed, looted, and burned down the Greenwood area.

(8) Based on new information contained in the report, the Greenwood claimants filed suit, pursuant to the laws codifed in sections 1981, 1983, and 1985 of title 42 of the United States Code and the 14th amendment, seeking damages for the injuries sustained in the riot as a result of the government's involvement. Their claims were dismissed as time barred by the court, and so were not determined on the merits. 382 F.3d 1206 (10th Cir. 2004), rehrg en banc denied (with dissent), 391 F. 3d 1155 (10th Cir. 2004), cert denied Alexander v. State of Oklahoma, 544 U.S. 1044 (2005).

SEC. 3. DETERMINATION ON MERITS FOR GREENWOOD CLAIMANTS.

(a) IN GENERAL.—Any Greenwood claimant who has not previously obtained a determination on the merits of a Greenwood claim may, in a civil action commenced not later than 5 years after the date of the enactment of this Act, obtain that determination.

(b) INTENT OF CONGRESS AS TO REMEDIAL NATURE OF SECTION.—It is the intent of Congress that this section be liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each Greenwood claim denied that determination.

(c) DEFINITIONS.—In this Act—

(1) the term ''Greenwood claimant'' means an individual who filed a discrimination complaint arising from conduct connected to the May 31, 1921, race riot in Tulsa, Oklahoma; and

(2) the term ''Greenwood claim'' means a complaint filed in the Alexander v. State of Oklahoma litigation that was dismissed as time barred by the Federal court.

○

Mr. NADLER. The Chair recognizes himself for 5 minutes for an opening statement.

Today the Subcommittee meets to examine an old injustice for which our nation has failed to find a remedy. In 1921, in less than 1 day, a 42-square block area of Tulsa, Oklahoma, the Greenwood neighborhood, was attacked by a White mob and burned to the ground. Approximately 300 of its residents were murdered by the mob. What had been a thriving community was obliterated.

A commission established by the state of Oklahoma issued a report in February of 2001, 6 years ago, detailing for the first time the extent of the city and State government's involvement in the riot and in the cover-up that followed and the total lack of remedy available in the courts at that time.

A civil rights suit based on these newly disclosed facts seeking compensation for the damages that occurred as a direct result of the government's involvement was dismissed by a divided 10th Circuit on the grounds that the suit was time-barred.

No one was ever convicted for this outrage. Racist courts were closed to the more than 100 lawsuits filed by Greenwood residents and property owners against insurance companies seeking payment on their policies. According to the commission, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code.

It is painful to realize that what can only be described as ethnic cleansing took place in our nation and that it has been virtually wiped from the history books. Thanks to the work of the 1921 Tulsa Race Riot Commission, we have another chance to confront the past.

Chairman Conyers introduced legislation yesterday to address this longstanding injustice. And I want to thank him for his efforts to bring this terrible history to the public's attention and for his hard work in seeking to do a measure of justice.

Nearly 90 years have passed since the Greenwood community was destroyed with the connivance of local officials. No one has been called to account for it. Very few of the survivors remain. We cannot undo the past, but we can seek to make amends to take responsibility on behalf of this nation for what happened and to do what we can for the survivors.

For too many, justice delayed has been justice denied. This is a matter that can no longer wait. And the least we can do is to open our courts at this late date to them.

We have a panel of very distinguished witnesses today, including one witness who will provide a very special perspective on the events of 1921.

I look forward to hearing from all of you. And I want to welcome you to the Subcommittee.

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And I thank the panelists for being here today. And I am looking forward to their testimony as well.

Mr. Chairman, in "Federalist 51", James Madison wrote, "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but also to guard one part of the soci-

ety against the injustice of the other part. If a majority be united by a common interest, the rights of the minority will be insecure."

Both of these issues are clearly illustrated here today. In Tulsa there was both a failure of law enforcement to protect an innocent minority and worse, an oppressive, unconstitutional disarming and then slaughtering of an innocent population that acted to protect its children and neighborhoods.

People suffered and died, Mr. Chairman. And this was an inexcusable outrage and disgrace. The Tulsa Race Riots cuts against everything that America stands for, namely, a fundamental belief that all of the people are created equal and endowed by their creator with certain unalienable rights, those of life, liberty and the pursuit of happiness.

Unfortunately, Mr. Chairman, most of the individuals who suffered in the Tulsa tragedy are no longer with us and did not live to witness their day in court, which the victims received more than a half a century after the fact. The courts found that the victims of the riot were terribly wronged. And finally the story of Greenwood is known.

Though the courts have given closure in the public domain and recognition for the indignities suffered, the Federal courts have had to uniformly and unanimously dismiss the claims because they were time-barred. The plaintiffs had opportunity to bring claims against the State since at least the 1960's but chose not to do so. Then in 2003, O.J. Simpson lawyer, Johnnie Cochran, brought claims for money damages in the case of *Alexander v. Oklahoma.*

This case was resolved in 2005 by a unanimous 10th Circuit Court ruling finding that the claims were indeed time-barred. The Supreme Court declined to hear the case because the facts and the law are clear and the case is beyond the statute of limitations.

It is important at this juncture to point out that the rights under our Constitution belong to individuals and not to groups. And nearly all the individuals who suffered in June 1921 are no longer alive. Nor are those who inflicted such injustice.

Mr. Chairman, it seems that we are never quite so eloquent as we are when we decry the crimes of a past generation. And we are never so blind as when we ignore the injustice of the day in our own time. It is a tragedy that occurs when innocent human beings, children of God, are diminished as persons. It is a tragedy repeated time and again in the history of the human family.

The greatest act of contrition we could ever offer to all of the victims of those tragedies is to instill anew in our own hearts once and for all a conviction that regardless of what other forces of expedience might exist, we as a society must resolve to treat every human being, Black or White, young or old, born or unborn, rich or poor, perfect or imperfect, weak or strong as the children of God that they are. May that be our greatest commitment at this hour as we remember the tragedy of the Tulsa riots.

Thank you, Mr. Chairman. And I look forward to the testimony.

Mr. NADLER. Thank you.

I now yield 5 minutes to the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Nadler.

And to Trent Franks of Arizona, the Ranking Member, I appreciate these opening statements because, to me, this is another piece of American history that is so important, that we come here today to remedy something that happened in 1921.

I notice sitting in the Judiciary Committee hearing room Alderwoman Dorothy Tillman of Chicago, who has worked not only on reparations but on this matter, on the issues with the Black farmers and for justice in many ways all across the country. I am delighted that she and all of these survivors are here. And of course, our more regular witness, Charles Ogletree of Harvard Law School is again with us. We welcome his presence.

Now, this is American history at its finest hour. What we are looking at are the reasons that sometimes the statute of limitations can be told. In the Japanese internment case that came before the Congress, in the *Pigford* Black farmers case that we tolled a statute of limitations. We mentioned Johnny Cochran, one of our legendary members of the bar here.

And so, we come here with the full understanding in the Judiciary Committee that it is within the courts' discretion to tow the statute of limitations based on common law principle and its balance test based on fairness and the need for finality. Some of the key equitable principles present here is not only was there evidence destroyed and that the city deliberately hid the evidence, but there is more than a suggestion that law enforcement operatives, including National Guard, participated in the riot itself.

And then to have Dr. John Hope Franklin, whose father was an attorney in Tulsa, the busy community known as the "Negro Wall Street," brings us all together in this room on this day to try to bring some finality to such an important issue.

The case of the Tulsa-Greenwood Race Riot is worthy of congressional attention because substantial evidence suggests that governmental officials deputized and armed some of the mob and that the National Guard itself joined in the destruction. The report commissioned by the Oklahoma State Legislature in 1997 brought new evidence forward.

And as a matter of fact, we have the State representative from Oklahoma who is present with us today sitting in the front row. And we want to thank you from the bottom of our hearts for the great work that you did in bringing this forward.

And so, with this new evidence crucial for the formulation of a substantial case, but its timeliness raised issues at law and resulted in a dismissal on statute of limitations ground in dismissing the survivors' claim. However, the court found that the extraordinary circumstances might support extending the statute of limitations, but that Congress did not establish rules applicable to the case it barred.

So with this legislation, we have the opportunity to provide closure for a group of claimants, all over 90 years old and some of them here today, and the ability to close the book on a tragic chapter in our history. So, I am very proud to join all of the Members of this Committee for the hearing that will now take place.

Thank you very much, Chairman Nadler.

Mr. NADLER. Thank you.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing if necessary.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority Members, providing that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or who is only able to be with us for a short time.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Today's hearing addresses yet another painful episode in our Nation's long-tortured history of race relations. The Greenwood Race Riot of 1921 represents a particular low point in that history. During the riot, a white mob burned one of the most prominent and thriving African-American communities in the country to the ground, aided and abetted by the very government officials who were supposed to be protecting the innocent residents and property owners of that community. Looking to the courts for relief, Greenwood's residents were denied justice—in the 1920's because of rank racial prejudice and in the 2000's because of a technical legal hurdle. The legislation that we discuss today—the "Tulsa-Greenwood Riot Accountability Act of 2007"—provides at least the fair opportunity for the riot's victims to obtain justice from the federal courts in light of new evidence that strongly suggests the culpability of government officials with respect to the riot. After eight and half decades in the shadows, the victims of the Greenwood Race Riot are entitled to their day in court.

Mr. NADLER. I would now like to welcome our distinguished panel of witnesses.

Professor Alfred Brophy teaches at the University of Alabama School of Law. He has written extensively on race and property law in colonial, antebellum and early 20th century America. He served as a clerk to Judge John Butzner of the U.S. Circuit Court of Appeals for the 4th Circuit and has taught at Boston College Law School, Indiana University, the University of Hawaii and Vanderbilt University. He received his A.B. from the University of Pennsylvania, his Ph.D. from Harvard and his J.D. from Columbia University.

John Hope Franklin is the James B. Duke Professor Meritus of History and was for 7 years a professor of Legal History in the Law School of Duke University. He is a native of Oklahoma and a graduate of Fisk University. He received his Ph.D. in history from Harvard. He is one of this nation's most distinguished historians of the African-American experience in the United States. I would go on to list his many acclaimed publications, awards, teaching posts and honorary degrees, but that would leave little time for our hearing.

The Chair would note with satisfaction that, among his many achievements, Professor Franklin chaired the history department at Brooklyn College. And Brooklyn is part of my constituency. Most relevant for the Subcommittee, I must note that Professor Frank-

lin's father was born in the Indian territory, grew up in Oklahoma and lived through the Tulsa Race Riot in 1921. He, himself, moved to Tulsa when he was 10 years old, just 4 years after the Tulsa riot, and witnessed firsthand the impact the riot had on Tulsa.

Dr. Olivia Hooker is a survivor the Tulsa Race Riot of 1921. She is here today as a witness to history. And we are both grateful and privileged that she has come all this way to describe for Congress exactly what happened.

She was the first African-American woman to enlist and go on active duty in the Coast Guard in World War II. She is a graduate of Ohio State University. She has an M.A. from Columbia Teachers College and a Ph.D. from the University of Rochester. She taught at the graduate school of arts and sciences at Fordham University before retiring in 1985.

Our final witness is no stranger to this Committee. Professor Charles Ogletree is the Jesse Climenko Professor of Law at Harvard and is the executive director of the Charles Hamilton Houston Institute for Race and Justice. Professor Ogletree earned his B.A. and M.A. from Stanford University and holds a J.D. from Harvard Law School.

On behalf of the Subcommittee, I want to extend a warm welcome to all of you.

Without objection, your written statements will be made part of the record in its entirety. I would ask each witness to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up.

I will begin by asking Professor Brophy——

Mr. OGLETREE. Chairman, before he speaks, can I have the privilege to introduce the survivors who are here who will not be testifying, if I could?

Mr. NADLER. By all means. By all means.

Mr. OGLETREE. Thank you very much. I am Charles Ogletree, the lead counsel for the survivors.

And we have here today Mrs. Edie Fay Gates, who has chronicled the history of the survivors—if you would stand up, Mrs. Gates—in several books and is the one who helped keep this alive. And she was also on the Tulsa Race Riot Commission.

We have Representative Donald Ross, who helped this legislation, was on that commission as well, who has come in from Oklahoma and has been an important mainstay.

We have Dr. Otis Clarke, who is 104 years old, the oldest survivor here. He was 18 years old during the riot in 1921. He is here with his daughter and granddaughter, Gwen and Starr Williams. And he is our oldest surviving witness.

We have Mr. Wess Young, a 91-year-old survival from Tulsa and his wife, Catherine Young, from Tulsa, Oklahoma.

We have Agnieszka Fryszman, one of the lawyers who has been working with the survivors, from the Cohen Milstein firm here in Washington, D.C.

We have Mr. Demarial Solomon Simmons, who is a young man from Tulsa whose grandparents were in Tulsa. And we would like to submit his testimony for the record.

[The information referred to was not received by the Subcommittee prior to the printing of this hearing.]

Mr. OGLETREE. We have Representative Jamar Shomate, who represents the district where many of these residents live now in Tulsa, Oklahoma.

We have Suzette M. Malveaux, who is with the Cohen Milstein firm and helped us draft the original complaint. She is a professor here at Catholic University.

And we also have Alderman Dorothy Tillman from Chicago, who has been down to Tulsa, who has been with the survivors here.

And we have Reverend Granger Browning, who hosted the survivors here this past weekend at Ebenezer AME Church in Fort Washington, Maryland, along with Jonathan Newton, one of my former students and also a member of AME church.

And I would also want to acknowledge the other lawyers: Dennis Sweet; Michele Roberts; Johnny Cochran, who you mentioned; Eric Miller; Raul Sanders; Leslie Mansfield; Jim Goodwin; and a few others; Reggie Turner, a classmate of mine who is documenting this history in a film called, "Before They Die."

Thank you.

Mr. NADLER. Thank you, Professor.

The Chair certainly wants to welcome the survivors and the chroniclers and all those who have worked on behalf of the survivors and to bring this injustice to light and to history and to judicial resolution. And I express my appreciation for all your efforts and for your being here today.

And I thank you, Professor, for bringing this to our attention and for introducing them. And thank you all for that.

And, Professor Brophy, you may now proceed with your testimony.

TESTIMONY OF ALFRED L. BROPHY, Ph.D., PROFESSOR OF LAW, UNIVERSITY OF ALABAMA SCHOOL OF LAW

Mr. BROPHY. Thank you, Representative Nadler, Representative Conyers, Ranking Member Franks, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties. It is my pleasure and honor to speak on behalf of this legislation to repair the tragedy of the Tulsa riots of 1921.

I am Al Brophy, professor of law at the University of Alabama and author of, among other works, "Reconstructing the Dreamland: The Tulsa Riots of 1921."

I think the most poignant photograph of the riot is this picture entitled, "Running the Negro out of Tulsa." It is a postcard made up after the riot to commemorate the riot. And it captures, I think, the essence of it. It was the result of race hatred and a move to drive out Tulsa's African-American population. It was about teaching Greenwood residents their place at the same time they were driven from their homes.

I would like to emphasize several key aspects of the riot.

First, the city is culpable. When the riot began, the police chief issued hundreds of commissions to men at the courthouse. They were instructed to get a gun and get a Black person or thereabouts. And they worked in conjunction with police officers and the local units of the National Guard to disarm every Black person in Tulsa

and take them to what newspapers called concentration camps around the city. What followed then was those deputies, sometimes working in conjunction with police officers to loot and burn Greenwood.

In the aftermath of the riot, Tulsa made concerted efforts to erase the city's culpability. An all-White grand jury investigated the riot. And their conclusion was told in the headline of the Tulsa World: "Grand Jury Blames Negroes for Inciting Race Rioting. Whites Clearly Exonerated." Or, as the Oklahoma City Black Dispatch commented, "There is a whitewash brush, and a big one, in operation in Tulsa."

Second, though some people knew and bravely sought to obtain some form of redress through the courts, race riot victims had no realistic shot at justice. For those riot victims, people who lived through the horror and brutality of the riot, Jim Crow has not yet ended.

For everyone else, we may have said that Jim Crow ended in the 1960's when this Congress passed its comprehensive civil rights statutes. For those riot victims who were taught at an early age the assertion of legal rights leads to their destruction, I think it has not yet ended.

And though we had something like 100 lawsuits filed at the time, they went nowhere. Things were going from worse for riot victims.

In 1923, the governor of Oklahoma declared martial law throughout the State citing among other reasons the pervasive influence of the Klan in the Tulsa courts. As late as the 1970's when someone is established as General Ed Wheeler of the Oklahoma National Guard, a White man, studied the riot, he was threatened with violence.

Third, it was through the Oklahoma legislature's Tulsa Riot Commission and the moral and financial support given to it by the legislature that we were finally able to piece together a complete picture of the riot. Though we knew pieces of this before, it was only through that comprehensive work representing the work of dozens of scholars and community members working over years that we were able to piece this together.

When looking at photographs like this and the next one showing scenes of utter destruction for as far as the eye can see, one might ask how has the story been buried for so long.

And I think the answer turns on an unholy combination of factors: the diligent efforts of Tulsa authorities and other prominent Tulsans to scuttle the story, to tell the world that Greenwood residents were to blame for the riot, to hide the culpability of the police department and the local units of the National Guard, and to threaten with prosecution those brave Greenwood leaders who might attempt to obtain justice.

It was a culture of suppression in which, to borrow a phrase from Ralph Ellison's novel, "Juneteenth," Blacks were counted but not heard. And it has only been relatively recently as people who had culpability for the crimes such as murder have died and evidence has come to light that we have been able to put together the complete picture of the riot.

I will in the interest of time just emphasize that the city and State are culpable. The tragedy is concentrated in time and place.

This isn't a claim for general societal reparations. And promises were made at the time to repair the community.

Thank you very much.

[The prepared statement of Mr. Brophy follows:]

PREPARED STATEMENT OF ALFRED L. BROPHY

Representative Conyers, Chairman Nadler, Ranking Minority Member Franks, and Members of the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties,

It is my pleasure and honor to speak on behalf of this legislation to repair in part the tragedy of the Tulsa riot of 1921. I am Al Brophy, professor of law at the University of Alabama and author of *Reconstructing the Dreamland: The Tulsa Riot of 1921* (Oxford University Press, 2002) and *Reparations Pro and Con* (Oxford University Press 2006). My remarks today are delivered in my individual capacity, not as a representative of the University of Alabama.

The tragedy of the Tulsa riot began when World War I veterans–men who contributed to saving democracy in Europe–took action to prevent a lynching on the evening of May 31, 1921. The threat of lynching was set off by a front-page article in the *Tulsa Tribune* on the afternoon of May 31, that (as we now know) falsely accused a young African American man of attempting to attack a young white woman. The *Oklahoma City Black Dispatch* called that story the "false story which set Tulsa in fire."[1] When black people in Tulsa read the story, realized that there was a threat of lynching, and began to mobilize to prevent it; at the same time, many in the white community read the same story and began to gather at the courthouse, in anticipation of a lynching.

Some met in the back room of the Dreamland Theater, to discuss what to do. They were afraid there would be a repeat of the September 1920 lynchings of a white man in Tulsa and a black man in Oklahoma City. In both cases, the lynching victims were taken from jail. Late in the evening of May 31, a group of black veterans appeared at the courthouse, to help protect the young man in jail there. The resulting confrontation set off a riot in which the Tulsa officials, their special deputies, and members of a mob destroyed the African American section of Tulsa, known as Greenwood. The Tulsa tragedy left dozens, perhaps hundreds, dead and thousands homeless and it left Greenwood in smoldering ruins. Bishop Ed D. Mouzon told the sobering story of the ways that the horrors of war in Europe appeared on American soil: "Civilization broke down in Tulsa. I do not attempt to place the blame[;] the mob spirit broke and hell was let loose. Then things happened that were on a footing with what the Germans did in Belgium, what the Turks did in Armenia, what the Bolsevists did in Russia."[2] The riot is replete with stories of looting, burning, cold-blooded killing, even use of the new technology of airplanes to attack Greenwood.

The stories of the riot's destruction are also replete with pathos–of an elderly couple shot in their home; of the homeless sifting through the charred embers of their homes, searching for whatever might remain; of families separated; of the burning of a church. It is impossible to convey the human cost in a short compass and I hesitate to even try. Perhaps one story from the *Tulsa World* will begin to introduce to the way the riot crushed the human spirit:

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[1] *The False Story Which Set Tulsa on Fire*, BLACK DISPATCH 1 (July 1, 1921).

[2] *Black Agitators Blamed for Riot*, TULSA WORLD 1 (June 6, 1921).

> Half lying, half sitting a negro girl with heavy-lidded eyes stared before her with such blank misery in them that more than one person hesitated before her. Someone asked her if she were ill. She raised tear-filled eyes. "No, I ain't sick." She scarely noticed her questioner. Was there anything could be done for her? "No, I ain't got nothin'." That was all she would say.[3]

The Oklahoma legislature's Tulsa Riot Commission provides us with a detailed picture of the destruction and tragedy wrought by the riot. I hope that you will spend some time with it, for it draws upon thousands of hours of research by a number of scholars and presents one of the most comprehensive pictures available of the unfolding of a riot and it lays out the detailed evidence implicating governmental actors in the destruction.[4]

The Riot and the Failure of the Rule of Law

I want to talk today about the riot–a uniquely horrific episode of violence during the Jim Crow era–as the complete breakdown of that most American value, the rule of law. The rule of law failed in the months leading up to the riot, as Oklahoma experienced lynchings and near-lynchings and as the law separated the races and left African Americans in unequal and vulnerable positions. Looking back on his childhood in Oklahoma in the 1910s and 1920s, Ralph Ellison recalled that law enforcement officers were called "laws," for they had the power to dictate what the "law" would be. They did not follow what we have come to know as the rule of law, however.[5] Moreover, when cases reached the courts, judges failed to apply the law equally to blacks and whites. Judges failed to convict whites who attacked blacks, issued harsher sentences to blacks than whites, and sometimes interpreted statutes to allow continued unequal treatment in schools and in voting. Ellison told of a quip made by an Oklahoma judge from the bench, that "a Model T Ford full of Negroes ranging at large on the streets of the city was a more devastating piece of bad luck than having one's path crossed by thirteen howling jet-

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[3] *Negroes Gladly Accept Guards*, TULSA WORLD 7 (June 2, 1921).

[4] *Tulsa Race Riot: A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921* (Scott Ellsworth & John Hope Franklin, eds.), available at: http://www.okhistory.org/trrc/freport.htm

For additional detail on the government's culpability and the promises to assist in rebuilding, as well as the recognition throughout Tulsa at the time that something ought to be done, see Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921*, esp. 103-19 (2002).

[5] Ralph Ellison, "The Perspective of Literature," in *The Collected Essays of Ralph Ellison* 768 (John F. Callahan ed., 1995). Similarly, as an Oklahoma City police officer roughly handled a woman suspected of stealing from her employer, she told him to "mind what you are doing. There is a law against such treatment." "By God, I am the law," was the reply. "Story Like Unto Dark Ages," *Black Dispatch* 1 (June 21, 1918).

black cats."[6] An editorial in the *Muskogee Cimeter*, Muskogee's weekly black newspaper, protested that Oklahoma statutes treated blacks as objects. Laws might be passed to control and punish a black man, but "[m]easures that would improve his mentality, encourage his industry and mold his morals are never thought of."[7] The pattern of using law to reinforce white superiority was common. "[L]aw and order methods," an NAACP official concluded, "absolutely insure 'white superiority' in every way in which that superiority is real."[8]

The Oklahoma legislature enacted, for instance, a statute that allowed railroads to haul segregated luxury cars for whites only. The Oklahoma Supreme Court upheld the statute when J.B. Stradford was charged with violating the segregation statute. The United States Supreme Court invalidated the segregation statute in 1914; the next year, it invalidated the Oklahoma grandfather clause. Yet that did not end Oklahoma's attempt to keep blacks from voting. A replacement statute for the grandfather clause, which served much the same purpose, was not struck down until the 1930s, again by the United States Supreme Court. In 1919, in the neighboring state of Arkansas, amid fears of a "negro uprising," dozens of African Americans were killed and others railroaded into death sentences. Justice Oliver Wendell Holmes eventually reversed their convictions, observing that "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion."[9] Public passion went out of control in Tulsa on the evening of May 31, 1921.

The rule of law failed completely during the riot, as the police department hastily deputized hundreds of men, then instructed them and others to "get a gun . . . and get a N–r."[10] Those who did not have access to guns were issued them by the police department. Some of those guns were taken from sporting goods shops in downtown Tulsa; one merchant whose guns were taken is the only person I know to receive compensation from the city for the riot.[11] One

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[6] Ralph Ellison, *The Perspective of Literature*, in THE COLLECTED ESSAYS OF RALPH ELLISON 768 (John F. Callahan ed., 1995).

[7] "Not a Child Race," *Muskogee Cimeter* (June 17, 1916).

[8] "Terrible Lessons," *Black Dispatch* 4 (August 22, 1919).

[9] *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

[10] *See* Testimony of Laurel Buck 30, Attorney General's Civil Case Files, RG 1-2, A-G Case No. 1062, Box 25 (Oklahoma State Archives) (discussing instructions given to Laurel Buck, a white man, to "get a gun, and get busy and try to get a n—er."). According to pleadings in a suit filed by a black riot victim, one deputy officer gave instructions to "Go out and kill you a d__m nigger." Petition in Robinson v. Evans, *et al*, Tulsa County District Court, No. 23,399, May 31, 1923. There is extensive discussion of this in Brophy, *Dreamland*, *supra* note 4, at 39-40.

[11] Brophy, *supra* note 4, at 40, 96.

indication of how poor the supervision of the "deputies" was is the police chief's plea in the *Tulsa World* after the riot for the return of the guns:

> Not all persons who borrowed guns from the police station the Tuesday night of the negro uprising have returned them to the station. Chief of Police John A. Gustafson Saturday asked that there be no more delay in returning those firearms. . . . "These guns were only loaned," the chief explained, "and were loaned with the understanding they would be returned as soon as the situation had improved to a point sufficient to justify their return."[12]

That plea illustrates how careless the police department was in issuing weapons and deputy police badges.

The police, working with their special deputies, and local units of the National Guard, arrested every black person they could find in the morning of June 1, 1921, and took them to what newspapers referred to as "concentration camps" around the city.[13] A mob, consisting in part of those special deputies (and assisted in some cases by police officers) then looted and burned Greenwood, the black section of Tulsa. We also learned how destructive those deputies were from General Charles Barrett of the Oklahoma National Guard. He was in charge of the Guardsmen who traveled throughout the night from Oklahoma City to put down the riot. He wrote critically of those deputies. Tulsa's police chief John Gustafson "did not realize that in a race war a large part, if not a majority, of those special deputies were imbued with the same spirit of destruction that animated the mob." General Barrett grimly concluded that deputes became "the most dangerous part of the mob."[14]

One picture of Greenwood on fire was made into a postcard after the riot and labeled "Running the Negro out of Tulsa." That captures the essence of the riot. It was the result of race hatred and became a move to drive out Tulsa's African American population. It was also about keeping Greenwood's residents in their places. One white newspaper wrote of treatment of homeless Greenwood residents in the aftermath of the riot. Where there had been hatred during the riot, now there was kindness: "The white citizens of Tulsa have forgotten the bitter hatred and their desperation that caused them to meet the negroes in battle to the death Tuesday night and are now thinking of them only as helpless refugees."[15] Once Greenwood residents were

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[12] "Guns Taken During Riot, Still Sought by Tulsa Policemen," *Tulsa World* 2A (June 19, 1921); "Weapons Must be Returned," *Tulsa World* 3 (June 4, 1921) (asking for return of weapons and threatening prosecution if weapons are not returned).

[13] Brophy, *supra* note 4, at 91.

[14] 1 Charles Barrett, *Oklahoma After Fifty Years* 209 (1941).

[15] "To Rebuild Homes for Negro Owners and Probe Blame," *Muskogee Phoenix* (June 3, 1921).

reduced to the status of "helpless refugees" they posed little challenge to white authority–and then could be seen as objects of charity and subject to white control.

In fact, they were subject to control. In the aftermath of the riot, thousands were left homeless. They were held at the concentration points around the city, such as the fairgrounds and the convention center, until a white employer or friend vouched for them. Then, they were issued green tags and released. Some were released quickly; others were held for several weeks. And when they left, they returned to scenes of destruction as far as the eye could see–nearly forty blocks leveled by fire. Many left, for cities including Kansas City, Chicago, Memphis, and Los Angeles, never to return.

Even in the aftermath of the riot, when cool heads should have prevailed, riot victims had no shot at justice. An all-white grand jury blamed the Greenwood community for inciting the riot and several leaders of the community fled, fearing indictment for inciting riot. The headlines of the *Tulsa World* told the whole story of the grand jury report: "Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated."[16] The *Oklahoma City Black Dispatch* more accurately characterized the nature of the grand jury report: "The truth is, and as usual, we have a white wash brush and a big one in operation in Tulsa."[17] For not only did the grand jury report blame Greenwood residents, the mayor tried to relocate Greenwood further away from white Tulsa and to prohibit rebuilding in the burned area by requiring use of fireproof materials.

The *Black Dispatch*'s editor, Roscoe Dunjee, wrote about the debt to riot victims:

> The white citizens of Tulsa are in debt to the Negroes whose property they burned and the lives they wantonly destroyed, and we believe that there are those who will make some effort to repair the loss which they have caused. They cannot forget it, they admit that it was wrong and they feel deep down in their hearts that they should repay. It will always be a debt until it is paid.[18]

Still, Dunjee placed extraordinary faith in the rule of law. He urged Tulsa riot victims to file lawsuits seeking damages against their insurance companies and the city. And they did so. Yet, the lawsuits were dismissed or the claims denied. When Mabel Allen's case against the city went to trial, it was dismissed before it went to the jury.

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[16] "Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated," *Tulsa World* 1, 8 (June 26, 1921).

[17] "In Name Only," *Black Dispatch* 4 (July 8, 1921) ("We observe that the only really definite statement made in the whole [grand jury] report is that the NEGRO IS TO BLAME, a conclusion they seemed to have arrived at through evidence unsupported by any facts which they present.").

[18] "Tulsa's Distress," *Black Dispatch* 4 (March 15, 1923).

But as they attempted to assert their rights, riot victims left us important evidence about the riot. William Redfearn's suit against his insurance company went to trial in Tulsa. Like Allen's case, it was dismissed before going to a jury. However Redfearn appealed to the Oklahoma Supreme Court. The court acknowledged in *Redfearn v. American Central Insurance Company* the culpability of the city. The court wrote that "groups of white men, many of them wearing police badges and badges indicating that they were deputy sheriffs, after removing the negroes from buildings, went inside the buildings, and, after they left, fires broke out inside the buildings."[19] Still, the Court offered no relief on Mr. Redfearn's insurance claim.

The courts' refusal to grant relief is unsurprising. Several decades before the riot, the Oklahoma territorial court blocked a suit against the city of Norman for a riot that occurred there, in which the mayor was allegedly involved. But things were going from bad to worse for riot victims. In 1923, the governor of Oklahoma declared martial law throughout the state. He cited, among other reasons, the pervasive control of the Tulsa courts by the Klan. The records of the military tribunals established by the governor to investigate the Klan are some of the most detailed available anywhere on how the Klan functioned in the years immediately after the movie *Birth of a Nation* rekindled it. They detail systematic, vicious beatings of people, black and white, who violated the Klan's norms of behavior. Those norms included the rule that some towns were "sundown towns"–places where blacks might come during the day to work, but where they had to leave by sundown.[20] Those who sought to assert their rights–before, during, or after the riot–faced the very real prospect of being destroyed for the assertion of those rights. The riot itself is testimony to it. And, as the district court recognized in *Alexander v. Oklahoma*, the Greenwood residents had no effective means of asserting their rights in the aftermath of the riot.[21] For those riot victims–people who lived through the horror and brutality of the riot–Jim Crow has not yet ended, for they were taught at an early age that the assertion of legal rights leads to destruction.

Even in the 1970s, when someone as established as General Ed Wheeler of the Oklahoma National Guard studied the riot, he was threatened with violence. Brent Staples' story about the riot in the *New York Times Magazine* recounts the story of the threats against Wheeler:

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[19] 242 P. 929, 930 (Okla. 1926). For further discussion of the case, see Alfred L. Brophy, "The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court," 54 *Okla. L. Rev.* 67 (2001).

[20] *See* Alfred L. Brophy, "Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma," 20 *Harv. Blackletter L.J.* 17-48 (2004).

[21] *Alexander v. Oklahoma*, No. 03-C-133-E, at 21-22 (N.D. Okla., March 19, 2004) ("Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights.").

> When it became known that Wheeler was moving forward with the article, he began to be harassed by telephone, both at home and at work. One afternoon in downtown Tulsa, a man in overalls tapped Wheeler on the shoulder, whispered, "You'll be sorry if you publish that story," and walked away.
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> In the spring of 1971, his article nearly finished, Wheeler discovered a message scrawled in soap across the windshield of his blue Ford sedan: "Best Look Under Your Hood From Now On."[22]

At the risk of belaboring the point, Tulsa riot victims had no shot at justice at the time and until recent memory would reasonably feel threatened for even discussing the riot, let alone trying to assert their rights in court.

The Oklahoma Legislature's Tulsa Riot Commission was, through the moral and financial support given it by the legislature, able to piece together a complete picture of the riot. The report draws on data from archives all over the United States–particularly the Oklahoma State Archives in Oklahoma City, the Oklahoma Historical Society in Oklahoma City, the Tulsa County Historical Society, the Tulsa County archives, but also the Library of Congress, the National Archives regional bureau, and the Cook County Records Office in Chicago, in addition to newspaper microfilm records. Many of those records–such as the critical National Guard records–have only become publically available in recent years. And certainly the entire picture has only been available since historians have assembled the recent pieces of the riot. Indeed, many people, upon hearing about the Tulsa riot for the first time, ask, how could this story have been hidden for so long? How, given the photographs showing scenes of utter destruction for as far as the eye can see, could this story have been buried? The answer turns on an unholy combination of factors: the diligent efforts of Tulsa authorities and other prominent Tulsans to scuttle the story and tell the rest of the world that they would make the injured parties whole; the diligent efforts of Tulsa authorities to blame Greenwood residents for the riot and to hide the culpability of the police department and their complicity with local units of the National Guard; the threats of prosecution of certain leaders of the Greenwood community who stayed in Tulsa or returned to it; and a culture of suppression, in which, to borrow a phrase from Ralph Ellison's novel *Juneteenth*, blacks were counted but not heard. It has been only relatively recently--as people who had culpability for such crimes as murder have died and as evidence has come to light and been put together by the Tulsa Riot Commission–that a fairly complete story of the Tulsa tragedy has emerged.

It is particularly disappointing that, after all the excellent work that has been done to recover a complete history of the riot (including the culpability of the city in the riot) that when the United States Court of Appeals for the Tenth Circuit affirmed the dismissal of the riot victim's lawsuit it referred to the angry mob that destroyed Greenwood. The court should have written of a deputized mob, clothed with the power of the state and working in conjunction with

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[22] Brent Staples, "Unearthing a Riot," *New York Times Magazine* (Dec. 19, 1999).

the local police. After all that work, we still have an inaccurate picture of the riot in the pages of the *Federal Reporter*.[23] Truth is fragile, particularly in the case of Tulsa. And it is hard to say that riot victims should have known what the United States Court of Appeals has so quickly forgotten.

Considering Legislative Relief Now

There are five key principles, which make the case for relief of Tulsa riot victims particularly compelling.

First, the city and state are culpable for the destruction during the riot. The city failed to keep the peace; when a riot broke out, its special deputies working in conjunction with the police and local units of the National Guard contributed to the riot's destruction. The federal government had no involvement in the riot; however, the federal government had failed to pass an anti-lynching act (the Dyer Anti-Lynching Bill had been pending before Congress since 1918).[24] An anti-lynching act would have made the riot less likely.

Second, the tragedy is concentrated in place and time; this is not a claim for general societal reparations, which is so suspect in modern jurisprudence. Instead, this is a claim for a very discrete event, of unique level of violence and destruction. In short, the amount of violence and damage in Tulsa is unparalleled.

Third, there are still people alive who suffered harm. That living connection was important in the Civil Rights Act of 1988, which provided $20,000 to every Japanese-American interned during World War II who survived until 1986. There is, in short, a direct, living connection to the riot. And so there is some possibility of repairing part of the damage to people who immediately suffered.

Fourth, the courts and legislature were effectively closed to riot victims at the time. They had no shot at justice; reopening the case now gives the opportunity for a full hearing, which was denied at the time. It was only after the Oklahoma legislature's Riot Commission re-examined the case that all the disparate strands of evidence began to come together. Where the mere discussion of the riot as recently as the early 1970s lead to threats of violence, the Riot

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[23] The second two sentence of the Tenth Circuit's opinion affirming the dismissal is: "An angry white mob converged on Greenwood in a devastating assault, burning homes and businesses, killing up to three hundred people, and leaving thousands homeless." 382 F.3d 1206, 1211 (10th Cir. 2004). Even later in the opinion, where this is some acknowledgment of the role of special deputies, the imagery of a "white mob" continues to dominate. *See id.* at 1211-12 ("Armed with machine guns, the white mob ravaged Greenwood, scattering machine gun fire indiscriminately at its African-American residents. . . . The guardsmen, often acting in conjunction with the white mob, disarmed the African-American men who were defending their community and placed them in 'protective custody.' Thus purged of any resistance, the white mob burned virtually every building in Greenwood.").

[24] Brophy, *supra* note 4, at 62 (discussing references to Tulsa riot in debate over Dyer Anti-Lynching Bill in aftermath of riot).

Commission made the riot something that victims could discuss. The fear was, at long last, lifted, by the brave actions of the holders of power in Oklahoma.

Finally, Tulsans at the time recognized that something was owed riot victims and they promised to do something. Even the *Tulsa Tribune*–the paper that set in motion the events that led to the tragedy–urged action to repair Greenwood.

> Acres of ashes lie smoldering in what but yesterday was "Niggertown." . . . City and county officials are responsible for this distressing story and this appalling loss of property. The insurance companies flatly place the responsibility there. The city and the county are liable . . . because the city of Tulsa and the county of Tulsa stand before the world as unable to protect life and liberty. . . . Let us meet the need and so far as we can redeem the wanton and unnecessary destruction of property. Let us try to be fair to the innocent.[25]

The most poignant promise came from Judge Loyal J. Martin, chair of the Emergency Committee:

> Tulsa can only redeem herself from the country-wide shame and humiliation into which she is today plunged by complete restitution and rehabilitation of the black belt. The rest of the United States must know that . . . Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny.[26]

Now the United States Congress has the opportunity to make some amends.

In conclusion, I am thinking now about that famous Oklahoman Ralph Ellison. His first novel, *Invisible Man*, begins in Greenwood, which he visited shortly after the riot. Later Ellison wrote about the faith that the *Black Dispatch*'s editor, Roscoe Dunjee, placed in the Constitution as a vehicle for justice. Ellison did not have such faith in his youth–for he saw corrupt Oklahoma politicians and judges who cared little for law and justice. Yet, he came to have more respect over time for our Constitution's ideals. Ellison alluded again to the Tulsa riot in his posthumously published novel, *Juneteenth*. What is particularly poignant today is that *Juneteenth* begins with a visit by a group of elderly African Americans from an unnamed southern state (perhaps Oklahoma) to Washington, D.C., to visit with a Senator. Their leader, Minister Alonzo Hickman, is asked if he is one of the Senator's constituents. Minister Hickman responds that the Senator has no one like him in his state; "We're from down where we're among the counted but not among the heard."[27] I deeply hope that this Committee will be able to hear and respond to the claims of the surviving Tulsa riot victims and to repay Dunjee and Ellison's faith in the justness of our country. For they have waited so long, so patiently, and

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[25] "The State in Action," *Tulsa Tribune* 1 (June 2, 1921).

[26] "Tulsa," *The Nation* (June 15, 1921).

[27] Ralph Ellison, *Juneteenth* 4 (1999).

have such a compelling claim to some rectification so many years after their community was destroyed through the actions of and neglect by their government.

Mr. NADLER. Thank you very much, Professor.

We will now hear from Professor Franklin, who is recognized for 5 minutes.

TESTIMONY OF JOHN HOPE FRANKLIN, Ph.D., PROFESSOR OF PSYCHOLOGY (RETIRED), FORDHAM UNIVERSITY

Mr. FRANKLIN. Thank you, Mr. Chairman. I will be as brief as I can about——

Mr. NADLER. Could you put on your microphone, please?

Mr. FRANKLIN. It is on, Mr. Chairman.

Mr. NADLER. Okay, thank you.

Mr. FRANKLIN. I will be as brief as I can about a matter that means so much to so many people.

My father was a lifelong resident of Oklahoma. We lived in a small village south of Tulsa for some years. I was born there.

But in early 1921, my father went to Tulsa to open a law office. We were to join him at the end of the school term, as my mother was a teacher and I was a student. But after we had packed and were waiting for him to arrive to escort us to Tulsa, we waited, and we waited for more than a day.

On the second day of waiting, my mother learned through the *Muskogee Daily Phoenix* that there had been a riot in Tulsa and that there were many casualties. For some days she did not know whether my father was living or dead. She finally got a note from him saying that he was unharmed but that he had been detained in the Convention Hall for several days.

He said that he could not bring us to Tulsa. The whole town where we would live had been devastated by fires and by murders and by all kinds of activities that prevented a normal procedure in that part of the community.

And so, we had to wait. We waited for 4 years before we were able to move to Tulsa. And it was at that time that I discovered that Tulsa was still on the move so far as reconstruction was concerned, that the Black part of town was still just in the midst of trying to rebuild.

And as a matter of fact, when I came there, I was amazed to see houses still partly rebuilt, churches where only the basement had been reconstructed. It was a strange sort of appearance.

Later, when I learned a little more and when I had learned something about architecture, I said that this town, this Black part of town is undergoing what might be called a post-riot building renaissance because the structures were just half-finished. And I did not know—I did not think they would ever be completely finished.

But they were in due course. But I noticed also that there was a culture of silence that had settled down over the city. Nothing was discussed that had any connection with the riot. Indeed, children in the White part of town grew up not even knowing that there had been a riot.

The mayor of Tulsa, the first woman mayor of Tulsa, Susan Savage, told me that she was a grown woman, although she had lived in Tulsa, born there after the riot, that she was a grown woman before she even knew that there had been a riot. A sort of culture of silence had settled down. And no one spoke of it, except in the Black part of town where they spoke of it in hushed tones and did

not want to convey the impression that they had been defeated and almost destroyed by the action that was taken.

It was in those years that my father brought suit against the city, against the State, against the insurance companies and anyone else who might have been connected with the riot in any way. I used to say that he lost all of those suits, except one which was against the city of Tulsa, which had passed an ordinance calling for no construction in the city that was not fireproof.

Well, there were no resources for the Black community to build fireproof constructions. And so, my father commanded them to build, build with anything they had, orange crates and what not.

And so, his clients were arrested and brought to trial for violation of the ordinance. And it was there that he was able to argue for them and to appeal and finally—and the State supreme court—the court handed down the decision that the ordinance had been passed as an effort to prevent any kind of action, to prevent even any discussion of the riot. And so, he proceeded to carry on in this fashion for many years.

And I want to say in conclusion that there were many of us like my schoolmate here to my left and others who survived. But most of our schoolmates have not survived. And they suffered during the remainder of their lives from the trauma of the experiences of 1921. And I can say that had I arrived on schedule as I should have arrived on schedule that I might not be here, either, at this time.

But I thank you for the opportunity, Mr. Chairman. And I could go on for many, many hours, but I won't. Thank you.

[The prepared statement of Mr. Franklin follows:]

PREPARED STATEMENT OF JOHN HOPE FRANKLIN

Dear Chairman John Conyers, members of the House Judiciary Committee and Subcommittee on Constitutional Rights:

My name is John Hope Franklin and I am the James B. Duke Professor Emeritus of History at the Law School at Duke University. I bring testimony today as both a historian and survivor of the 1921 Tulsa race riot. My full biographical information is attached and I will not use the committee's valuable time to review it now. I have attached by declaration from Tulsa litigation as written testimony.

DECLARATION OF DR. JOHN HOPE FRANKLIN

1. I am an historian currently serving as the James B. Duke Professor of History Emeritus at Duke University in Durham, North Carolina. I received my Bachelor of Arts from Fisk University, and a doctorate in history from Harvard University in 1941. I have studied, written, and taught extensively on the subjects of African-American history and race over the last several decades, and my work includes numerous books and hundreds of articles and speeches on these topics. I have also served as the head of the three major historical associations in the United States, and recently served as the Chairman of the Advisory Board to President Clinton's Initiative on Race.

2. My father was born in the Indian territory and grew up in Oklahoma. He lived through the Tulsa race riot in 1921. I moved to Tulsa when I was ten years old, just four years after the Tulsa riot, and witnessed first-hand the impact the riot had on Tulsa.

3. In addition to writing and teaching on the general subjects of African American history and race, I have also written and spoken specifically about the Tulsa riot and its long term effects on Tulsa. These perspectives are based on the personal experience of moving to Tulsa four years after the riot, and on my later work studying and considering history and race, which added a scholarly perspective to these personal experiences.

4. I observed and have concluded the 1921 riot had a devastating impact on Tulsa that

lasted for decades. In my public statements and published work, I have recounted my view that a culture of silence and official negligence descended on the white community of Tulsa in the years after the riot, and persisted for several decades, and my view that in Tulsa's black community in the ensuing decades, after the economic and physical destruction of the riot, the difficulty of rebuilding, and the indifference or worse of the white community, a public silence among blacks also settled in, even while they privately remembered and feared the riot and its aftermath. For example, in the Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921 released in February 2001, I wrote an overview of the report with Scott Ellsworth in which we stated:

> By any standard, the Tulsa race riot of 1921 is one of the great tragedies of Oklahoma history. Walter White, one of the nation's foremost experts on racial violence, who visited Tulsa during the week after the riot, was shocked by what had taken place. "I am able to state" he said, "that the Tulsa riot, in sheer brutality and willful destruction of life and property, stands without parallel in America."
>
> Indeed, for a number of observers through the years, the term "riot" itself seems somehow inadequate to describe the violence and conflagration that took place. For some, what occurred in Tulsa on May 31 and June 1, 1921 was a massacre, a pogrom, or, to use a more modern term, an ethnic cleansing. For others, it was nothing short of a race war. But whatever terms is used, one thing is certain: when it was all over, Tulsa's African American district had been turned into a scorched wasteland of vacant lots, crumbling storefronts, burned churches, and blackened, leafless trees.
>
> Like the Murrah Building bombing, the Tulsa riot would forever alter life in Oklahoma. . . . But unlike the Oklahoma City bombing, which has, to this day, remained a high profile event, for many years the Tulsa race riot practically disappeared from view. For decades afterwards, Oklahoma newspapers rarely mentioned the riot, the state's historical establishment essentially ignored it, and entire generations of Oklahoma school children were taught little or nothing about what had happened. To be sure, the riot was still a topic of conversation, particularly in Tulsa. But these discussions – whether among family or friends, in barber shops or

> on the front porch – were private affairs. And once the riot slipped from the headlines, its public memory also began to fade.
>
> Of course, any one who lived through the riot could never forget what had taken place. And in Tulsa's African American neighborhoods, the physical, psychological, and spiritual damage caused by the riot remained highly apparent for years. Indeed, even today there are places in the city where the scars of the riot can still be observed.

"History Knows No Fences, An Overview," John Hope Franklin & Scott Ellsworth, Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921, at 24-25 (2001) (Attached as Exhibit A.).

5. Similarly, I stated in a speech at a reconciliation service at Mt. Zion Baptist Church in Tulsa in 2000, that when I first moved to Tulsa four years after the riot, seeing "half-built buildings and churches reduced to basements, including Mt. Zion," were like the images I saw "in the aftermath of World War II bombing in Europe." (As reported in "79 Years After Race Riot, Rebuilding Still the Focus," *Daily Armoreite*, June 5, 2000 (Attached as Exhibit B)). Although those churches were rebuilt, I have also noted that other, more insidious effects of the riot persisted: "One of the most profound effects [of the Riot] in the long run was what it did to the city. It robbed it of its honesty, and it sentenced it to 75 years of denial." (As reported in "Race Riot Panelists OK Dig for Remains," *Tulsa World,* Aug. 10, 1999 (Attached as Exhibit C)).

6. I have also stated to the Oklahoma Commission and in other instances that any reparation to the victims of the riot "is a mere pittance compared to the three-quarters of a century of suffering of the victims of the looting, burning, killing, and bombing, as so many endured." *Tulsa World*, Aug. 10, 1999 (Exhibit C); *see also* "Righting a Wrong: It's Time for Reparations for Tulsa's Race Rampage," *Pittsburgh Post-Gazette*, Aug. 14, 1999 (Attached as Exhibit D).

7. I have also expressed my view that we still have much to learn from the riot, because to

learn from events such as the riot, these events must be confronted and dealt with, and Tulsa, like other places in which violent racial incidences have occurred, has never dealt honestly with what happened, and because of this failure, the city and its black community in particular has simply never recovered from the event. "Black Historian Chronicles Time Franklin Leads Race Panel," *Daily Oklahoman*, April 18, 1999 (Attached as Exhibit E); *see also* "Historian Hopes Service to Bring Reconciliation," *Tulsa World*, June 4, 2000 (Attached as Exhibit F); "Small Steps by Many Can Aid Race Relations," *Seattle Times*, April 13, 1998 (Attached as Exhibit G).

8. None of this is inconsistent with the view I expressed in the foreword to Scott Ellsworth's book, *Death in a Promised Land*, in which I said that immediately after the riot, there was a spirit, born no doubt of dire necessity, of people picking themselves up and rebuilding, instead of dwelling on the horror and destruction. In stating that people had high self-esteem in the period after the riot, I also said this was as a result of myths and beliefs that people developed as a means of coping with the riot and moving on. *Death in the Promised Land* xvi-xvii (1982) (Attached as Exhibit H).

9. In addition, while it is true that there was a sort of "bouncing back" period in Tulsa immediately after the riot – which is why the churches that had been reduced to basements were eventually rebuilt – this does not describe the long-term effects of the riot, which were, in my view, negative, devastating, and persistent to this day. My belief in the negative, long-term effects of the riot has grown in the years since Ellsworth's book was published, as I have learned more about the riot, have visited Tulsa, and had more time to reflect on the riot's impact.

10. I believe in the long-term, the riot has cast a pall over the city, and has made it feel half-dead even today. Prior to the riot, the black community in Tulsa had been economically prosperous, not to mention spiritually and physically cohesive and strong. The riot was

economically devastating, and given the lack of assistance and almost absolute segregation that existed for decades after the riot, people were not able to recover economically. The combination of circumstances that existed after the riot made it impossible for blacks in Tulsa to live as upstanding and fearless citizens even if they initially tried to do so. People did not just lose their homes and businesses, they seemed eventually to lose part of their dreams and their will, at least as a group. Thus while I believe there was a period of approximately ten years in which people made their best effort to rebuild, and revitalize their community educationally and socially, eventually, given the economic devastation, and the persistent and complete separation and indifference of the white community, a pall of discouragement set in among the black community. And because the city has never honestly confronted what happened, that pall persists to this day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ___ day of December, 2003, in Durham, North Carolina

_____/S/_____

Dr. John Hope Franklin

Mr. NADLER. Thank you, Professor.

Professor Hooker?

TESTIMONY OF OLIVIA HOOKER, Ph.D., JAMES B. DUKE PROFESSOR EMERITUS OF HISTORY, DUKE UNIVERSITY SCHOOL OF LAW

Ms. HOOKER. Thank you, Representative Conyers and Committee, for allowing us to unburden ourselves after 86 years of suffering.

As a small girl of 6 years, my two parents who had come to Oklahoma to teach in the Indian nations, my mother from Texas and my father from Mississippi. And when Oklahoma became a State, then it was possible for my father to go into business.

But then picture with me the trauma of a young 6-year-old girl hearing things hitting the house, "bang, bang, bang, bang" like that, and thinking it was hail until my mother took me to the window and let me peer through the blinds and said, "That thing up there on the stand with the American flag on top of it is a machine gun. And those are bullets hitting the house. And that means your country is shooting at you."

This was a totally amazing thought to a child who was totally idealistic. I had never met any kind of discrimination because the salesmen who came to sell my father things always acted as if the children were so important in order to sell their goods. So I didn't know about hatred. And this was devastating to me to think of my country shooting at me.

As the publicity was suppressed, the nation did not know about what happened in Tulsa except through the Black press: Roscoe Dungee in Oklahoma City and Mr. Smitherman in Tulsa, who did publish it. But the local presses of many cities did not.

It so happened my dad went down to the rubble. There was nothing but bricks left of the store, but he noticed his safe was still there. And he thought, "Well, I will try to open it," thinking it would be empty. But, praise the Lord, it was not empty.

He didn't have money, but he had some war bonds. And he was able then, with a wise secretary, Mr. Greg, who had been trained in a graduate school in Germany—Archie Greg and my father went on a speaking tour to the Black churches of the United States on the East Coast mostly.

They went to Washington to the AME Zion Church and to Petersburg and Lynchburg and Richmond, places like that, where the Black people in those towns sent missionary barrels of shoes and useful clothing. And those things were distributed out of the undestroyed part of Booker Washington High School.

The Red Cross entered the field a little later because the local Red Cross had said they would not give people anything unless those people came and washed their clothes and took care of their children because they were desolate for help at home. Finally, the National Red Cross sent Maurice Willows, and things got better so far as issuing of materials.

But the damage that was done was not only the material things. A house destroyed, the entire neighborhood destroyed, the businesses destroyed, all the services destroyed, our school bombed on the day that we should have been getting our report cards to move

up to the next class so that the children of Tulsa were very devastated.

The machine gun captain decided that he had to make my mother leave the house as she was pouring water on the house to try to keep it from burning. So he sent somebody down and said, "Tell that woman to get out of there with those children and go to a place of safety." My mother was trained in oratory at Tuskegee.

And she said, "I cannot go until I talk to these people who brought their children to watch this catastrophe." And my mother started to speak to them to say it would be visited upon the children unto the third and fourth generation at which point the people said, "Stop that woman. She is scaring our children."

And a man came over and said to her, "When the mob gets out of your house, I will go down and put out the fire if I can." And there was evidence at our house that he did do that. But, of course, most things were lost.

I see I am over time. And I thank you again for letting me speak.

[The prepared statement of Ms. Hooker follows:]

PREPARED STATEMENT OF OLIVA J. HOOKER

My name is Dr. Olivia J. Hooker, and I currently reside in the State of New York. I was born on February 12, 1915, and I am a survivor of what is known as the Tulsa Race Riot of 1921, but what was really a massacre of the Greenwood neighborhood of Tulsa, then called the "Black Wall Street."

My parents Samuel and Anita Hooker came to Tulsa from Holmes County Mississippi. At the time of the Riot, I lived on Independence Street in the Greenwood District of Tulsa with my parents and four siblings.

At the time of the riot, my parents owned a home on Independence Street valued at $10,000 and a clothing store at 123 North Greenwood Avenue that was one of the most prominent stores in Greenwood. My home was severely damaged but not destroyed in the riot, however, the mob completely destroyed my parents' business, which was described as "a total loss."

Furnishings valued at $3000 were either stolen or deliberately smashed or destroyed. Jewelry valued at $1000 furs valued at $1000 and silver valued at $500 were also stolen. The estimated total loss of goods displayed at the store was $100,000. That makes a total loss of $104,000 to our parents during that riot.

My parents were distraught over the loss of the many beautiful things they had purchased with their hard-earned money. The mobs hacked up our furniture with axes and set fire to my grandmother's bed and sewing machine. I still remember the sound of gunfire raining down on my home and that the mob burned all my doll's clothes. After the riot, my mother saved all the artillery shells that mobsters had put in all of our dresser drawers.

As a child, I had believed every word of the Constitution, but after the riots happened, I realized that the Constitution did not include me.

After the Tulsa violence, my mother took our family to Topeka, Kansas, while my father remained in Tulsa to try to restore his bombed out business. My father filed a lawsuit against the insurance company for the value of the destroyed property, but a judge threw the case out in 1926 or 1927.

Later, we moved to Columbus, Ohio, where my sisters and I graduated from Ohio State University. After teaching third grade for seven years, I enlisted in the United States Coast Guard, becoming the first African American woman to enlist and go on active duty in the Coast Guard, then a part of the U.S. Navy during World War II. I earned an M.A. from Columbia University Teachers College on the GI Bill, and a Ph.d Degree at the University of Rochester where I was one of two black female students. I taught in the Graduate School of Arts and Sciences at Fordham University, retiring as Associate Professor in 1985.

We did go on with our lives after the riot but the memories of what happened to us then will never go away. The injustices we suffered the two days of the riot and the injustices we suffered after the riot when insurance companies failed to pay riot victims for their losses and when court officials summarily threw out our riot victims cases are a blot on Tulsa's image that have not been erased to today.

Mr. NADLER. Thank you, Professor Hooker.

Professor Ogletree?

TESTIMONY OF CHARLES J. OGLETREE, JR., DIRECTOR, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, HARVARD LAW SCHOOL

Mr. OGLETREE. Thank you, Chairman Nadler, and thank you, Chairman of the Judiciary Committee John Conyers, and also the minority leader, Congressman Franks, for this hearing.

These are challenging times for all of us. I represented these clients when I first met them in 2002 and, with the support of a volunteer group of lawyers, have represented them ever since.

When we filed this lawsuit on their behalf on February 28, 2003, there were 150 living survivors. Since then, 70 have died in the last 3 years. They are dying every day.

And one of the amazing things is that there is a edifice over the Florida Supreme Court. The court is where the injured flock for justice. And that is where we are today.

This report, thanks to Don Ross and Al Brophy and people like Edie Fay Gates, this documents Oklahoma's history. It is here, every single word, every single verse, every single crime, every single incident. And it took 80 years to unbury an American nightmare. But they did it. They did it.

We have been in court—and if you read Judge Ellison's opinion of the District Court, if you read the 10th Circuit's opinion, no court has ever said that these clients are barred by a 2-year statute of limitations, which is normally the law. They said that the criminal justice system, the legal system in Tulsa, was not available to people of African descent at that time. And indeed, Judge Ellison said they couldn't have filed suits in the 1920's, 1930's, 1940's, 1950's or 1960's because the courts were just not open.

And then in an amazing feat of creative imagination, he said, "Perhaps they should have filed in the 1960's." We went to the 10th Circuit Court of Appeals. The 10th Circuit said, "We don't know when you should have filed this lawsuit, but sometime before today."

"Sometime before today." What kind of justice is that when our courts are—if they had said, "You should have been in court by 1923; it is over." They didn't say that because they knew the justice system did not work.

And what makes this so important is that these aren't individuals who are asking for something that they didn't earn. When you look at these photographs, the Greenland Theater was a treasure in Oklahoma and Tulsa. When you look at the J.B. Stratford Hotel, Blacks couldn't stay any other place when they came to Oklahoma to perform. They stayed there. They had to live in segregation. That was destroyed. When you look at the businesses and the homes and the idea that no one has ever been held responsible criminally or civilly for destroying a 42-block Black community. No one has ever been held responsible.

And this role is important because if we look at our own history, when I think of that Florida phrase, I think of this Committee. This is where the people flock for justice. When citizens saw their families exterminated in the holocaust, they couldn't go to court.

They tried to explain their history, but there was no one there to speak for them.

When American citizens in the Second World War were placed in interment camps in the Western part of the United States and stayed there, it took a Republican Senator Bob Dole and a Democrat Senator Daniel Inouye to pass the 1988 Civil Rights Act decades after the incident to give them some reparations.

When Black farmers throughout America found that they couldn't go to Virginia and Michigan and all over the country, North Carolina to get their rights, Congress stepped in and said, "They come here, and we will address their needs." Every single time the courts have said no, someone with moral authority has spoken up to make sure that these injustices are addressed.

And this isn't, as Congressman Nadler said, it is not a riot. It really is ethnic cleansing. If we go back to Oklahoma City, a tragedy that all of us suffered from on April 19, 1995, there are monuments. The president of the United States was there. Every victim has been compensated. Every person responsible has been punished. We will never forget April 19, 1995, and nor should we.

When we go to September 11, 2001, thousands of people lost their lives, friends of mine, personal friends. And we have compensated those victims. We have tried to bring those responsible to justice.

And here we have document evidence record that hear the people. Otis Clark, Wess Young, Dr. Olivia Hooker, John Hope Franklin—they have never, ever, ever had their day in court. We simply ask you, Chairman Nadler and this Committee, to make sure that they get justice before they die.

Thank you.

[The prepared statement of Mr. Ogletree follows:]

PREPARED STATEMENT OF CHARLES J. OGLETREE, JR.

Dear Chairman John Conyers, members of the House Judiciary Committee and Subcommittee on Constitutional Rights:

My name is Charles Ogletree and I am the Jesse Climenko Professor of Law at the Harvard Law School and the Founder and Executive Director of the Charles Hamilton Houston Institute. My full biographical information is attached and I will not use the committee's valuable time to review it now.

1. Introduction

I serve as lead counsel for a group of African-Americans who, in 1921, resided in the Tulsa, Oklahoma community known as Greenwood. On the evening of May 31, 1921, a white mob, many of whom were drunk, gathered in front of the Tulsa jail, and was rumored to be preparing to lynch an African American man accused of attempting to assault a white woman. Some African American men, including World War I veterans, came to the jail to prevent the lynching. During a mêlée between some of the white and African American men, shots were fired and "all hell broke loose." The Mayor of the City of Tulsa, acting under color of law, called out local units of the State National Guard and, with the assistance of the Tulsa Chief of Police, deputized and armed some of the white citizens of Tulsa, many of whom were part of the drunken mob. The deputies were instructed to "go get . . . a nigger." The deputized white citizens, acting under color of law, terrorized and brutalized the African American residents of Greenwood.

In the early hours of the morning of June 1, 1921, local units of the National Guard, along with the white Chief of Police and his deputies, removed the African American residents of Greenwood from their homes. The deputies and the white mob then looted the empty buildings before burning Greenwood to the ground. Defendants harnessed the latest techniques of modern warfare to put down what they considered a "Negro Uprising." Defendants or their agents deployed a machine gun to fire on African American residents of Greenwood. Defendants or their agents also used airplanes for reconnaissance of Greenwood. In addition, some eyewitnesses recall that one or more of the airplanes engaged in the attack by shooting at the African American Greenwood residents and dropping one or more incendiary devices. These acts resulted in the mass destruction of property located in Greenwood, as well as the unlawful killing of hundreds of African American residents of Greenwood. In the course of the Riot, Defendants unlawfully detained African American residents of Greenwood, forcing many of them to work in captivity.

As a direct consequence of the Riot, the 8,000 African American citizens of the Greenwood District of Tulsa lost their homes; 5,000 of those were detained in camps by the State and City; the other 3,000 fled Tulsa, many never to return. In the aftermath of the Riot, the state and federal relief was so completely unavailable to the victims that they could not achieve justice through the court system.[1] The Tulsa Riot was, quite simply, a

[1] A federal district court and the Tenth Circuit Court of Appeals both found that the courts were effectively closed to the plaintiffs. *See* Alexander v. Governor of Oklahoma,

singular event in American history — unique in terms of violence, governmental culpability, and the inability of riot victims to later obtain redress. Walter White, President of the NAACP, wrote: ""I am able to state that the Tulsa riot, in sheer brutality and willful destruction of life and property, stands without parallel in America."[2]

There is no doubt that the City of Tulsa and the State of Oklahoma are culpable for the acts of violence perpetrated during the Tulsa Race Riot of May 31 through June 1, 1921.[3] In 2001 the State officially and expressly accepted responsibility for creating the climate of racial intolerance that led to the Riot. The State acknowledged that local and county officials, the City of Tulsa, and the City of Tulsa Police Department were "participants in the ... violence which took place on May 31 and June 1, 1921."[4] In short: "the Oklahoma Legislature freely acknowledge[s] its moral responsibility on behalf of the state of Oklahoma and its citizens."[5]

Furthermore, there is no doubt that the State and City conspired to suppress the historical record of the Tulsa Race Riot of 1921, and particularly their involvement in that Riot.[6] Yet, despite the evidence uncovered by a Commission to Study the Riot of 1921 created by the State, the State of Oklahoma and City of Tulsa still refuse to take the blame: the State still denies participating in the Riot;[7] and the City argues that the Riot victims slept upon their rights and now to much time has passed to pay compensation.[8]

2. Greenwood and the Riot

Prior to the Riot, Greenwood was a segregated community that was known as many as the "Black Wall Street" because of the amazing success that African-Americans experienced in Tulsa at that time.[9] Among the prominent businesses were the Dreamland Theater, the Stratford Hotel, and hundreds of other businesses providing African-

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Civ. No. 03-133, Order at 21-22 (2004) (apportioning responsibility for the Riot); Alexander v. Governor of Oklahoma, 382 F.3d 1206, 1219 (2004).

[2] Walter White, NEW YORK CALL, June 10, 1921.

[3] *See* Alexander v. Governor of Oklahoma, 382 F.3d 1206, 1219 (2004); *see also* Alexander v. State of Oklahoma, Civ. No. 03-133, Order at 21-23 (N.D. Okl. Mar. 19, 2004).

[4] 74 Okl. Stat. Ann. 8000.1.2.

[5] 74 Okl. Stat. Ann. §8000.1.6.

[6] *See* 74 Okl. Stat. Ann. §8000.1.4

[7] See, e.g., 74 Okl. Stat. Ann. §8000.1 (placing legal responsibility for the Riot with City and County actors, rather than state agents); Lois Romano, No Vow to Make Amends for Tulsa; Legislators' Sidestepping Disappoints Survivors of 1921 Race Riot, THE WASHINGTON POST, Thursday, March 1, 2001 Section A (Governor Keating denied the State was responsible for injuries stemming from the Riot).

[8] See, e.g., *Alexander*, 382 F.3d at 1218-1219.

[9] SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 22 (1982).

Americans in a segregated city opportunities to survive and thrive.[10] Additionally, the law office of Buck Colbert Franklin, the father of John Hope Franklin, was in Tulsa and he was in the early stages of a very successful law practice.[11]

Everything changed in Black Wall Street on May 31, 1921. As you know, Dick Rowland, who shined shoes and who was an African-American, was falsely accused of an assault against a white woman, Sarah Page. As a result of that report, Mr. Rowland was arrested and taken to the local jail. Not long after, a mob of white men arrived at the jail with the purpose of lynching Mr. Rowland, rather than letting the judicial process take its course. The good news is that Mr. Rowland never actually had to go through extensive proceedings because he was not guilty of the crime. The bad news was that the combination of the threat of lynching and the arrival of African-American men who were WWI veterans and wanted to prevent the lynching led to what is now known as the Tulsa Race Riots. Ultimately it was not a race riot as much as it was the destruction of an African-American community. As the attached timeline will show, after shots were fired and battle occurred between African-Americans and whites in Tulsa, the local sheriff then deputized a number of white men who received guns from pawn shops and gun shops and were sent into the black community known as Greenwood. Their arrival there led to one of the most destructive days in the history of America. The successful businesses, private homes, and private property were destroyed by the white mob. What was once known as a thriving economic and socially tight-knit community was destroyed overnight. While the official reports listed only a few dozen casualties, the reality is that the black community was essentially destroyed and never fully recovered. There are reports of hundreds of lives being lost and bodies not being accounted for following the 1921 Tulsa Race Riots.

3. The State Acknowledges Culpability

No other riot manifested the level of governmental involvement in both perpetrating and covering up the Riot. During the Riot, state and local officials were directly implicated in the racially discriminatory violence. On the evening of May 31, 1921, a white mob, many of whom were drunk, participated in the worst race riot in America's history: The Mayor of the City of Tulsa, acting under color of law and with the assistance of the Tulsa Chief of Police, deputized and armed some of the white citizens of Tulsa, many of whom were part of the drunken mob. The deputies were instructed to "go get . . . a nigger." The deputized white citizens, acting under color of law, terrorized and brutalized the African American residents of Greenwood.

The Mayor also deputized local units of the National Guard which, along with the white Chief of Police and his deputies, killed African American residents of Greenwood,

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[10] REPORT OF THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 40 (2001); *see generally* ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002).

[11] REPORT OF THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 40 (2001).

dragged them from their homes. The white mob then looted the empty buildings before burning Greenwood to the ground. State and city officials deployed a machine gun to fire on African American residents of Greenwood. They used airplanes for reconnaissance and to attack the African American Greenwood residents, shooting at them and dropping one or more incendiary devices. These acts resulted in the mass destruction of property located in Greenwood, as well as the unlawful killing of hundreds of African American residents of Greenwood. In the course of the Riot, state and city officials unlawfully detained African American residents of Greenwood, forcing many of them to work in captivity in conditions deliberately designed to be reminiscent of slavery.

According to the State of Oklahoma legislature:

> The documentation assembled by The 1921 Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area.[12]
>
> The staggering cost of the Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. Nonetheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Riot.[13]

In the aftermath of the Riot, the State of Oklahoma and the City of Tulsa impeded the African American Riot survivors' attempts to rebuild their lives. Local officials attempted to block the rebuilding of the Greenwood community by adopting zoning restrictions to Greenwood that rendered reconstruction of the destroyed dwellings prohibitively expensive. When the zoning regulations were declared unlawful, the City of Tulsa refused to pay any restitution to the African American survivors of the Riot: the only restitution paid was to white gun-shop owners whose business had been looted. After the City of Tulsa refused to help the victims of this act of terrorism, many of the African American victims remained housed in tents through the fall and into the winter of 1921.

The State of Oklahoma and the City of Tulsa acted, in the wake of the Riot, to suppress all talk of the Riot as well as the survivors' attempts to seek legal redress. Efforts to seek relief from the court system were unsuccessful and futile. While some African Americans filed lawsuits at the time, over 100 of them were dismissed before

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[12] 74 Okl. Stat. Ann. §§8000.1.3

[13] Id.

even receiving a hearing in the State Of Oklahoma's courts. Of the two cases that were heard by the Court, one, filed by Mabel Allen, was dismissed before the jury deliberated, and the Oklahoma Supreme Court dismissed the other on appeal.

The legislature of the State Of Oklahoma, which adopted many of the Riot Commission's findings by statute in 2001, made specific reference to the "'conspiracy of silence' surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath." According to the legislature:

> Perhaps the most repugnant fact regarding the history of the 1921 Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This 'conspiracy of silence' served the dominant interests of the state during that period which found the riot a 'public relations nightmare' that was 'best to be forgotten, something to be swept well beneath history's carpet' for a community which attempted to attract new businesses and settlers.

The conspiracy of silence fell particularly hard on African American citizens throughout Oklahoma. Even those that fled Tulsa to other parts of the state were not allowed to speak of their experiences, and were not believed when they did. Many of the survivors and their families suffered a deep psychological scarring, as one of the purposes of the Riot and its aftermath — which lingers to this day throughout the African American community in Oklahoma — was to diminish the sense of security of all African Americans, to place them in a subservient condition, and to enforce a racial caste system that privileged whites and disadvantaged and demeaned African Americans. Many of the Riot survivors are still hesitant to talk about the events surrounding the Riot and its aftermath. Many of them still believe that the state and municipal government will punish them for discussing openly what happened during the Riot. Where one part of the community remains silenced, there can be no discussion of racial reconciliation in Oklahoma, and the stunted conversation on race that caught Justice Marshall's attention in Dowell as recently as 1991 is perpetuated from one century to the next.
The Riot Commission found that, to this day, Oklahoma, and in particular, Tulsa, remains racially divided.

The Riot victims did attempt to obtain redress in the aftermath of the violence. Nonetheless, those who filed suit found their cases held in legal limbo. The District Court unequivocally found that the State and City's actions precluded the plaintiffs from timely filing their claim for the approximately fifty years following the Riot:

> *[The] legal system . . . was openly hostile to them, courts . . . were practically closed to their claims, [the] City . . . blamed them for the Riot and actively suppressed the facts, [in] an era of Klan domination of the courts and police force, and the era of Jim Crow.* . . . Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the *intimidation, misrepresentation and denial that took place afterward. The*

> *political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights.*[14]

The Riot — by the State's own admission — stands out in American history of one of the worst examples of state-sponsored violence against an African-American community. The State Commission's own findings, incorporated by Statute, determined that because of the actions and inactions of government officials, as many as 300 African-Americans were killed; 1,256 African-American residences and businesses were burned to the ground; and that approximately $16,752,600 (in 1999 dollars) of property was destroyed.[15] As the State acknowledges, it was designed to send a message to all African Americans with "the goal [of] to 'putting African-Americans in Oklahoma in their place' and to 'push down, push out, and push under' African-Americans in Oklahoma."[16]

The State explicitly accepts that it "*ignored [its responsibilities] ever since [the Riot] rather than confront the realities of an Oklahoma history of race relations that allowed one race to 'put down' another race.*"[17] It has found that the City of Tulsa, conspired with it to suppress discussion of the Riot and actions seeking redress for damages suffered, and that the City, through its officials, is similarly culpable for the racially-motivated murder of up to 300 African Americans and the destruction of over 1,200 properties worth some $20,000 million in 2003 dollars.

Despite acknowledging moral culpability, the State of Oklahoma and the City of Tulsa have refused to compensate the victims of the riot.

4. The Courts Fail to Provide a Remedy

The African-American survivors of the riot attempted to have some legal remedy but as every judge has heard this case, at the federal level, district court, and the court of appeals, the courts really were not available to African-Americans and the Tulsa Race Riot survivors during this difficult time of race relations in America.

The merit of the Tulsa Race Riot case was recited with unmitigated elegance by Judge Ellison, who, though denying their claim for relief, stated the worthiness of their cause and how there were exceptions that should be applied to this case. Judge Ellison stated that:

> "There is no question that there are exceptional circumstances here. Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward.

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[14] Alexander, Civ. No. 03-133, Order at 21-22.
[15] 74 Olk. St. Ann. § 8000.1.2, 8000.1.3.
[16] 74 Okl. Stat. Ann. §8000.11.
[17] 74 Okl. Stat. Ann. §8000.16.

> The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights. The question is not a factual question of whether exceptional circumstances existed. They did."[18]

The District Court ruled, however, that despite these exceptional circumstances the survivors should have known at some time during the 1960s that the could file a lawsuit, and so denied the survivors' equitable estoppel, equitable tolling, and "extraordinary circumstances" arguments for suspending the statute of limitations. Rather, the District Court held that the survivors were sufficiently aware of the "necessary facts" to file suit in the "aftermath of the riot," and so had run out of time by 2003.[19]

After our lack of success with the District Court of Appeals in the 10th Circuit, which also recognized the merits of the case but denied relief, in a blistering dissent Judge Carlos Lucero, speaking on behalf of four judges, said the following:

> This case is not about tolling, it is about equitable tolling. ... Given the district court's indefiniteness regarding when equitable tolling was no longer appropriate, I suspect that there is no time when social conditions would have been different for the plaintiffs--no time when, on the court's reasoning, they could have brought their claim. That is, the court could always point to some earlier time when plaintiffs should have brought their claims--e.g., the naming of the Commission, the publication of Ellsworth's book, the passage of civil rights legislation, the decision in Brown v. Board of Education--all the way back in time until the racist conditions underlying the claim for equitable tolling would have foreclosed any such claims. Our equitable duties require more from us than to place plaintiffs in such an untenable position.[20]

After the lack of success before the District and Circuit Courts, we filed a petition with the Supreme Court which was denied on May 16, 2005.

In these instances, it is clear that these Tulsa Race Riot survivors deserve relief. When we first filed this lawsuit on their behalf, building on the change of circumstances as recounted in the Tulsa Race Riot Commission Report of 2001, and filing before the two-year statute of limitation, we were able to recite the specific claims that the clients were making. Four years have passed since we filed that lawsuit in February of 2003. Nearly half of the clients who we represented have since died and the numbers are only increasing.

5. The Need for Federal Intervention

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[18] *See* Alexander v. Governor of Oklahoma, Civ. No. 03-133, Order at 21-22 (2004).
[19] *See id.* at 22.
[20] Alexander v. Governor of Oklahoma, 391 F.3d 1155, 1159, 1163 (10th Cir. 2004) (Lucero, J., dissenting from denial of rehearing en banc)

The Tulsa Race Riot victims' case should not be viewed in an isolated context. When the courts have been unable to respond to the needs of its citizens, it has often taken the courage and the moral leadership of the executive and legislative branches of the government to address these travesties and miscarriages of justice. This great Congress stood forward through the efforts of Senator Robert Dole of Kansas, Republican, and Senator Daniel Inouye of Hawaii, Democrat, both WWII veterans, to pass the Civil Liberties Act of 1988, PL 100-383, 1988 HR 442, in order to:

> (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
> (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
> (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;
> (4) make restitution to those individuals of Japanese ancestry who were interned.
>
> The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

The Civil Liberties Act of 1988 provided the opportunity for Japanese-Americans who were placed in internment camps during the Second World War to receive reparations. By the same token, this Congress looking at the mistreatment of African-Americans who were farmers in the 20th Century and yet repeatedly saw their claims for support denied on the basis of race and not on merit, receive the benefit of congressional action to address those decades of disparity.[21] By the same token, it is imperative that this

[21] *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub.L. 105-277, 112 Stat. 2681-30, (codified at 7

Congress, sitting in the 21st Century more than 85 years after the Tulsa Race Riot, must rise to the occasion and address the ongoing needs of the Tulsa Race Riot survivors. They have been waiting patiently and praying diligently since May 31, 1921 that this nightmare they experienced would go away. They are still patient and still in prayer, they are still believing that justice will prevail and that individuals of good spirit and good heart will see the extent to which they have been wrongly denied their rights and will give them relief before they die.

We appropriately, as a nation, express remorse and deep sadness for the tragic death of innocent citizens in Oklahoma City on April 19, 1995. That incident has lead to the establishment of appropriate memorials, compensation for the victims, and punishment for those who were responsible.[22] As well, we have appropriately responded to the tragedy of the death of 3000 innocent Americans as a result of the terrorist acts of September 11, 2001. We are attempting to bring those responsible to justice to compensate those for their losses and to memorialize this tragic event of the 21st Century. I lost personal friends and acquaintances on September 11th and shall never forget that tragic day in America. By the same token, as we sit here and see 104-year-old Clark, 91-year-old Dr. Olivia Hooker, 91-year-old Wess Young, and the chronicler of their travels, Mrs. Edie Fay Gates and others, we must continue the work. Every lawyer who has worked on this case has done so without requesting or receiving compensation. We do the work because it is the right thing to do and because it is our moral obligation to defend those who are suffering, who are in need, who are neglected and who seek justice. We call on the House Subcommittee on Constitution, Civil Rights and Civil Liberties to give justice to the Tulsa survivors and to let them know that you, too, see that, no matter that this tragedy occurred long ago, we shall not forget nor will we allow it to be ignored as part of our responsibility.

U.S.C. §2297) (waiving statute of limitations). *See also* the Holocaust Victims Redress Act, PL 105-158 (1998 S 1564) which was enacted "[t]o provide a measure of justice to survivors of the Holocaust all around the world while they are still alive" by appropriating funds for distribution to Holocaust survivors.

[22] As a result of the need for federal monetary assistance to victims of the Oklahoma City bombing, Congress, in 1996, gave OVC the authority to access the Victims of Crime Act emergency reserve fund of $50 million to assist victims of terrorism and mass violence. The Antiterrorism and Effective Death Penalty Act of 1996 amended VOCA by adding 42 U.S.C. § 19693(b) to allow OVC access to the emergency reserve fund in both domestic and international terrorist incidents. The Department of Justice has paid out over $800,000 to the victims of the Oklahoma City Bombing for mental health care alone.

TIMELINE

Stage 1: Preparation for Riot
6:30 p.m. and 10:30 p.m. on May 31

6:30 p.m.: African Americans present at the courthouse were shot, some killed, and the rest driven out of downtown Tulsa and into Greenwood
7:00 p.m.-10:30 p.m.: Chief of Police deputized and armed about 500 white citizens
9:30 p.m.: Local National Guard hailing from Tulsa and the surrounding towns were mobilized at the request of the Mayor of Tulsa under the command of Lt. Col. Frank Rooney

Stage 2: Pitch Battle
10:30 p.m. May 31, 1921 until 3:00 a.m. June 1, 1921

Whites attempted to invade Greenwood from the south and west.
Two particularly intense battles were fought at Sunset Hill, north of the central section of Greenwood and at Standpipe Hill South of the central section.
2:00 a.m.: Local Guard repeatedly invaded Greenwood
2:00 a.m.: fierce gunfight erupted at the Frisco Railroad
3:00 a.m., Capt. Van Voorhis arrived to find the local Guard thus deployed and immediately started firing on Mount Zion church, a prominent church in Greenwood

Stage 3: Burning & Looting
5:00 a.m. until 10:30 a.m. June 1, 1921

5:00 a.m. A siren sounded and the white mob invaded in numbers, primarily from Archer Street in the south, looting, burning, and killing as they went
7:30 a.m., after a night of fighting, Capt. Voorhis began his first sweep through Greenwood, traveling east along Cameron Street into the center of Greenwood, then north along Greenwood Avenue, taking prisoners as they went.
8:00 a.m., Capt. Voorhis then returned south to Davenport Street, just north of Cameron Street, between Detroit and Greenwood, where the local Guard once again started searching "every house to the right and left for negroes and firearms."
At the same time, Capt. McCuen entered the northern part of Greenwood in a kind of pincer movement, working north and northeast from Sunset Hill. Throughout this process, the Guardsmen "captured, arrested and disarmed a great many negro men in this settlement and sent them under guard to the convention hall and other points where they were being concentrated."

June 1-June 4, 1921:
"During the first two days…120 graves [were dug] in each of which a dead Negro was buried. No coffins were used. The bodies were dumped into the holes and covered with dirt." Walter F. White, "The Eruption of Tulsa", The Nation, June 29, 1921
African-American Survivors kept in Detention Centers

Summer 1921-Winter 1921-22
African-American Survivors housed in Red Cross tents

1922-1932
1923: Governor Jack Walton declared martial law in Tulsa in an effort to curb the Klan's power.[23] He subsequently expanded martial law to throughout the state and then convened military tribunals to investigate the Klan's violence and the ways it used its power to stop prosecutions.[24] Governor Walton's actions are susceptible of several interpretations.

"Everyone agrees that within months of the riot Tulsa's Klan chapter had become one of the nation's most powerful, able to dictate its will with the ballot as well as the whip. . . . Everyone agrees that Tulsa's atmosphere reeked with a Klan-like stench that oozed through the robes of the Hooded Order. . . ."[25]

1997
House Joint Resolution 1035 (1997), the statute passed by the Oklahoma legislature and that created the Commission, waives the statute of limitations defense. That statute conceded that:

> "black persons of that era were practically denied equal access to the civil or criminal justice system in order to obtain damages or other relief for the tortious and criminal conduct which had been committed."

and that:

> "the Greenwood community and the residents who lived and worked there were irrevocably damaged by the tortious and criminal conduct that occurred during the Tulsa Race Riot; . . . and ... at the time of the 1921 riot

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[23] Sheldon Neuringer, *Governor Walton's War on the Ku Klux Klan: An Episode in Oklahoma History*, 45 CHRONICLES OF OKLAHOMA 153 (1967); Brad L. Duren, *"Klanspiracy" or Despotism? The Rise and Fall of Governor Jack Walton, featuring W.D. McBee*, 80 CHRONICLES OF OKLAHOMA 463 (2002-03).
[24] The conflict over the Klan had important political overtones. Members of the legislature opposed the Governor. He used the National Guard to prevent the legislature from meeting in special session and drawing impeachment charges against him. Walton, however, was successfully impeached in November 1923, following a special election that ratified the special session of the legislature.
[25] RIOT COMMISSION REPORT at 11, 47

ATTACHMENT

Changing Perception of the Tulsa Race Riot 1921 - 2001

1921	1923	1971	1982	1997	2001
"We find that the recent race riot was the direct result of an effort on the part of a certain group of colored men." - Final Report of the Grand Jury, Tulsa, June 1921	"Persons acting together "without authority of law." - Answer of Continental Insurance Co.	"almost simultaneously the black and white mobs began firing at one another. . . Pawn shops and hardware stores were immediately broken into, looted by both black and white mobs and stripped of firearms. . ." -Ed Wheeler, "It Happened in Tulsa"	"White rioters and onlookers were given a free reign of the city's streets while the predominantly white police force occupied its time imprisoning black citizens..." -Scott Fellsworth, Death in a Promised Land	". . .the assembly became unruly and riotous in its conduct and persons who were asked by law enforcement officials to disperse refused to do so. . ." -State of Oklahoma House Joint Resolution HJR1029	"Official reports and accounts of the time that viewed the Tulsa Race Riot as a 'Negro uprising' were incorrect. . . Vigilantes. . .under the color of law, destroyed the Black Wall Street of America." -Report by the Oklahoma Commission to study the Tulsa Race Riot of 1921

Mr. NADLER. Thank you, Professor.

The Chair will now recognize himself for 5 minutes.

Professor Ogletree and Professor Brophy, the facts having been well-established, the real question, and, in fact, I think the only question here is the question of the statute of limitations.

Now, we don't have a Federal statute of limitations. The courts have borrowed States' statutes of limitations. The courts have stated that equitable principles should be used for determining to what extent we will borrow the States' statutes of limitations.

Professor, could you place for us the bill before us would reopen for us in 5 years, very much like a toxic tort statute?

Mr. OGLETREE. Right.

Mr. NADLER. Could you place that for us in the context of what we have previously done or how courts have ruled reopening statutes of limitations in light of the fact that the courts were not open for so many years? And also elaborate what was significant about the 1960's in one of the court decisions.

Mr. OGLETREE. Well, thank you. Let me take the second question with Judge Ellison.

Judge Ellison, like the 10th Circuit, they both understood the magnitude of the travesty that happened at Oklahoma City. And they knew that, as one of the slides show, in the 1920's mayors, public officials, a lot of the elected officials were associated with the Ku Klux Klan.

And Judge Ellison said in unequivocal terms the courts were not open. They were not available at all. But his sense was at some point America had a civil rights movement. But as John Hope Franklin has told you, people who were born in 1990 had no idea that this happened in 1921. That is the issue.

There was no record of this until 2001. And that is what makes it so important. And that is why we filed the lawsuit. We filed the lawsuit within 2 years of having determined that this was necessary.

The 10th Circuit said an extraordinary thing for a court to say. They didn't say that the plaintiffs had no claim to bring the lawsuit. They said two important things. One, a book was written in 1982, a book about the Tulsa Race Riots. Perhaps the survivors, Dr. Olivia Hooker, perhaps Otis Clark, perhaps Wess Young should have read this book in 1982 and realized what happened and filed a lawsuit. The author of that very book testified and said, "You know what? What I wrote in 1982 didn't even address the scope of what happened. I didn't find out until I, Scott Ellsworth, became a witness."

Mr. NADLER. So in other words, the court was looking or thought it had found some hook——

Mr. OGLETREE. Something, some point——

Mr. NADLER. Some hook, the book, the civil rights laws of the 1960's, on which it said, after that, people should have known and should have—and the statute should have started——

Mr. OGLETREE. Indeed. What they were really saying is that, "We can't solve this because we are unable to." The report tells us this evidence was not disclosed. And this is a Committee appointed for the State of Oklahoma. And it gives you, Congress, a chance to look at this and give reasonable time.

My only concern is time because clients died last week. They are dying every week. Even with this 5-year statute of limitations, my hope and expectation is that it can be done sooner. Otis Clark is 104 years old. He has forgotten more than he has remembered.

Mr. NADLER. Obviously we want to do it as quickly as possible.

Professor, would you comment? Professor Brophy?

Mr. BROPHY. Mr. Chairman, thanks very much.

As you know, the statute of limitations is an artificial bar to something that would otherwise be a valid lawsuit. And along those lines, I would like to introduce my colleague, Suzette Malveaux's terrific article in the George Washington Law Review specifically addressing statute of limitations for old civil rights cases.

In terms of precedent, it strikes me as though one of the key precedents here is what you did for Black farmers in the Department of Agriculture case where you tolled the statute of limitations.

When you are thinking of things that go back further even than the Tulsa Race Riot, I might refer you to the California legislation restarting the statute of limitations for victims of the Armenian genocide where folks who had not had—whose relatives died in that tragedy and then never received compensation from insurance companies, the State of California restarted the statute of limitations.

Mr. NADLER. Thank you very much.

And my last question is really—Professor Brophy, again. Given the fact that this is grounded in 1983, among other things, that this is State involvement, that this is involvement by the Federal Government as well as the State and local governments.

Does that affect, in your judgment, the equities of tolling the statute?

Mr. BROPHY. I believe it does. And I think it affects it, makes it easier to restart the statute of limitations, in that this was done by the State and local governments. And it strikes me as though those folks have less of a claim to a statute of limitations.

We have statute of limitations to give artificial repose to individuals. And I think the claims are much less strong in the case of a government than private entities.

Mr. NADLER. Thank you very much.

The Chairman's time is expired. I will now recognize the distinguished Mr. Franks for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And I want to thank the panel for your very moving testimony.

As I said in my opening statement, I believe that the greatest challenge that we have in humanity is somehow recognizing each other in a way that carries with it the human dignity that is imparted to every person by God Almighty. I am convinced that that remains our greatest challenge even today.

There are examples throughout history that are replete with these kinds of tragedies. You know, in Nazi Germany we saw 6 million Jews murdered along with people of other groups as well that simply were looked down as inferior by this Nazi war machine. We saw in the whole worldwide tragedy of human slavery how something continued for thousands of years and that somehow

we as human beings were not able to recognize what a tragedy all of that was.

And we see it, in my judgment, today with abortion on demand. We don't recognize, I think, the loss of 50 million of our own children.

And I believe that all of us have some kind of historical reference in our own lives. And my own grandmother was a child of a Cherokee and talked often about some of the things that her mother had told her of the Trail of Tears.

And I think that the greatest way that we can honor the victims and even to somehow repay the victims is to use their tragedy to somehow better the human family now and in the future.

And quite honestly, Mr. Chairman, it is a hard subject for me because I am not sure that the bill that is considered here is the best way to do it, because it seems to me that it penalizes those who did not do this tragedy and ends up helping those that weren't the victims of the tragedy.

And that is a great concern to me because I believe if you apply the principles of this bill to all of the ones that I just mentioned, I guess we would just get lost. And somehow as a human family we have to come together and realize that at least we can say no more. It doesn't have to continue like this.

And so, I guess my question to you, Professor Ogletree, first is, are there any other persons who are responsible for the actual wrongs in Greenwood still alive today?

In other words, you know, according to my math, if they were of maturity age at the time, they would have to be around 104 years old. I know that we have one 104-year-old victim here today.

Are there any of those that were the perpetrators of this tragedy alive, as far as you know?

Mr. OGLETREE. No.

And the more direct answer to your question, Congressman Franks, is that—two things.

First of all, there were murders in 1921. There is no statute of limitation on murder, even though those responsible are no longer with us. But secondly, there are claims of descendants.

And this was State action. This was not just individuals. These were sheriffs deputizing people, going into pawn shops, gun shops, et cetera.

And the graphic tells you that even though—here is the issue, the catch-22. In 1921, they couldn't go to the court. They had to wait. Now that they have counsel, now that they have the evidence that was buried, now we are being told it is too late.

That is where Congress comes in. There is an equity and justice point here. I am not trying to prosecute someone who killed Otis Clark's relatives in 1921 or took Dr. Hooker's property in 1921. But the reality is that there was State action.

And we didn't prosecute anybody in 1988 with the Civil Rights Act that was passed by Senator Dole and Senator Inouye. They just said Congress has a higher moral duty to do something.

We didn't prosecute anybody because Blacks were denied their right to their farming subsidies. When you passed the congressional subsidy for them, no one was punished. That was not the issue.

The issue is, how do we correct a wrong before they die?

I mean, they are here today, and they have been here. And my sense is that we can have a wonderful, I think, theoretical argument about, you know, who to punish. But in some sense, those who are the successors have some obligation.

I think it was high-minded of the State of Virginia to express its regrets for slavery, as we heard from the State of Maryland. They didn't hold anybody as slaves, but the current generation said, "It is on our watch."

I thought it was important for President Bush to have the Tuskegee airmen there, to apologize and salute them. It was important for President Clinton to have the syphilis experiment men there to apologize.

At some point, somebody has to say, "I didn't do it, but it happened on my watch, when I had the authority, the moral authority to correct it."

So we can get into that trap of, "No one is there." But I think we can say, "Let's look back and solve it," in the sense it helps all of us and doesn't punish anybody but, in a sense, sets the record straight and, I think, achieves a greater goal for all of us.

Mr. FRANKS. Mr. Chairman, my time is up. But I would just like to express my agreement with the sentiments of Mr. Ogletree, that it is right and appropriate for those of us in later times to express regret for some of the tragedies that occurred in the past.

And I think, again, the greatest way that we express that regret is to make sure on behalf of those victims that such tragedies are not repeated.

Mr. NADLER. Professor, before I go into the next, let me—Professor Ogletree, is it not true that many of the descendants in lawsuits that might be brought are the State government and insurance companies, which are ongoing entities?

Mr. OGLETREE. That is exactly right.

Mr. NADLER. Thank you.

Now I will recognize the distinguished Chairman of the Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler.

I hope that your discussion with Trent Franks has made it perfectly clear that we are following a long tradition in terms of tolling the statute of limitations. This is not new information.

And I join Professor Brophy in asking unanimous consent that this tremendous article written by Professor Suzette Malveaux in the George Washington Law Review—which not only discussed the statute of limitations as a policy analysis, but applies it specifically to the Tulsa Riots of 1921 be submitted for the record.

Let me now turn. The second question I am going to ask after I have talked with Dr. John Hope Franklin is to Professor Ogletree in, where do we go from here? Because it is not over. Once we toll the statute of limitations—is only the very first step in the beginning. I have the confidence to believe that this Congress will act appropriately.

But before we come back to that, I wanted to ask Dr. John Hope Franklin about, just looking back on this 1921 tragedy, how was it created? How did it happen that so much hatred exploded and so much violence took place?

And would Tulsa be much different today if this riot had not occurred?

And are there other comparable race riots that you draw analogy between the Tulsa riot, Dr. Franklin?

Mr. FRANKLIN. Well, yes. One has to remember that this is a period of extreme violence. It can hardly be called civilized, the relationships of people from the beginning of the 20th century right down to the time of the riot in Tulsa. There had been riots in Washington and Chicago along with Texas, Rosewood and many other places in the country.

I think what is also interesting to observe is—and I have learned this from reading the journals, the newspapers and so forth in connection with something else—that you get a very remarkable degree of admission and contriteness on the part of even the Tulsa community in the months following the riot. You would have thought they would have come out and been pouring all of their largess on the people who were the survivors, except that after making these pious statements, nothing happened. They didn't do anything about it.

They threw things out of court that might have pursued justice in the long run. But what we need to remember is that this comes on the heels of enormous, enormous racist sentiment that is expressed even during World War I. It is to be remembered that Black soldiers who were in the war were not permitted to be a part of the United States Army in Europe.

They had to be attached to the French Army. And then having been attached to the French Army, being treated somewhat equally, then the United States doesn't want them back unless they can go through some sort of period of retraining so they can go back to their inferior status which they had occupied in the United States.

So we have got a climate of hostility, of barbarism that is widespread in the years from 1918—called the Red Summer of 1918 because there were so many riots—down through 1922 or 1923.

Mr. CONYERS. Thank you so much for putting that in perspective.

Let me ask Professor Ogletree, where else do we go from here? Let us assume we get the limitations period tolled.

Mr. OGLETREE. Well, I wish I had both been aware and able to answer that question 25 years ago because I would say we go back to Tulsa and we tell the stories. Thanks to the work of Don Ross and Edie Fay Gates, we have captured some of the testimony.

Edie Fay Gates has interviewed hundreds, hundreds of African-Americans who lost property, family who lost lives, businesses that were destroyed and have that record. But virtually every person that she has interviewed from the early times is now dead. And the numbers are staggeringly low.

So I also hope there is also not a false sense of security that we toll the statute of limitations but we can't help Otis Clark explain what happened to his home in 1921, you know, 87 years ago. Dr. Olivia Hooker documented all of her family's losses with great detail. And we have that. But we have a documentary on the survivors. And what is sad about it is that we started interviewing people in 2004, 2003. And we have dozens of survivors interviewed.

Eighty percent of the people who were interviewed to tell their story are dead, 80 percent. And so, I am hoping we can not only address this in terms of those who are living, but also find ways through descendants to establish some of these claims. And what we do know—we have the 42-block area. We know where they lived. And we know what was lost.

Mr. CONYERS. Yes, thank you, Dr. Franklin and Professor Ogletree.

Mr. OGLETREE. Thank you.

Mr. NADLER. The time of the gentleman is expired.

Mr. Pence is recognized for 5 minutes.

Mr. PENCE. Thank you, Mr. Chairman. And thank you for holding this hearing on this appalling moment in American history.

And I want to thank this thoughtful panel and particularly Professor Ogletree, with whom I had the opportunity to visit in chambers with the Chairman last week.

Thank you for your role over many years, Professor Franklin, yours in bringing to light this travesty, national travesty of justice.

I am especially anxious to have the opportunity to meet some of the vigorous survivors of this incident, who I know still continue to—were on CapitOl Hill this week and may be present today. And I would greet them as well.

Thank you for your example of persistence and determination in the interest of justice. I commend you. And I am inspired by that persistence.

Professor Ogletree, you and I had a chance to speak privately a little bit ago, but I thought it would be helpful to have you unpack some of these thoughts.

And, Professor Franklin, the same.

I find myself, as a student of American history, fascinated by what I like to refer to as progress interrupted in Black America.

And it seems like what happened in 1921 in Tulsa, Oklahoma, and as, Professor Franklin, you stated, happened elsewhere in the country, while we feel a sense of moral outrage because it was an incident motivated by and organized around racial enmity, but it seems to me that, as I said to you last week, Professor, it feels a bit more like envy than racism.

Madam Walker of Indianapolis fame is a great example of an entrepreneurial class in Black America that had within a single generation not only wrestled free from the shackles of slavery, but whose economic wealth was growing at a pace that significantly outpaced the broader population, according to most statistics from roughly immediately post-reconstruction to the advent of the New Deal.

Black America was expanding economically and aggressively. There was an entrepreneurial class.

And, Professor, it seems to me that I would love to get your sense because, as we think in this legislation about extending the statute of limitation, which is not without precedent, would be highly unusual to do, or, as some have suggested, whether a specific relief bill would be more appropriate in this case, whatever extraordinary relief the Congress would consider in this case, is it simply justified by the fact that this was an incident of barbaric racial violence that

claimed the lives of 200 African-Americans and the one square mile Black district in the city? Or was there an economic motive here?

Was this economic progress interrupted that was, if you will permit a gross analogy, thinly veiled under a sheet of sectarian racist sentiment?

Professor Franklin?

Mr. FRANKLIN. Well, I could throw the question back to you by pointing out—asking if Madam Walker had been White, would there have been some kind of resentment of her.

Mr. PENCE. Right.

Mr. FRANKLIN. I think the answer—if I may say so, I would answer that question by saying no; that she is a part of a contradiction. She is a part of a resentment that she cannot rise because the whole culture of this country, not in 1915 or 1916 when Madam Walker came on the scene, but for two centuries before that, we had had very carefully woven into our Constitution, into our legal system and everything the notion that the Madam Walkers of this world must not rise.

Mr. PENCE. Right.

Mr. FRANKLIN. They cannot. They cannot because they are not allowed to. It is contrary to the tradition, history, culture, law, everything of this country that she cannot—she has no business rising.

And I think that there might have been some sentiment like that in the Hookers' store, that, "What in the world was Mr. Hooker doing acting like he is not a subservient black person?" You see? He has got a store, and he has got goods in the store. He is acting out of order, that is not what he is supposed to be doing. He is supposed to be working for someone else. The experiences I have had, as a grown man over 80, of people looking at me and saying, "You are out of order. You are out of place."

The night before I got the Presidential Medal of Freedom, I was giving a party at my club, and I went down to see whether all of my guests had arrived. And when I got in, there was a woman, a White woman, who met me at the foot of the stairs. And she said, "Here, you go and get my coat." What was I doing there, except that I was there to serve her? You see?

You have to understand what this—it is deep. The culture is deep, and is abiding. It is persistent. It is still here, which I think we ought to recognize.

Mr. PENCE. And they are linked.

Mr. NADLER. Thank you. The gentleman's time is——

Mr. PENCE. They are linked. Thank you.

Mr. NADLER. The gentleman's time is expired.

The Chair recognizes the gentleman from Minnesota for 5 minutes.

Mr. ELLISON. Professor Franklin, I wonder if you could share your thoughts on this subject. There has been demonstration of contrition and sadness, and even it has been said perhaps one of the best things or perhaps the only thing we could do is just say "no more."

Given that there are survivors who are still around, there is still economic loss, tremendous economic loss that is still calculable, and

given that the historic record has been laid out, is simply saying "no more" good enough?

Mr. FRANKLIN. No. I would say "no more" is not good enough.

Mr. ELLISON. Professor Ogletree, do you have any views on this subject?

Mr. OGLETREE. I agree.

And I actually want to applaud Congressman Pence for raising the issue of compensation for the economic losses, because they were substantial. And I think that is exactly the direction. Whatever the cause may be, the economic losses were substantial.

Tulsa was booming in terms of the oil industry, the untold secret. Envy? Yes. Power? Yes. I mean, the Dreamland Theater, the Stratford Hotel—if you look at this community, it was thriving, thriving despite segregation, despite racism. This wasn't Tulsa. This was a Black segregated community that prospered economically.

And the jealousy was, "They have something that they shouldn't have." But everything they had was earned—not government, not public. This was earned dollars, earned property, earned businesses.

And there is no end to it. The only end to it, I think, is to try to figure out a way to both provide some form of compensation for the survivors and their descendants and also some correction of history.

The one great thing about the Civil Rights Act of 1988, it didn't just compensate people, but there was a public commitment to educate so that it never happened again.

And to put Congressman Franks' question in context—the Holocaust, 1930's; internment, World War II, 1940's; Black farmers, 1950's, 1960's, 1970's, 1980's and 1990's; Tulsa, 1921—it proceeded all—we have corrected all of the rest. But here is one that is unmistakably clear.

Oklahoma City, 1990, unmistakably clear; race riots in North Carolina. We are doing all of these things. But here is one that we have not addressed. And I think your efforts will make sure it is not enough. It is time to do it.

Mr. ELLISON. Yes. You know, Professor Ogletree, I just want to add that, you know, even in the great State of Minnesota, in 1921, three African-American workers in a circus were lynched. And it is a horrific tragedy that some people in Duluth, Minnesota, still talk about.

But I just want to ask Professor Brophy, do you believe that there are still substantial remedial measures that could be made available to the victims in this case?

Mr. BROPHY. Thank you, Mr. Ellison. Yes, I do.

And what I think is so critical is that there are people still alive who suffered the harm. Right? Oftentimes when the subject of reparations, for example, for slavery comes up, people say, "Well, nobody is still alive who was enslaved." What is so critical here and what we saw in the Civil Liberties Act of 1988 was that direct living connection.

We have the ability, I think, to restore something of that dreamland that existed for folks who made their way against the tide in Greenwood. And I hope either through this legislation or just direct remedial legislation will do that.

Mr. ELLISON. And perhaps let me just change the direction slightly. In this debate, not just here today but in other arenas, it is often said that, "Well, you know, the people who did this, we don't really know exactly who they are. Therefore, what can we really do?"

But could you explain to the panel, to the folks who might be listening, what difference it makes that the State was deeply and fundamentally implicated in this and this is not simply a matter of one private individual harming other private individuals? Could you draw the connection to the State?

Mr. BROPHY. Sure, right. The way in which people have spoken about this riot, including the 10th Circuit, was as an angry White mob. And I think what distinguishes the Tulsa riot from so many other instances is this is not a claim for general society reparations. This is a claim for something in which there has been specific, well-documented government actors—special deputies, the local police force working in conjunction with the local, not the out-of-town, the local units of the National Guard—led to the destruction of Greenwood.

And I think that is what distinguishes this. And that is some of the really important and new evidence that the Tulsa Race Riot Commission was able to put together, that this was the government doing this.

Mr. NADLER. Thank you. The gentleman's time is expired.

I now recognize the gentleman from Virginia for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Ogletree, let me just get a couple of quick questions just to make sure we understand what the bill does. The bill just extends, reopens the statute of limitations. And if it passes, that would not guarantee anyone's victory. It would only allow them to bring the case on the merits. Is that right?

Mr. OGLETREE. That is correct.

Mr. SCOTT. And the plaintiffs in the case are already identified. They have to have been in the original case and denied their rights——

Mr. OGLETREE. Well, the——

Mr. SCOTT [continuing]. To be heard.

Mr. OGLETREE [continuing]. Action that we filed was on behalf of all of the surviving plaintiffs and identifiable descendants as of 2003.

Mr. SCOTT. And so, is that list of people known?

Mr. OGLETREE. Yes, we have the documentation. Edie Fay Gates has done a tremendous job of compiling data.

And what is interesting—just to be clear about this—the vast majority of the survivors are not in Oklahoma. If you think about 1921 when their homes were destroyed, there was no place to live. There was no shelter. They are in California, they are in New York, they are in Texas. So they are all around the country. And we are trying to gather them.

Mr. SCOTT. But the list is known?

Mr. OGLETREE. That is exactly right.

Mr. SCOTT. And the defendants are insurance companies and local and State government?

Mr. OGLETREE. That is exactly right.

Mr. SCOTT. And if they are able to bring that case, they would have to show what the insurance companies didn't pay and what the governments actually did. Is that right?

Mr. OGLETREE. Right.

Mr. SCOTT. Now, could you explain if there had been no riot—well, because of the riot what the insurance companies were—unjust gains and what the plaintiffs actually lost?

Mr. OGLETREE. Yes. The Tulsa Race Riots Commission did a very thorough examination and found records that had been buried for decades to show who was insured, where they lived, the amount of loss and how the courts absolved the insurance companies back in the early 1920's based on actions by Buck Colbert Franklin.

John Hope Franklin's father was the lawyer trying to resurrect this in 1923. And the court dismissed all those claims. But the records from the early 1920's we now have. And it lays out many of the plaintiffs—not all, but many of the plaintiffs. And we have many of the descendants of those plaintiffs as well.

Now, here is the big problem. We have to be clear, though. I mean, on May 31, 1921, it explodes. June 1st—if you think about this, this is a war. This is a bomb. You can't go to the corner store. You can't go to your bedroom. You can't go to your law office to see a lawyer.

I don't know if we have a slide here, but Buck Colbert Franklin's—I mean, talking about the courage of the 20th century. His office was destroyed. His home was destroyed. He found a few law books left over and literally filed a lawsuit in a tent on the streets of Tulsa, Oklahoma, where he was to represent clients who came through.

And it shows John Hope Franklin's father in that context trying to figure out what to do. This is what was left. Think about a lawyer in 1921, no telephone, no office, literally taking a tent, finding books and sitting there. And that is what—and history—this is what reminds us.

We know what happened. We just haven't had a remedy. But I think those records will help us prove it in going forward.

Mr. SCOTT. And, Dr. Franklin, if there had not been a riot, could you tell what other opportunities people would have had in terms of inheritance, business opportunities, educational opportunities, how they would be better off today had the riot not occurred?

Mr. FRANKLIN. Well, I can only speculate, Congressman Scott. I don't think there is any doubt but that, with the energy that that Black community was already displaying, if there hadn't been the kind of interruptions which were brought on by the riot and the various activities connected with it, there is no question but that the professional people, the economic enterprisers and all the rest would have moved rapidly and upwardly in the whole order of the scheme of things.

I don't think there is any question but that if they had had the opportunity, without the interruption of the riot and so forth, they would have been infinitely better off in the next period, in the next decade, say, than they had been in the previous decade. I don't think there is any question of that.

Their energy and enthusiasm and wisdom and expertise that they displayed even after the riot suggests to me that if they had

had the opportunity without this kind of tragic interruption, they would have been far along on the road to prosperity and that sort of thing.

Mr. NADLER. The time of the gentleman is expired.

The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

Thank you. I always benefit from earlier questions. And I do find it sad to look at a middle-class wiped out long after the justice system was instructed to, in fact, support equal rights.

But in the case of equal rights, I have a line of questioning that I want to understand from a standpoint of the legislation.

I don't think any of us in this room have any question but that there was an injustice. And the injustice did not have—because of the times, because of the system—did not provide you all with a remedy within the time allotted within the statute.

But I have two questions. One is, if we assume for a moment that the State case, which you brought, expired and we cannot make that whole—this legislation doesn't try to preempt the State and tell them to do something. But from a Federal standpoint, if this legislation, which it doesn't appear to do, simply put back into place a venue for you to be made whole in Federal court for those State laws and Federal laws which were in effect in 1921, would you be satisfied?

Mr. OGLETREE. The answer is no. I think, as you can see, that some of the harm is both hard to ascertain and to prove, number one.

And number two, you are right in pinpointing the magnitude of it. Think about the Jewish families that Congressman Franks talked about. Your name is Finkelstein, and you are trying to prove that your family had losses, and they say there are 100 Finkelsteins. How do we know this is you? How can we prove it?

And it is a question of equity. We know you were there. We know you lost property. We know things were destroyed. And that is what happened. Black farmers—their records—all the records were destroyed when they tried to go into an office in Kentucky or North Carolina. And if they never filed your claim, there is no records there. So how do you prove it?

I think what——

Mr. ISSA. Sure. And I understand that. Although my time is limited, the question probably begs three follow-ups to maybe get to a full understanding.

There are injustices on the books. I happen to have a very large Native American group of tribes in my district. And the injustices within the Native American community are probably the only ones that the African-Americans look at and say, "They had it worse." They were exterminated. They were exterminated in mass quantities deliberately.

So when I look at the injustices, I look at a country which has historically tried to right the wrong. And we have done some through legislation. I don't believe we have ever done—I don't know of a precedent for it, and that is why I am asking. I don't know that we have ever said we are going to make a remedy available that wasn't available at the time, and we are going to say it because of the absence of a statute of limitation.

The remedies that were available in 1921 or remedies which were passed specifically envisioning a specific event, from what I can tell, have not yet been linked. In other words, the Civil Rights Act was not intended, discussed or created in order to deal with injustices of 1921 retrospectively. And that is my question.

This Committee has a very strong hook to the Constitution and wanting to look at how we can give you everything that we can give you to make this as just as possible but not cross that line. And I have concerns that are crossing the line by essentially saying we are going to give you rights under an act that was by no way, shape, or form ever envisioned at the time of the injustice.

Mr. OGLETREE. Professor Brophy can respond in a minute, but I want to show you a slide here from Judge L.J. Martin 2 weeks after the riot, so this is contemporary.

Mr. ISSA. No, look, I am the first to say, give you everything we can possibly give. My question, though, and in my limited time, is—and, Professor, maybe you can help me. I am looking for how we do this without opening Pandora's Box to essentially looking at everything forever that was done wrong by passing a subsequent and then retolling against it—and particularly when I look at Native Americans and reopening, there is no limit.

Please, Professor.

Mr. BROPHY. No, I understand. And that is why I think it is so critical that this is a discrete tragedy, right, where there was no—this isn't general societal reparations.

Mr. ISSA. Right.

Mr. BROPHY. This is very discrete, and people are still alive.

But what we are asking for is retolling the statute of limitations for civil rights acts that were on the books in 1921, just not given effect. Right? We sued under 1983, which you folks passed around 1871. So what we are asking for is our chance to have a hearing on statutes that we could not have at the time.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. NADLER. The time of the gentleman is expired.

The Chair recognizes the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. And I want to thank the Chairman for convening this important hearing and thank Mr. Conyers for introducing the bill.

I am almost mesmerized by the quality of the testimony this morning. I have heard Dr. Franklin speak many, many, many times. And I don't think I have heard him be more profound than he was in response to the question that Mr. Pence raised, in particular. We, in North Carolina, have reached the point where, if we are in a room with Dr. Franklin, we need to be listening rather than talking.

And so, I want to direct a general question to Dr. Franklin that will allow him to just talk to me because I am always trying to be in that position as much as I can.

One of the concerns that everybody will raise is a spin-off of the question that was last raised: Once we get on the slippery slope, what precedents are we setting for other situations?

There are obviously distinctions and similarities between what happened in Tulsa and in other localities around the country. Dr.

Ogletree referred to the incidents in Wilmington, North Carolina, for example.

How might we frame this issue to, number one, address the concerns about being on a slippery slope that creates a precedent for other situations, yet not foreclose the possibility that there may well be other situations that still cry out for a similar kind of analysis and the possibility of compensation or opening or waiving of statute of limitation?

And let me address that question to Dr. Franklin, Dr. Ogletree and Professor Brophy, who at some point in his testimony said that promises were made at the time to repair the community, and have the three of you kind of address that issue for me and the Committee's concern about the slippery slope.

Mr. FRANKLIN. Well, let me just say very briefly that it is my view that all of these situations are different. They have different causes. They have different outcomes. And so, you can frame your proposals to meet the needs of that particular situation.

What is interesting about this is that there was a time in the 1920's when there was widespread expression of willingness to face the problem and do something about it. If you read the papers in 1922 and 1923, it is amazing at the effort on the part of local press and people writing, speaking in the local press. It is amazing how much contriteness you get and how willing the community is to face up to this.

And then they shut down. I mean, it is real—it is a real shutdown. Nothing happens after about 1923 or 1924. And I think it was because there was this deliberate decision made. I don't know whether it was made by a corporate group, by the whole group or whether it was just reached, made by individuals.

But after that, you don't get anything else. It is stonewalling after that. And there is silence, silence, complete silence.

And I think that was not true in any other community that I know about in the post-riot period. But there was in this community so that the mayor who comes up in much, much later had never heard of it, never heard of it. And I think that is where it shut down.

Mr. NADLER. Thank you. The time of the gentleman is expired.

I now recognize the gentleman from Tennessee for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman.

I am in awe in being before you, Dr. Franklin. When I was a Vanderbilt student, your text, "From Slavery to Freedom," was one of the texts I had, and I have it on my bookcase in Memphis. And really, to be honest, I wondered if it was your father because you don't look old enough to have written a book when I was in college. But I guess that shows my age as well. [Laughter.]

Can you give us some background on the extent and the rise of the Klan and the strength they had in this area and in the South in the 1920's?

Mr. FRANKLIN. Well, of course, the Klan had a period of decline in the first part of the 20th century, and then they had a very great recrudescence and rise. In 1915 at Stone Mountain where they were really resurrected, and they reorganized. They were inspired, stimulated by, among other things, "The Birth of a Nation," the first film that came out that year that glorified the Klan of an

earlier period. So that they do—this is a period of great prosperity for the Klan.

In the late teens and early 1920's, that is when they flourished greatly. And it is this group already organized now in 1915, the very year I was born, that is ready, willing, able and anxious to put down the Blacks of Tulsa and of Rosewood and of other places in the 1920's. And the Klan is flourishing all during the 1920's, absolutely flourishing.

And I can remember seeing them parading and so forth. It is amazing. And it is so un-American. It is so anti-American. It is so—all of these things that we stand for. And they not only do that, but they are glorified in doing it and celebrated.

I can think of no other—I don't know that there is anything that could happen where they bring their children to lynchings, pass out the body parts as souvenirs and continue this kind of action in the face of what we ought to have in the way of law enforcement. There is no enforcement of anything in this period. And it is the Klan's day.

Mr. COHEN. If I remember my history in the 1920's, I think they elected some governors or might have come close to it. I mean, they hit a peak in the 1920's, did they not?

Mr. FRANKLIN. Yes. Yes. I would not be able to say that Governor So-and-So was elected by the Klan, but——

Mr. COHEN. Right.

I would just like to comment. And I know I have heard before people say, "Well, we can't make up for past grievances and we need to move on."

But it is kind of like, if you had a football game and you had one team and you didn't give them shoulder pads and you didn't give them cleats and you didn't give them helmets and they didn't have training and they didn't have Gatorade and the officials were crooked, and you played the game, and you played the game, and you played the game, and all of a sudden you realized it is getting near the end of the game and it is 72 to nothing, you go, "All right, this was a mistake. We are going to give you shoulder pads. We are going to give you real helmets. We are going to start to give you Gatorade and train you and all the right things. And we are going to have real good officials now," but it is 72 to nothing, and there is 3 minutes left. That is not fair.

And that is what you are saying when you say, "Well, we just can't make up for these. They happened in the past, but let us just let bygones be bygones, and let us start over now."

There are a lot of companies that are "So-and-So and Sons," or "So-and-So, So-and-So, So-and-So, So-and-So and Sons." But African-American people who were in Tulsa couldn't be that because their property and their businesses were destroyed. And they didn't have that opportunity. They didn't have capital going through generations to give them opportunities.

And statute of limitations are basically for the ordered society. It is for who is in control. It is for the defendant. It is never for the plaintiff. It is to give people who are liable a date that they can clean up their books and move on.

And this is such an horrendous case that there should be some way to get beyond the statute of limitations. And we need to do

that, because statute of limitations aren't for people who have been aggrieved; they are for people who were the aggriever. That is what they are all about. And that is what a lot of the system is about, is a defense bar.

So I am pleased that the Chairman of the Subcommittee has held this hearing and that Chairman Conyers has brought this bill. It has been edifying to me. And I am going to do what I can to follow the lead to see justice is brought forth.

And I thank you.

Mr. NADLER. Thank you. The time of the gentleman is expired.

I now recognize for 5 minutes the gentlelady from Texas.

Ms. JACKSON LEE. Let me thank the Chairman very much.

And let me thank the Chairman of the full Committee for a concise, constructive and forthright initiative through legislation.

If I might for a moment reflect on the crossroads of history and comment on the panel that is before us, because I think sometimes history crosses paths and we have choices to make in the direction that we travel.

Let me acknowledge Dr. Brophy because he comes out of a segregated South. And when I say that, he now teaches at the University of Alabama. And he is here before us to make an argument in support of relief, if you will, for those who have been aggrieved and makes one speechless about how they have been aggrieved.

Dr. Franklin, someone had mentioned how youthful you look, but how interesting it is that you are the son of a survivor or a son of one of those who, not only was at the cornerstone of helping those who had been grieved, but now you have come to be a premier historian for this nation and I might say for the world.

I do want to as well out of a moment of personal privilege acknowledge Dr. Hooker. And I will ask her the first question because she is a living survivor but yet the first African-American woman at the Coast Guard or joined the Coast Guard, but I note a meritus professor at Duke University School of Law. That is no short accomplishment.

And, Dr. Ogletree, Professor Ogletree, you come from the school of W.E.B. Dubois, however he could have gotten there. So I want to make note of this panel.

Dr. Hooker, let me ask you as I try to make sure that we understand that H.R. 1995, the legislation that Chairman Conyers has offered, really goes no further than what this body has been asked to do in times past. I don't think it goes any further than the 13th, 14th, and 15th amendment. And why I say this is that it is a pathway for seeking remedy.

There is nothing in this—this is not a private bill which says—and as we pass this, we will dispense certain dollars to these survivors or their descendants. Mind you, through 9/11, as my colleagues have said, we actually through a congressional action—and certainly, that was a horrific tragedy—actually dispensed or created a vehicle for monies to be dispensed.

So we have gone further than this legislation. I think it is very important to let everyone know that this is a four corners document. It ends on this page of the document. It says you can go to court.

Dr. Hooker, would you tell me again. You said you looked out the window, your mother showed you a gun, a machine gun with an American flag. Was that accurate? Is that what you said in your testimony?

Ms. HOOKER. That is what I said. And that is what we experienced. The machine gun captain, when he ordered us out of the house, said, "I can't protect you." But the guns and the bullets were hitting the house. He said he was shooting at the mob, but it was hitting the house and could have killed us.

Ms. JACKSON LEE. So you were confused because, whether or not he was part of the State action that we speak of, it was unclear because the bullets were hitting the house?

Ms. HOOKER. It was unclear to me why someone who was sent to protect you was not protecting you. And they took the men away. And my 8-year-old brother was one of the ones they interned before they turned the mob loose. In other words, they cleared out all the male population and locked them up, and then said to the mob, "There is nothing out there but women and children."

Ms. JACKSON LEE. And that was a State action, might I make it very clear. Dr. Hooker could testify to that if this bill was to pass.

Dr. Franklin, would you then respond to a, if you will, suggestion that we have made it, there are individual success stories in the African-American population, there are individual success stories in the population that sits before us, the survivors; why then would there need to be a remedy?

Mr. FRANKLIN. Well, I think there needs to be a remedy because the individual success stories do not explain the plight of these victims, you see. When you look at the victims, you have to think about the least that can be done to facilitate their progress or their survival.

And I think one of the things we often do or too often do in this country is to—it is to point to Booker Washington or whatever and say that why can't you do what Booker Washington did or why can't you do what someone else did that has risen. But you can't do that. That is not what the opportunities provide.

The least among us is the one that ought to be watched and cared for and looked after, not the successful ones, sometimes lucky, successful ones, but the least.

Mr. NADLER. The gentlelady's time is expired.

Ms. JACKSON LEE. Thank you.

Mr. NADLER. The time of the gentlelady is expired.

I now yield 5 minutes to the gentlelady from California.

Ms. WATERS. Thank you very much, Mr. Chairman. I am very appreciative for this hearing that you are holding.

And I would like to thank Chairman Conyers for authoring or sponsoring the legislation that would effectively waive the statute of limitations, I suppose, in this case. The 10th Circuit was just simply wrong.

And I would like to thank particularly Professor Ogletree for his persistence. He has stuck with this, along with Dorothy Tillman over there from Chicago. It is the kind of persistence and strength we don't see a lot of these days. It is just remarkable.

I would like to thank Dr. John Hope Franklin for his consistent, ever-present involvement in civil rights and justice.

And for all of the survivors, I am just in awe. These survivors have been on this trail for a long time. I was recalling earlier about the Supreme Court in the dead of winter when these aged survivors did not complain. They were there bundled up. I have been to Tulsa with Professor Ogletree. They are always there. They sit for hours. It is absolutely amazing.

And I thank all of you. And I am dedicated to the proposition that if you can do this, we can do this. And it makes a difference that now that we are in charge that we do everything that we possibly can to get some justice in this case.

Let me just say that there is a gentleman in the back of the room. He is a cab driver. His name is Mack. He drove me, picked me up on the corner this morning as I was coming to work. He said when he heard my voice, he recognized the voice.

He said, "Are you that lady from California? Do you know anything about this hearing that is going to be held today?" And I said, "Yes, I do. And I am on my way there." And he said, "Well, you know, I want to come, too." I said, "Well, park this cab and get over there and come on over here with us."

And there he is in the back of the room. And that is Mack who has been driving a cab. Mack has been driving a cab for 40 years. He is a third-generation Washingtonian.

But it is the Macks of the world who depend on us to make things right. I mean, you have got a lot of people out there who care about what happens with all of this. And so, I am glad that he is here. And I am glad that we are here and we are able to exercise our power and our influence.

Now, I was the chair of the Congressional Black Caucus when we negotiated with Janet Reno to waive the statute of limitations. I remember her coming to my office with Rahm Emanuel. I kicked Rahm Emanuel out of my office because he didn't think it could be done. And we convinced Bill Clinton and Janet Reno to move.

And as I understand it, it was when they came to this Committee that you created and helped to fashion, along with Sensenbrenner, the statute that was needed. We did it then, and we can do it again. We can do it again because there is nothing that stops the Federal Government from deciding that it can do it.

As I understand, everything taking a look at what has been put before us today, the 10th Circuit had the option. It did not exercise the option. And the reasons that they gave are not substantial, in my estimation, having reviewed this.

So from here, we get this out of Committee. We work it past the floor. We get our Senate with us. And we will put it on the president's desk. And we will stand with it until justice is done.

In closing, let me just say, again, Mr. Chairman, you have worked hard for so many years in doing the impossible. And, again, you have demonstrated your courage by taking up an issue that has been ignored for too long. And this will be part of your legacy and all of our legacy, I suppose. We know what the obstacles are that will be placed before us.

But, Mr. Ogletree, let me just say to you, Professor, if you may, just answer one question in this time limit that I have. What is it that made you so determined, so sure that this was the right thing to do? Why have you stuck with this so long and so hard?

Mr. OGLETREE. Congressman Waters, thank you so much.

It happened because—and Congressman Nadler, two of your constituents, Michele Roberts, one of the lawyers from New York is here. She worked with us. And Fay Anderson is also from New York. They are here for the hearing. I stuck with it because I walked into a room in 2003, saw these people. And no one had ever said, "I am sorry, I understand, and I want to help."

What makes it amazing is that I talked to Wess Young about what they received, and I made a mistake. I said they got a gold medal from the State of Oklahoma. He said, "No, first, it is not gold; it is brass. And it was given by the Black caucus from Oklahoma." That is all they have ever been given. And that, to me, is an American tragedy.

And if I have—when I went to Johnny Cochran, he put money in. Everyone saw this as something that—this is what our life is about. If we are here with God's grace to do something, these are the cases that matter, not the ones that make money or give us fame, but the unknown, the faceless, the powerless. That is what we do.

And I am so glad that 4 years ago when we filed this lawsuit—and we have lost, we have lost, we have lost, we have lost—to even be before Congress, to have you here present, to have a bill with their fingerprints on it, we have made it.

And we will use every ounce of our breath and our commitment to make sure that they in their lifetime can tell their children and now grandchildren, now great-grandchildren and great-great-grandchildren somebody heard them in the wilderness and gave them comfort. That is why I am here.

Mr. WATT. And finally, if I may, 30 seconds, Mr. Chairman?

Mr. NADLER. Without objection.

Mr. WATT. I don't know if the Committee had an opportunity to meet the survivors. Did they? And they know who is here with us today?

Mr. OGLETREE. Very briefly. But they are here.

Just one last time, Otis Clark, 104-year-old, is the oldest survivor. If he will stand.

Mr. WATT. One-hundred-and-four years old.

Mr. OGLETREE. Wess Young, 91-year-old survivor; Dr. Olivia Hooker, 91-year-old survivor; and John Hope Franklin, 92-year-old son of Buck Colvert Franklin; and Edie Fay Gates, who has been the chronicler of their work; and former Representative Don Ross, who has written it; and their current representative who lives in their—they live in the district, Jamar Shomate.

I think I have gotten everybody. Those are the folks. And the next generation, Demarial Solomon Simmons, the young man from Oklahoma who is going to help make this thing go forward.

Mr. WATT. Demarial, yes. Yes. Thank you.

Mr. OGLETREE. Thank you.

I would ask the Chairman, if we could—I have been showing the PowerPoint that describes much of the timeline. With your permission, I would like to have that in the record for this Committee to consider.

Mr. NADLER. Without objection.

[The information referred to is available in the Appendix.]

Mr. NADLER. The Chair thanks the witnesses and all the survivors and the other people who came today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can so that your answers may be part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Again, I thank all participants.

And with that, this hearing is adjourned.

[Whereupon, at 12:02 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation

Suzette M. Malveaux*

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* Assistant Professor, The University of Alabama School of Law. A.B., Harvard University, 1988; J.D., New York University School of Law, 1994. I am indebted to many for their support of this project. I am especially grateful for the invaluable feedback I received on prior drafts from Bryan K. Fair, A. Mechele Dickerson, Robert S. Westley, F. Michael Higginbotham, and Dean Kenneth C. Randall. A special thanks to Creighton Miller, who provided superb research assistance, and to my research assistants Richard M. Pittman, Aimee Self Pittman, and Brett Pouncey. I am grateful for the advice and support of Carol N. Brown, Daniel M. Filler, Susan P. Hamill, Dorothy A. Brown, Bob Cochran, and Judge Ivan Lemelle. Much thanks goes to the Tulsa litigation team, with whom I've represented the plaintiffs the past three years, especially Charles J. Ogletree, Michael D. Hausfeld, Alfred L. Brophy, Eric J. Miller, Michele A. Roberts, Adjoa A. Aiyetoro, Agnieszka M. Fryszman, and Lisa Thompson. Thank you to the University of Alabama and its alumni for their generous funding and to Associate Dean Alfreda Robinson, who invited me to present a draft of this Article at the Second Annual National People of Color Legal Scholarship Conference held at The George Washington University Law School in October 2004. And, of course, I am most grateful for the love and support of my family, especially my daughter Nailah Harper-Malveaux, my sister Suzanne M. Malveaux, and my mother Myrna R. Malveaux. This Article is dedicated to my parents, Dr. and Mrs. Floyd J. Malveaux, who have, through example, taught me the importance of respect, courage, and justice.

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I. Introduction

Over three-quarters of a century ago, one of the worst race riots in the United States took place. On May 31, 1921, up to three hundred African-Americans were killed,[1] thousands were left homeless,[2] and the predominantly Black Greenwood community was burnt to the ground by a white mob, deputized by the City of Tulsa and aided by the State of Oklahoma.[3] Many riot victims—traumatized and homeless—could not pursue legal recourse.[4] Those who did were stymied by a judicial system[5] infected by the Ku Klux Klan[6] and undermined by local and state government that hid evidence and promised restitution that never came.[7] The truth about the government's

1 Danney Goble, *Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, *in* OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 1, 12–13 (2001) [hereinafter TULSA RACE RIOT]; *see also* OKLA. STAT. ANN. tit. 74, § 8000.1.2–.1.3 (West 2002).

2 Robert L. Brooks & Alan H. Witten, *The Investigation of Potential Mass Grave Locations for the Tulsa Race Riot*, *in* TULSA RACE RIOT, *supra* note 1, at 123, 123 (stating that approximately 11,000 African-Americans lived in Tulsa in 1921, most of them in the Greenwood community); Goble, *supra* note 1, at 16 (1256 homes burned).

3 Goble, *supra* note 1, at 11–12; *see also* Scott Ellsworth, *The Tulsa Race Riot*, *in* TULSA RACE RIOT, *supra* note 1, at 37, 64 (stating that up to 500 white males were sworn in by the police as "Special Deputies," one of which had been given the specific instruction to "[g]et a gun and get a nigger"); 1921 Tulsa Race Riot Commission—Creation, No. 1035, 1997 Okla. Sess. Laws 2834 (describing "wide-scale attack" on Greenwood property and on innocent Greenwood men, women, and children; including "assault, aggravated assault, arson, battery, trespass against persons and property, false imprisonment, malicious destruction of property, attempted murder, murder, and manslaughter").

4 *See* Letter from Eric D. Caine, Dep't of Psychiatry, Univ. of Rochester Med. Ctr., to Michael D. Hausfeld, Attorney, Cohen, Milstein, Hausfeld, and Toll, Washington (Aug. 25, 2003) ("[F]ew would have had the psychological resources to vigorously pursue restitution in court" shortly after the riot, and such actions would have "seemed foolhardy to most in that era."), *appended to* Brief in Support of Defendant City of Tulsa's Motion to Exclude the Report and Testimony of Dr. Eric D. Caine at 11, 14–15, Alexander v. Oklahoma, No. 03-CV-133-E(C) (N.D. Okla. Nov. 19, 2003); *cf.* Hardin v. Straub, 490 U.S. 536, 544 (1989) (concluding that because inmates "loathe" to bring constitutional claims against supervisors while still confined, this justifies extending time period for filing).

5 *See* Goble, *supra* note 1, at 13–14 (noting that not a single criminal act has ever been prosecuted by any level of government and, in fact, the municipal government initially tried to impede Greenwood's rebuilding); *see also* tit. 74, § 8000.1.3 ("[T]here were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot.").

6 Goble, *supra* note 1, at 11 (concluding that "within months of the riot Tulsa's Klan chapter had become one of the nation's largest and most powerful" and that during the 1920's "many of the city's most prominent men were klansmen"); *see* Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 40–45 (2004).

7 *See Tulsa*, THE NATION, June 15, 1921, at 839 (quoting former Tulsa Mayor and head of

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complicity in the riot[8] did not surface until roughly eighty years later, with the historic publication of the Tulsa Commission Report ("Commission Report").[9] Although the government conceded moral culpability,[10] it refused to provide reparations to riot victims or their descendents, prompting them to file suit in the U.S. District Court for the Northern District of Oklahoma on February 24, 2003,[11] for violation of their constitutional and federal civil rights. The district court dismissed the case, concluding that the plaintiffs were barred by the expiration of the statute of limitations.[12]

The Tulsa case is not unique. Unfortunately, this pattern of racial violence,[13] and the concomitant denial of a legal remedy, has repeated itself in

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the welfare board, Loyal J. Martin, as stating, "Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny"); *A Grand Jury Riot Probe: And Tulsa Business Men Will Rebuild Negroes' Homes*, KAN. CITY STAR, June 3, 1921, at 1; *Tulsa Is Repentant Now*, KAN. CITY STAR, June 3, 1921, at 6; *Citizens to Help Rebuild "Little Africa,"* TULSA DAILY WORLD, June 3, 1921, at 8; *Tulsa Will*, TULSA TRIB., June 3, 1921, at 5; *Niles Blames Lawlessness for Race War*, TULSA TRIB., June 2, 1921, at 4 (quoting Alva J. Niles, President of the Tulsa Chamber of Commerce) ("The sympathy of the citizenship of Tulsa, in a great wave has gone out to the unfortunate law abiding negroes who became victims of the action and bad advice of some of the lawless leaders and as quickly as possible rehabilitation will take place and reparation made.").

8 *See* tit. 74, § 8000.1.2 (citing "strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence" and "even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area"); *see also* Goble, *supra* note 1, at 11–12.

9 *See* Goble, *supra* note 1, at 6–8; tit. 74, § 8000.1.2 ("Official reports and accounts of the time that viewed the Tulsa Race Riot as a 'Negro uprising' were incorrect.").

10 Goble, *supra* note 1, at 19; tit. 74, § 8000.1.6 ("The 48th Oklahoma Legislature . . . recognizes that there were moral responsibilities at the time of the riot which were ignored and has [sic] been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to 'put down' another race. Therefore, it is the intention of the Oklahoma Legislature . . . to freely acknowledge its moral responsibility on behalf of the State of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.").

11 The plaintiffs filed their First Amended Complaint on February 28, 2003, *see* First Amended Complaint at 1, Alexander v. Oklahoma, No. 03-CV-133-E(C) (N.D. Okla. Feb. 28, 2003), and their Second Amended Complaint on April 29, 2003, *see* Second Amended Complaint at 1, *Alexander*, No. 03-CV-133-E(C) (N.D. Okla. Apr. 29, 2003).

12 *See* Alexander v. Oklahoma, No. 03-CV-133-E, 2004 U.S. Dist. LEXIS 5131, at *37 (N.D. Okla. Mar. 19, 2004). The U.S. Court of Appeals for the Tenth Circuit affirmed the district court's dismissal based on similar grounds to the district court. *See* Alexander v. Oklahoma, 382 F.3d 1206, 1211 (10th Cir. 2004). The Tenth Circuit then denied the plaintiffs' petition for rehearing en banc. Alexander v. Oklahoma, 391 F.3d 1155, 1159 (10th Cir. 2004) (denying en banc review), *cert. denied*, 125 S. Ct. 2257 (2005). The dissent's arguments to the denial of en banc review mirror some of those made in this Article. *See id.*

13 For example, similar race riots have taken place in Wilmington, North Carolina (1898); Helena, Arkansas (1919); Elaine, Arkansas (1919); Atlanta, Georgia (1906); and Sherman, Texas (1930). *See* Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1061 (2003). Race riots were not limited to the South. They also occurred in Springfield, Missouri (1906); East St. Louis, Illinois (1917); Chicago, Illinois (1919); Washington, D.C. (1919); and Rosewood, Florida (1923). *See id.*; Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 94–96 (2004) (comparing to Tulsa); ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 111 (2002).

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communities throughout the United States. The Tulsa case is just one example of government-sanctioned collective violence going unpunished because of a procedural hurdle—the statute of limitations. Japanese Americans interned during World War II and Jewish survivors of the Holocaust have also struggled to clear this hurdle.

Despite the history of government-sanctioned violence, courts reject reparations claims; and many Americans support these decisions. People are incredulous and unsympathetic to the notion that African-Americans could present claims and seek relief for events that took place decades ago, if not longer. The courts—expressed recently in the Tulsa case—routinely dismiss such claims despite the ability to exercise their discretion otherwise.

Reparations litigation is at a critical juncture; the viability of a reparations lawsuit has once again become the focus of intense and serious debate. There is no dearth of scholarship on the broad issue of reparations,[14] but little has been written on the narrow but essential question of whether, as a

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[14] *See generally* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 51–56 (5th ed. 2004); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 3 (2d ed. 2003); SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 3 (Raymond A. Winbush ed., 2003); F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 167–72, 241–42 (2001); JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 97, 244, 260–66 (2000); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 1 (2000); Richard A. Epstein, *The Case* Against *Black Reparations*, 84 B.U. L. REV. 1177, 1177 (2004); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 685 (2004); Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277, 1277 (2004); Alfreda Robinson, *Troubling "Settled" Water: The Opportunity and Peril of African-American Reparations*, 24 B.C. THIRD WORLD L.J. 139, 139 (2004); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1269 (2003); Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 475 (2003); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 497 (2003); Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 409 (2003); F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447, 447 (2003); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 557 (2003); Ogletree, *supra* note 13, at 1051; Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 245 (2003); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 651 (2003); Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 659 (2003); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1689 (2002); Kevin Hopkins, *Forgive U.S. Our Debts?: Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2531 (2001); John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, NEW REPUBLIC, July 23, 2001, at 32; Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 677 (1999); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1657 (1999); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429, 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 477 (1998); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up*, 79 VA. L. REV. 863, 864 (1993); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 598 (1993); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323 (1987).

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matter of current public policy, it is legitimate to apply outmoded notions of the statute of limitations to such litigation while simultaneously refusing to consider modern bases for expanding permissible exceptions to the application of statutes of limitations. This Article fills that void, focusing on the limitations issues within the reparations debate.

Some limited work has been done on both sides. Proponents argue that reparations claims should survive limitations periods and be adjudicated on the merits because they fall within commonly recognized exceptions[15] or fall completely outside of law governed by temporal restrictions.[16] At the heart of arguments for the adjudication of claims so remote in time is the principle of restorative justice. Proponents assert that government has a duty to do justice and give restitution to victims of racial violence for their losses.[17] Opponents argue that reparations claims should be time-barred because their age complicates the identification of the parties, causation, and remedies;[18] compromises deterrence;[19] undermines repose;[20] and does not warrant

15 *See, e.g.*, Brophy, *supra* note 13, at 91–93 (discussing the unavailability of courts as a typical basis for tolling limitations period as compelling argument in Tulsa case); Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 41–43 (2004) (discussing the discovery rule for accrual of claims and equitable tolling in reparations context); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 26–27 (2004) (discussing the applicability of equitable tolling doctrine in reparations cases); Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 469–71 (2003) (discussing continuing violations as means of overcoming limitations restriction in reparations cases); Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview*, 58 N.Y.U. ANN. SURV. AM. L. 623, 626–29 (2003) (discussing continuing violations and equitable tolling as useful sources for tolling statutes of limitations in reparations cases); Matsuda, *supra* note 14, at 380–85 (citing applicability of "standard exceptions" such as disability, continuing wrong, and fraudulent concealment as bases for permitting reparations claims that would otherwise be time-barred).

16 *See, e.g.*, Brophy, *supra* note 13, at 93 n.29 (discussing legislation as an alternative means of extending the statute of limitations in reparations cases); Aiyetoro, *supra* note 15, at 469–71 (characterizing slavery as a crime against humanity and therefore not subject to statutes of limitations under international law); Ratner, *supra* note 15, at 626–29 (discussing treaties and legislation as useful sources for tolling statutes of limitations in reparations cases); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 621–22 (2003) (suggesting political programs as a means for addressing reparations claims).

17 *See* Forde-Mazrui, *supra* note 14, at 707–09; Martha Minow, *Foreword: Why Retry? Reviving Dormant Racial Justice Claims*, 101 MICH. L. REV. 1133, 1135–37 (2003); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1225–27 (2003); Yamamoto et al., *supra* note 14, at 1334–37.

18 *See* Epstein, *supra* note 14, at 1185 ("[T]he basic theory of the statute of limitations" is that "the passage of time is, in general, a reliable proxy for the increased complexity of events."); Hylton, *supra* note 15, at 38; Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 161–66 (2004) (describing how passage of time makes determination of duty, causation, and damages more difficult in slavery reparations cases).

19 *See* Hylton, *supra* note 15, at 38.

20 Epstein, *supra* note 14, at 1183; *see* Ogletree, *supra* note 13, at 1054–55 ("The victims' families and communities are told to 'get over it,' even by the citizens of the towns still traumatized by their history of racial and ethnic violence as well as by black and white critics of reparations around the country."). Opponents also make numerous arguments unrelated to statutes of limitations. *See* DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS

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equitable treatment.[21]

This Article argues that time-barring reparations claims is against public policy for several reasons. First, under existing policy rationales for statutes of limitations and their exemptions, such claims could survive. Second, the courts should exercise their equitable powers more broadly to permit reparations claims to be heard on the merits. Third, some of the values underlying statutes of limitations upon which the courts rely are outmoded and inapplicable in the context of reparations litigation. The Tulsa case is illustrative: the district court interpreted plaintiffs' injuries and their causation in an overly simplified and ahistorical manner, inappropriately held plaintiffs to a far greater standard than due diligence, and permitted defendants to avoid liability through deception.

Part II of this Article describes the underlying policy rationales for Anglo-American statutes of limitations. Part III illustrates the underlying rationales for exceptions to the limitations period and the doctrine used to implement such exceptions. Using the Tulsa case as an exemplar, Parts IV and V analyze the propriety of courts' dismissal of reparations as time-barred. Specifically, Part IV critiques the application of doctrine commonly used to exempt the limitations period, and Part V critiques the underlying limitations policies and whether they are served by barring reparations claims.

II. Policy Reasons for Statutes of Limitations

Although limitations periods have been a fixture in the American legal system for centuries,[22] in general, little modern scholarship has questioned the continued validity of their underlying purposes.[23] This void, recognized

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FOR SLAVERY 12–16 (2002); David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too*, FRONTPAGEMAGAZINE.COM, Jan. 3, 2001, http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153; *see also* Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1201–02 (2004) (categorizing the opposition to reparations).

21 Epstein, *supra* note 14, at 1184.

22 *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879); *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950); Harry B. Littell, *A Comparison of the Statutes of Limitation*, 21 IND. L.J. 23, 23 (1945) (noting that from the Limitation Act of 1623 to modern times, limitations periods have existed in England and the United States); Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 157–76 (1927) (describing history of law of limitations).

23 Wolin v. Smith Barney Inc., 83 F.3d 847, 849 (7th Cir. 1996) ("Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, [and] often misunderstood issues . . . ."); *Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1185 ("So firmly have statutes of limitations become imbedded in our law in the course of centuries that legislatures seldom reconsider them in the light of the various functions that they actually perform; the delicate process of adjustment is left to rationalization and interpretation by the courts."). For current scholarship on the purposes of statutes of limitations, see, e.g., CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, at 11–17 (1991); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 172–75 (2001); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454–55 (1997) (exploring limitations system in California). For prior scholarship on the purposes of statutes of limitations, see, e.g., Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 130–39 (1955); *Developments in the Law—Statutes of Limitations*, *supra* note

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by Justice Oliver Wendell Holmes at the turn of the twentieth century,[24] remains today. Justice Holmes's question, "what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"[25] continues to puzzle judges, scholars, lawyers, and lay persons today.

The dearth of scholarship on the rationales for limitations periods and their concomitant exceptions is troubling.[26] The absence suggests that inertia may be at work, a notion that Justice Holmes correctly found disturbing:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[27]

Are the federal courts currently implementing limitations rules where significant grounds for such rules have long since vanished? Reparations litigation is a perfect test case. It presents both the starkest example of a stale claim (i.e., it may be decades old or longer) and, at the same time, the most egregious circumstances under which equitable principles would conceivably apply (i.e., state-sanctioned violence and discrimination). Reparations litigation thus provides an important lens through which scholars may examine the policy rationale for our limitations system. After examining the most egregious cases, we may find the notion of permitting such cases to go forward far less incredible than first conceived. By examining the most common underlying policy rationales given for limitations law, we may come to realize that the goals the law is meant to serve are not being served—or, more important, that the goals themselves are less important relative to other societal values.

Central to limitations law is society's recognition that there must be tradeoffs for a just and orderly legal system to prevail.[28] Here, the tradeoff is between two countervailing goals: permitting claimants to resolve all claims substantively on the merits, on the one hand, and prohibiting untimely claims from being heard, on the other. Numerous policies are served by each goal.

Although particular statutes of limitations may serve specific purposes,[29] the general law of limitations has been justified by the federal court system as

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22, at 1185–86; Littell, *supra* note 22, at 38; John R. Mix, *State Statutes of Limitation: Contrasted and Compared*, 3 ROCKY MTN. L. REV. 106, 106–17 (1931).

24 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

25 *Id.*

26 This observation has not escaped the notice of others. *See* Ochoa & Wistrich, *supra* note 23, at 454 (noting surprise at the dearth of scholarship given importance of statutes of limitations in American and other legal systems for thousands of years); *Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1185.

27 Holmes, *supra* note 24, at 469.

28 *Cf.* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (describing the contrast between those rules valuing stability and those valuing flexibility).

29 The modern American limitations law consists of general statutes of limitations found in each state that fix time periods for various actions. *Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1179. There are also special statutes that govern specific actions between specific parties. *Id.* Federal statutes may have their own limitations periods, but where a cause of action arises under a federal statute enacted after December 1, 1990, which is silent on limitations, a general federal four-year statute of limitations applies. Jones v. R.R. Donnelley &

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serving primarily three major purposes: providing fairness to the defendant, promoting efficiency, and ensuring institutional legitimacy.[30]

A. Fairness to the Defendant

The courts articulate an overriding desire to make sure defendants are treated fairly as one justification for limitations law.[31] This desire is expressed primarily through three overarching mechanisms: (1) providing repose for the defendant;[32] (2) promoting accuracy in fact finding;[33] and (3) curtailing plaintiff misconduct.[34]

First, at the heart of the law of limitations, is the primacy of repose, or providing peace for the defendant. Claims, even those that are meritorious, are cut off at some arbitrary point in time to protect a defendant's well-settled expectations that he will not be held accountable for misconduct after a certain period of time has elapsed. The slate should be wiped clean[35] and the

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Sons Co., 541 U.S. 369, 372, 374 (2004) (discussing the four-year "catchall" statute of limitations, 28 U.S.C. § 1658(a)). For all other federal statutes silent on the issue, the court borrows the most analogous state statute of limitations and tolling rules if they are not inconsistent with the federal statute or its goals. *Id.* at 377–80.

30 The courts, however, have been underinclusive in their recognition of the myriad policy reasons for the law of limitations. *See, e.g.*, Ochoa & Wistrich, *supra* note 23, at 455 n.14. Few articles offer a broad framework for how the underlying policy rationales for statutes of limitations are organized, with the exception of Tyler T. Ochoa and Andrew J. Wistrich's *The Puzzling Purposes of Statutes of Limitation*, *supra* note 23. My Article sets out an alternative organizational scheme based on an examination of United States Supreme Court case trends.

31 Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants."); *see* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352–53 (1983) (noting that statute of limitations is designed to provide notice to defendant of adverse claim); *see also Developments in the Law—Statutes of Limitation*, *supra* note 22, at 1185 ("The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant.").

32 *See* Young v. United States, 535 U.S. 43, 47 (2002) (repose); Rotella v. Wood, 528 U.S. 549, 555 (2000) (same); Bd. of Regents v. Tomanio, 446 U.S. 478, 487 (1980) (protecting settled expectations); Del. State Coll. v. Ricks, 449 U.S. 250, 256–57 (1980) (protecting defendants from claims arising out of actions "long past"); Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("peace of mind"); United States v. Kubrick, 444 U.S. 111, 117 (1979); Guar. Trust Co. v. United States, 304 U.S. 126, 136 (1938) (repose); United States v. Or. Lumber Co., 260 U.S. 290, 299 (1922) (same); Wood v. Carpenter, 101 U.S. 135, 139 (1879) (same); Levy v. Stewart, 78 U.S. (11 Wall.) 244, 249 (1870) (same); United States v. Wiley, 78 U.S. (11 Wall.) 508, 513–14 (1870) (same); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868) (same); Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) (same).

33 *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (preservation of evidence); *Tomanio*, 446 U.S. at 487 (reliability of witness testimony); *Kubrick*, 444 U.S. at 117 (protecting against "loss of evidence"); *Or. Lumber Co.*, 260 U.S. at 299 (statutes actually "supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary"); *Wood*, 101 U.S. at 139 (preservation of evidence); Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 70 (1873) (same); *Riddlesbarger*, 74 U.S. at 390 (same); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538 (1867) ("[D]eficiency of proofs aris[e] from the ambiguity and obscurity or antiquity of transactions.").

34 *See* Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874) (preventing fraudulent claims by plaintiff); *Riddlesbarger*, 74 U.S. at 390 (promoting due diligence); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 295–96 (1866) (protecting defendant from "unjust and harassing litigation").

35 *Developments in the Law—Statutes of Limitation*, *supra* note 22, at 1185.

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defendant provided repose.[36] "Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber . . . ."[37]

Repose is attractive because it protects everyone, in that each individual is a potential defendant—the innocent and guilty alike—and therefore everyone benefits from immunity from suit.[38] Protecting repose also advances larger institutional interests that implicate economic, political, and social relations. Defendants, for example, benefit greatly from the knowledge that they are immune from suit and their potential concomitant financial obligations.[39] With a limitations system intact, institutions can engage in commercial transactions unencumbered by the risk of litigation and able to structure and plan their affairs.[40] Given the greater interdependency and globalization of individuals and institutions today, repose plays an even more significant role in providing stability and certainty on a macro level.[41]

Second, statutes of limitations are designed to favor the defendant by requiring the plaintiff to bring his claim early enough to enhance the accuracy of the evidence. Plaintiffs are not permitted to revive claims so old that the "evidence has been lost, memories have faded, and witnesses have disappeared."[42] This prohibition stems from the notion that it would be fundamentally unfair for the plaintiff not to give the defendant sufficient notice to properly defend himself.[43] This policy rationale is founded on the logical premise that over time evidence deteriorates; the longer a plaintiff waits to bring a case, the greater the likelihood that evidence will be compromised:

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36 "Repose" is defined as "freedom from something that disturbs or excites: CALM, PEACE, TRANQUILITY." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1993). Some scholars have chosen to define "repose" for purposes of statutes of limitations as the composite of four concepts: "(a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims." Ochoa & Wistrich, *supra* note 23, at 460; *see also* BLACK'S LAW DICTIONARY 1327 (8th ed. 2004) ("Cessation of activity; temporary rest").

37 Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944). One scholar suggests that this emphasis on cultivating peace of mind stems from the early concept of amnesty and from Western cultural values rooted in Christianity—values such as forgiveness and reform. Ochoa & Wistrich, *supra* note 23, at 460 n.34, 460–61 (citing HENRY THOMAS BANNING, A CONCISE TREATISE ON THE STATUTE LAW OF LIMITATION OF ACTIONS 2 (London, Steven & Haynes 2d ed. 1892)); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 81 (Cambridge Univ. Press 1923) (1895).

38 Ochoa & Wistrich, *supra* note 23, at 460–61 & n.34.

39 *See id.* at 466–68; *see also* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 672 (1986) ("A sound system of rights resolves [conflicts] early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption.").

40 *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879); 1 CORMAN, *supra* note 23, § 1.1, at 16 ("Certainty and finality in the administration of affairs is promoted.").

41 Davila v. Mumford, 65 U.S. (24 How.) 214, 223 (1860) (noting repose for "society").

42 *Order of R.R. Telegraphers*, 321 U.S. at 348–49.

43 *Id.* at 349 ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."); Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965).

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> The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to impair the accuracy of the fact-finding process . . . .[44]

Consequently, as the United States Supreme Court concluded in *Wood v. Carpenter*,[45] at some point the plaintiff's delay forecloses her cause of action altogether: "While time is constantly destroying the evidence of rights, [statutes of limitations] supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."[46]

Third, the limitation of actions ensures fairness towards the defendant by monitoring the plaintiff's conduct. Limitations law tries to do this by: (1) preventing fraud;[47] (2) promoting diligence;[48] and (3) leveling the playing field between the parties.[49]

First, statutes of limitations seek to protect the defendant from fraudulent claims by making it harder for plaintiffs to file claims based on evidence whose accuracy cannot be checked. The presumption underlying this policy is that the older evidence is, the harder it is to verify. Thus, if there is no restriction on when a plaintiff may file, she may intentionally file a frivolous claim remote in time, knowing that its frivolity cannot be proven. Others—such as witnesses—may engage in revisionist history, knowing that their false testimony cannot be easily challenged.

Second, although the courts recognize promoting diligence on the part of the plaintiff as an underlying goal of limitations law, they are divided over whether this goal is designed to discourage apathy or to enforce other collat-

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44 Bd. of Regents v. Tomanio, 446 U.S. 478, 487 (1980), *modified on other grounds by* Wilson v. Garcia, 471 U.S. 261, 276 (1985); *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979) ("[Statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) ("[Statutes of limitations] afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.").

45 Wood v. Carpenter, 101 U.S. 135 (1879).

46 *Id.* at 139.

47 Pickett v. Brown, 462 U.S. 1, 14–15 (1983); Mills v. Habluetzel, 456 U.S. 91, 98–99 (1982); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874) (preventing fraudulent claims by plaintiff); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538 (1867).

48 *See* Rotella v. Wood, 528 U.S. 549, 550, 555–58 (2000) (encouraging prompt prosecution); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (per curiam) (promoting diligence); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352–53 (1983) (statute of limitations designed to "prevent plaintiffs from sleeping on their rights"); Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980); *Kubrick*, 444 U.S. at 117 ("encourage the prompt presentation of claims"); *Burnett*, 380 U.S. at 428 (promoting plaintiff diligence); Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (due diligence); *Wood*, 101 U.S. at 139 (due diligence); *Hanger*, 73 U.S. (6 Wall.) at 538.

49 *See* Ochoa & Wistrich, *supra* note 23, at 484–85.

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eral goals.[50] Statutes of limitations may be designed to "stimulate to activity and punish negligence."[51] The courts seek to promote the cultural value of diligence on the part of the plaintiff. As Justice Holmes observed, "[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."[52] Therefore, limitations law is punitive and normative in nature.[53] Statutes of limitations may also be designed to ward against dilatory conduct only as a means of protecting other interests, such as repose and evidence preservation.[54]

Requiring plaintiff diligence may also have the collateral effect of deterring defendant misconduct. To the extent that prompt enforcement of the substantive law promotes such deterrence,[55] encouraging plaintiff diligence makes sense. Given that plaintiffs are often relied upon as private attorneys general to enforce substantive rights, a policy requiring plaintiffs to file quickly enhances deterrence objectives.[56]

Third, the limitations law aims to equalize the opportunity for defendant and plaintiff to prevail in litigation. This is done by requiring the plaintiff to give the defendant sufficient notice to gather evidence while it is still fresh, thereby maximizing the latter's ability to mount the best defense possible.[57] At the heart of this policy is the concern that plaintiffs will engage in what

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50 *See Tomanio*, 446 U.S. at 488–89.

51 *Wood*, 101 U.S. at 139; *see also Crown, Cork & Seal Co.*, 462 U.S. at 352 ("Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights."); Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348 (1943) ("Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber."); 1 HORACE G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS 8–9 (4th ed. 1916) ("The statute of limitations . . . is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof.").

52 Holmes, *supra* note 24, at 476.

53 *See* Ochoa & Wistrich, *supra* note 23, at 489–90; *see also* Nathan Kahan, *Statutes of Limitations Problems in Cases of Insidious Diseases: The Development of the Discovery Rule*, 2 J. PROD. LIAB. 127, 136 (1978) ("[S]tatutes of limitations are today viewed as punitive, as opposed to protective. Their primary purpose is considered to be punishment for the slumbering plaintiff and not protection for yesterday's wrongdoer.").

54 *See* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 981 (1988) ("This explanation for statutes of limitations can only be justified as an instrument for furthering one or more of the [other] purposes . . . . Unless the indolence of the plaintiff has somehow threatened the quality of the evidence available at trial or intruded on a potential defendant's repose, no purpose, other than generally punishing the slothful, is served by barring the claim.").

55 *See* Ochoa & Wistrich, *supra* note 23, at 492–93; Hardin v. Straub, 490 U.S. 536, 543 (1989).

56 *See Hardin*, 490 U.S. at 543; *see also* Ochoa & Wistrich, *supra* note 23, at 492 n.175 (citing Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868) ("The policy of these statutes is to encourage promptitude in the prosecution of remedies.")). Of course, deterrence is based on various other factors, including "the level of enforcement, the accuracy of adjudication, the severity of punishment, and the promptness with which punishment is imposed." Ochoa & Wistrich, *supra* note 23, at 492–93.

57 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims."); Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations . . . recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim.").

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Professor Ochoa and Judge Wistrich cleverly call "time shopping."[58] That is, plaintiffs, when given the chance, will purposefully gather helpful evidence in preparation for filing suit, while unsuspecting potential defendants will discard, disregard, or fail to preserve evidence helpful to their defense.[59]

B. Efficiency

At the center of limitations law is the desire not only to protect defendants, but to promote efficiency in our legal system.[60] The objective is not lofty; it is very pragmatic. Statutes of limitations are justified as efficient because they: (1) reduce costs; (2) clear dockets;[61] and (3) simplify judicial decisions.

First, limitations periods reduce transaction costs brought about by evidentiary concerns. In general, the more remote in time a claim is, the greater those concerns may be. The policy rationale for limiting claims based on time is that stale claims cost more—in terms of time, money, and resources—to gather the relevant evidence and to resolve related admissibility issues.[62] For cases involving very old claims, the cost of finding witnesses, documents, and other reliable evidence to reconstruct the past may be exorbitant or, even worse, prohibitive.

Limitations law may also reduce the costs associated with uncertainty.[63] For example, in the absence of a limitations period, an institutional defendant may pay more for liability insurance than it would otherwise.[64] Such an allocation of resources may be unnecessary and better spent elsewhere. In the face of uncertainty, a defendant might also incur significant costs preserving and retaining documents over a long period of time, in case such documents will be needed as evidence in future litigation.[65] This, too, is inefficient.

Second, statutes of limitations are being used as a means of alleviating the burgeoning dockets the federal courts are laboring under today.[66] Belea-

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58 *See* Ochoa & Wistrich, *supra* note 23, at 484.

59 *See id.* at 484–85.

60 *See* 1 CORMAN, *supra* note 23, § 1.1, at 16 ("Judicial efficiency is the reward when these statutes [of limitations] produce speedy and fair adjudication of the rights of the parties.").

61 *See Hardin*, 490 U.S. at 543 (discussing balance between interest in disposing of litigation as quickly as possible and allowing claims to be heard on the merits); Davila v. Mumford, 65 U.S. (24 How.) 214, 223 (1860) (noting that one goal of statute of limitations is "preventing litigation").

62 *See* Ochoa & Wistrich, *supra* note 23, at 480–81; Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1182 (1986) ("The passage of time is positively correlated with both of the costs just identified: the expense of litigation and the error rate."); Peter V. Letsou, Comment, *A Time-Dependent Model of Products Liability*, 53 U. CHI. L. REV. 209, 227 (1986) ("[A]ny liability rule . . . becomes more costly and difficult to enforce over time. The passage of time magnifies uncertainty and evidentiary problems."); Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 534 (1984) ("[D]elay leads to decay of evidence, blurs the chain of causation, adds multiple defendants, and hence increases litigation expense.").

63 *See* Ochoa & Wistrich, *supra* note 23, at 468–71.

64 *See id.* at 469.

65 *See id.* at 470–71.

66 This, in fact, is not a new concept. The Supreme Court has long recognized the role statutes of limitations can play in preventing litigation. *See Davila*, 65 U.S. at 223 (in the context

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guered by heavy case loads, the courts[67] may find reprieve in being able to dismiss outright some cases solely on procedural grounds.[68] Statutes of limitations thus serve as a clearinghouse, reducing the number of filings in the court system.

Moreover, statutes of limitations are used to reduce the number of undesirable claims—such as those that lack merit or curry disfavor with the legislature.[69] Courts justify eliminating stale claims under the long-held belief that such claims are more likely to be unmeritorious than those brought on time: "Statutes of limitation . . . are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand, creates, therefore, a presumption against its original validity, or that it has ceased to subsist."[70] The courts presume that if a plaintiff sincerely believes that his case is strong and important, he will be more likely to bring it quickly than to delay. The legislature may also enact a short limitations period in an attempt to discourage litigants from pursuing certain types of claims.[71] Rather than changing the substantive law, the legislature may instead use procedural hurdles—such as a limitations period—to discourage such claims. A strict limitations period will have the effect of barring numerous claims and clearing the federal dockets.

Finally, statutes of limitations promote efficiency by creating an easy way for courts to determine what claims may be heard. Having a bright-line rule is simple, fast, and predictable. By taking the guesswork out of the court's determination, the judiciary's limited time and resources can be spent elsewhere. The legislature's enactment and the courts' enforcement of limitations periods provide administrative ease[72] essential to the smooth functioning of an increasingly complicated legal system.

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of adverse possession, identifying one of the purposes of statutes of limitations as "preventing litigation").

67 *See, e.g.*, Rothensies v. Elec. Storage Battery Co., 329 U.S. 296, 302–03 (1946) (describing tolling as a "menace to the statute of limitations" and expressing concern that tolling statute for taxpayers seeking tax recoupment remedy "would depend on diverting the litigation to the district courts").

68 *See* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) ("[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."). This phenomenon is taking place in other ways as well. The Court's preference for enforcing predispute arbitration clauses and encouraging settlement, for example, also reduces the volume of litigation on procedural grounds.

69 *See* Ochoa & Wistrich, *supra* note 23, at 495–97.

70 Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 70 (1873); United States v. Wiley, 78 U.S. (11 Wall.) 508, 513–14 (1870) ("Statutes of limitations . . . are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue."); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868); *see* 1 CORMAN, *supra* note 23, § 1.1, at 13 ("When no attempt is made in a reasonable time to enforce a demand, it is likely that a judicial presumption will arise against the original validity of the claim or its continued existence."); Green, *supra* note 54, at 1003 n.164 ("The assumption underlying this claim is that those with meritorious claims will be anxious to pursue them and will therefore file suit promptly.").

71 *See* Ochoa & Wistrich, *supra* note 23, at 499–500.

72 *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 275 (1985) (discussing "federal interests in uniformity, certainty, and the minimization of unnecessary litigation"); *Rothensies*, 329 U.S. at

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A bright-line rule that prohibits claims after a certain date provides the parties and the courts with structure and clarity.[73] Everyone is clear about the rules of engagement, and plaintiffs will not conceivably "waste" the defendant's and the court's time by pursuing a claim remote in time. In the absence of a concrete deadline, the courts would be free to decide whether a claim is too remote in time based on political or spurious rationales. Left to its own devices, the court is unchecked by the legislature, raising separation of powers concerns. There is a risk that if the bases for tolling are expanded too much, the exception will swallow the rule.

In fact, the judiciary endorses the law of limitations for expedience's sake, even where this results in injustice:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.[74]

Thus, from a cost-benefit analysis, statutes of limitations serve an important utilitarian function; they operate as gatekeepers—permitting timely claims in and keeping untimely claims out of the legal system. Limitations periods create certainty that reduces transaction costs and saves time and scarce resources.

C. *Institutional Legitimacy*

An unspoken yet important rationale for limitations law is its legitimizing function.[75] Statutes of limitations attempt to assure the public that decision making is rational. The courts permit claims to go forward on the basis of clear rules rather than prejudice or excessive discretion. "[S]trict adherence to the procedural requirements" enhances an "evenhanded administration of the law."[76] To the extent that the public believes that limitations law serves important and legitimate goals (such as bolstering the reliability of evidence, preventing fraudulent claims, and curtailing judicial waste), limita-

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301 (prohibiting a taxpayer from seeking recoupment of claim for tax refund long after statute of limitations had expired was an "almost indispensable element of fairness as well as of practical administration of an income tax policy").

73 *See* Young v. United States, 535 U.S. 43, 47 (2002).

74 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *see also* United States v. Kubrick, 444 U.S. 111, 125 (1979) ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."); Kavanagh v. Noble, 332 U.S. 535, 539 (1947) ("[P]eriods [of limitation] are established to cut off rights, justifiable or not.").

75 *See* Ochoa & Wistrich, *supra* note 23, at 481–83.

76 Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) (per curiam) (quotation omitted); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 108 (2002).

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tions law reinforces and strengthens the legal system's institutional legitimacy.[77]

In summary, the reasons for statutes of limitations are varied and complex. Admittedly, the rationale for the law of limitations is complicated and fails to be neatly categorized.[78] The controversy over the effect of limitations law, especially in the context of reparations, continues to perplex. As a result, the courts and Congress have carved out numerous exceptions to the application of limitations periods. Part III sets forth the major underlying policy rationales given for exempting certain claims from time bars.

III. Policy Reasons for Exceptions to Statutes of Limitations and the Mechanisms for Their Implementation

A. Policy Rationales for Exceptions to Limitations Periods

Notwithstanding the myriad benefits of limitations law, deeming claims to be time-barred creates angst within the Anglo-American legal system for a host of reasons. First, statutes of limitations deprive citizens of one of the most fundamental rights upon which our legal system is based—the right to be heard. The Supreme Court has long acknowledged the primacy of this value, established by the United States Constitution: "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . . ."[79] Ask any citizen what he or she expects from the legal system, and the answer will be his or her proverbial "day in court."[80] So entrenched is this notion of entitlement that deprivation of access to the court system on procedural grounds seems practically un-American. Depriving someone of the opportunity to be heard undermines fundamental notions of fairness and due process that form the cornerstone of the legal system. As the Supreme Court recognized at the beginning of the nineteenth century in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[81] Exemptions from limitations law thus protect a citizen's opportunity to vindicate his rights.

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77 Limitations law also discourages courts from retroactively applying current legal and moral standards on a defendant's past conduct, which may be perceived as unfair to the defendant. *See* Ochoa & Wistrich, *supra* note 23, at 493–95.

78 *Chase Sec. Corp.*, 325 U.S. at 313.

79 Truax v. Corrigan, 257 U.S. 312, 332 (1921); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to heard."); *see also* Foman v. Davis, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) ("[There is] *intrinsic* value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her.").

80 *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 6.7, at 311 (4th ed. 1992) ("Another characteristic American value is the right to have one's say, specifically, to have one's 'day in court.'").

81 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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The injustice of not having access to the court system because of an arbitrary cutoff is particularly acute where a claim is meritorious. Denying a claimant relief where moral culpability has been established violates the fundamental concept that "for every wrong there is a remedy."[82] The notion of applying a time bar—where the plaintiff has been diligent and the defendant has not been prejudiced—seems illogical and unjust.[83] Not surprisingly, the courts have considered the merits of stale claims when determining whether to exempt them from limitations periods.[84] Such consideration, however, is fundamentally unfair to the defendant because he risks having to defend himself with unreliable evidence—one of the very things the limitations period is designed to avoid.[85] The courts must pick their vice: unfairness to the aggrieved plaintiff or unfairness to the culpable defendant. When confronted with this choice, some courts may understandably prioritize the injured party over the wrongdoer and permit remote claims to escape the time bar.[86]

Second, exemptions from statutes of limitations ensure that procedural mechanisms do not supercede the enforcement of substantive law. A fundamental objective of the Anglo-American legal system is that disputes be resolved on their merits and not on procedural grounds.[87] Where this is not the case—and the merits are subordinated to "technicalities"—a collective groan is often heard.[88] Exemptions from the statutes of limitations are important because they ensure that the substantive law is being enforced and that misconduct is deterred. Cutting off meritorious claims because of a time bar risks underenforcement and lack of deterrence.[89]

Third, permitting old claims to be heard bolsters the institutional legitimacy of the legal system. Although clear rules attempt to signal that judicial decisions are rational, a wooden and inflexible application of such rules undermines institutional legitimacy. Shutting legitimate claims and blameless

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82 Stringer v. Young's Lessee, 28 U.S. (3 Pet.) 320, 330 (1830).

83 *See* JUDITH N. SHKLAR, THE FACES OF INJUSTICE 18–19 (1990) (describing injustice as "the refusal to recognize valid claims"); Ochoa & Wistrich, *supra* note 23, at 505 (describing injustice as "[f]ailure to provide compensation where morally it is held due") (quotation omitted)); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 450 (1990) (noting that "victims must be made whole" for corrective justice).

84 *See* Ochoa & Wistrich, *supra* note 23, at 509.

85 *Id.*

86 *See* ELIZABETH H. WOLGAST, THE GRAMMAR OF JUSTICE 162 (1987) ("It is . . . not tolerable or acceptable that the innocent should suffer and the wicked not pay for their misdeeds."); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) ("The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.").

87 *See* Ochoa & Wistrich, *supra* note 23, at 500–01; FLEMING JAMES, JR. ET AL., *supra* note 80, § 1.1, at 2 ("In its day-to-day application, the law of procedure implements substantive law."); ROBERT E. KEETON, JUDGING 99 (1990) ("A decisionmaker" prefers to make decisions "squarely on [the] merits.").

88 LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 27 (1993) ("No one . . . feels satisfied when a decision announced is based on what seems to be a legal technicality instead of on the real issues.").

89 *See* Hardin v. Straub, 490 U.S. 536, 543 (1989) ("[I]f the official knows an act is unconstitutional, the risk that he or she might be haled into court indefinitely is more likely to check misbehavior than the knowledge that he or she might escape a challenge to that conduct within a brief period of time."); Ochoa & Wistrich, *supra* note 23, at 506.

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plaintiffs out of the legal process creates disaffection and disillusionment with the legal process:

> [N]o democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least . . . .[90]

If victims of injustice are selectively deprived the benefits of the laws, citizens may come to view the legal system as ineffective, unfair, and illegitimate. As a result, they may resort to extrajudicial remedies and self-help—even violence.

Allowing litigants the opportunity to present stale claims also gives victims an opportunity to seek recourse where there may be no other options. Through complex litigation—such as nationwide class actions and multidistrict litigation—the judiciary can solve problems left unresolved by the legislative and executive branches.[91] Indeed, some court decisions and court-monitored agreements implement policies the other branches are unwilling or unable to address.[92] Access to the courts is particularly important for minorities, the poor, lower socioeconomic classes, and other disenfranchised groups who must rely on the legal system for protection of basic human and civil rights. Such groups lean on the legal system for relief because of the unresponsiveness of the legislative and executive branches.[93] Informal mechanisms within the legal system, such as alternative dispute resolution and settlement, may be fraught with risk and biased against such groups.[94] In fact, the federal judicial system has often protected minorities and other disenfranchised groups from the tyranny of local government and private actors.[95] This safety net provides some measure of comfort and stability.

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90 SHKLAR, *supra* note 83, at 35.

91 *See* HERBERT JACOB, JUSTICE IN AMERICA 41 (3d ed. 1978). The judiciary plays an important role in the political process, as this commentator notes:

> It opens another avenue for seeking favorable decisions for those who are unsuccessful with the legislature or the executive. If a group fails to capture or hold a legislative majority, and if it fails to elect its candidate as chief executive of the state or nation, it may nevertheless seek to alter public policy through litigation.

Id.

92 In an effort to address systemic problems not adequately addressed by the legislature, such as asbestos, tobacco, and other mass torts, the courts have attempted to play a greater and more creative role. *See* Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881, 881–93 (1996) (discussing use of "new creative case management techniques aimed at the comprehensive resolution of . . . complex litigation"); Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 379–85 (1995) (discussing expanded role of judges and special masters). *But see* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2012–33 (1997) (discussing whether judicial role has been expanded too far).

93 *See* Ochoa & Wistrich, *supra* note 23, at 502–03.

94 Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (discussing risks minorities face in alternative dispute resolution).

95 *See, e.g.*, England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("[F]ederal judges appointed for life are more likely to enforce the constitutional

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Fourth, to the extent that the judiciary plays a larger role than merely resolving disputes—and instead develops and articulates public values—limitations law deprives society of meaningful discourse and growth.[96] Exemptions overcome this. Judicial opinions legitimize outcomes and convince others of their propriety, not just explain decisions.[97] The courts promote, influence, and reflect cultural values and moral norms. Exemptions from limitations law appropriately promote the courts' role as educator and culture disseminator.

Finally, exemptions from statutes of limitations are justified to promote fairness to the plaintiff and deter defendant misconduct. Time bars are often exempted because of a defendant's conduct, a plaintiff's status, or a legal prohibition. For example, where a defendant has impeded a plaintiff from filing suit by fraudulently concealing the cause of action, the plaintiff is not required to file suit until she knew or should have known of the cause of action.[98] Similarly, where a defendant induces a plaintiff not to bring suit and the plaintiff reasonably relies on that inducement, the defendant is estopped from asserting the statute of limitations defense.[99] The same is true if the defendant explicitly waives the defense. The underlying policy rationale for this exemption is to prevent a defendant from escaping liability through deception or misrepresentation.[100] Because the plaintiff is either unable to sue or has been reasonably duped into not suing, the limitations exemption does not undermine the goal of promoting plaintiff diligence.

Like the defendant, the plaintiff is also scrutinized. A plaintiff's status—whether legally disabled or even dead—will have an impact on whether a limitations period is exempted.[101] Legal disabilities that exempt plaintiffs

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rights of unpopular minorities than elected state judges."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

96 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 93 ("[T]he trial is an end in itself in the same way that religious rituals and artistic performances are not means to ulterior purposes but are intrinsically valuable."); Geoffrey C. Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 711 (1969) ("The legal assertion of a claim is a political event, sometimes a significant one, even if the claim is rejected. In our tradition it is thus a function in fact if not in concept for the courts to be forums for political grievance.").

97 *Cf.* SOLAN, *supra* note 88, at 1–3.

98 *See Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1220–22, 1236–37.

99 *Id.* at 1222–24.

100 Additionally, where a defendant absences himself, the courts will sometimes suspend limitations periods in an effort not to penalize the plaintiff for the defendant's conduct. *See id.* at 1224–29, 1235–36; *see, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (holding equitable tolling applicable where former Philippine President made himself immune from suit while in office); Cleghorn v. Bishop, 3 Haw. 483, 483–84 (1873) (holding statute of limitations was tolled until after death of King Kamehameha V where the King was immune from suit during his lifetime).

101 *See Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1220, 1229–33.

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from time bars include infancy, insanity, imprisonment, and coverture.[102] The disability must exist at the time the cause of action accrues and, generally, does not stop the limitations period once it has started running.[103] The underlying policy rationale for this exemption is to prevent a defendant from fortuitously benefiting from a plaintiff's hardship.[104]

A legal prohibition may also suspend the limitations period. Where a statute or injunction explicitly prohibits suit, the courts will exempt a plaintiff from the limitations period.[105] The underlying policy rationale for this exemption is fairness to the plaintiff: "Where the plaintiff is prevented from filing timely suit by force of law, it is manifestly unjust to penalize him by barring the suit."[106] Although rarer, "a factual, rather than legal, impossibility of bringing suit" is sometimes invoked by the courts.[107] For example, where the courts are closed to citizens of an enemy state during war, the courts will suspend the limitations period.[108]

There are numerous reasons why limitations periods are exempted. The next section examines the most common ways in which the courts actually implement those exemptions.

B. Mechanisms for Exempting Claims from Limitations Periods

1. Accrual

A court's determination of when a cause of action accrues impacts whether a plaintiff may successfully bring a claim remote in time. Accrual is the moment when a plaintiff may bring a cause of action. In other words, a "cause of action 'accrues' when a suit may be maintained thereon, and the law in this regard differs from state-to-state and by nature of action."[109] It is at this point that the proverbial clock begins to run.

a. The Discovery Rule

In general, the clock begins to run not on the date an injury has occurred,[110] but on the date that the plaintiff discovers or should have reasonably discovered the injury.[111] In most jurisdictions, this discovery rule has replaced the more restrictive rule that a tort claim accrues at the time of

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102 *See* Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538–39 (1867) (infancy, imprisonment, coverture); United States v. Wiley, 78 U.S. (11 Wall.) 508, 508 (1870) (infancy, insanity, coverture).

103 *See Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1229–30.

104 *See id.* at 1233.

105 *Id.*

106 *Id.*

107 *Id.* at 1234.

108 *Id.*

109 BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

110 Justice Scalia, in a concurrence in *Klehr v. A.O. Smith Corp.*, identifies the possibility of an "injury occurrence" rule in which discovery of the injury would be irrelevant. Klehr v. A.O. Smith Corp., 521 U.S. 179, 198 (1997) (Scalia, J., concurring). The Supreme Court has left this question open. Rotella v. Wood, 528 U.S. 549, 554 n.2 (2000).

111 Federal courts generally apply the discovery accrual rule where a federal statute is silent on the issue. *Rotella*, 528 U.S. at 555; *Klehr*, 521 U.S. at 191; 1 CORMAN, *supra* note 23, § 6.5.5.1, at 449.

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plaintiff's injury.[112] There are, however, various approaches to accrual which are even more liberal than the general discovery rule—e.g., a cause of action may not be triggered until something other than the initial injury is discovered.[113]

There is an ongoing debate over just how malleable the concept of accrual should be. On the one hand, accrual has been liberalized. The amount of time a plaintiff has to bring a claim has expanded—from the date of injury to the date plaintiff actually or constructively discovered the injury. On the other hand, accrual has been constricted. The amount of time a plaintiff has to bring a claim has contracted—from the date of discovery of the last predicate act or pattern of misconduct to the date of injury. The Supreme Court is openly wrestling with the propriety of various accrual approaches—based largely on the type of claim that is being asserted and the statute being enforced.[114]

There is no uniform application of the discovery rule; it varies according to the type of claim and circumstances. The propriety of the discovery rule is governed by the Court's own subjective determination of which claims "cry out" for its application.[115]

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112 United States v. Kubrick, 444 U.S. 111, 120, 121 n.8 (1979); *see also* Green, *supra* note 54, at 977 (noting that "[v]irtually all commentators and the vast majority of courts" have adopted a discovery accrual approach because of its fairness).

113 The Supreme Court has recently had occasion to evaluate such liberal discovery rules and rejected them on the grounds that they violate the underlying purposes of limitations periods. *See, e.g.*, *Rotella*, 528 U.S. at 553–55, 558 (rejecting the "injury and pattern discovery rule" in the context of civil action brought under the Racketeer Influenced Corrupt Organizations Act ("RICO"); Court anticipated the rule would lead to claims very remote in time, and concluded that the policies of limitations law—"repose, elimination of stale claims, and certainty"—would be undermined); *Klehr*, 521 U.S. at 187–90 (rejecting the most liberal accrual discovery rule, the "last predicate act rule," in the context of a civil RICO claim); *Kubrick*, 444 U.S. at 117–18, 122–24 (rejecting a more lenient accrual rule in the context of a medical malpractice case, despite plaintiff's contention that tolling was justified due to the technical complexity of the case, because the primary purpose of the limitations period—encouraging plaintiff diligence—would be undermined).

114 *See* Green, *supra* note 54, at 978 (identifying various formulations of the discovery rule); *see, e.g.*, Nat'l. R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 123–24 (2002) (O'Connor, J., dissenting) (concluding that discovery rule applies to discrete acts of employment discrimination but noting that "courts continue to disagree on what the [plaintiff] notice must be *of*" (quotation omitted)); TRW Inc. v. Andrews, 534 U.S. 19, 27–28 (2001) (foregoing application of the discovery rule to claims under the Fair Credit Reporting Act where statute had its own enumerated bases for accrual and where Court concluded claim was not in "an area of the law that cries out for application of a discovery rule"); *Kubrick*, 444 U.S. at 126–27 (Stevens, J., dissenting) (acknowledging that in most commercial cases accrual was appropriate at the time of injury, but in medical malpractice cases accrual was appropriate at the time a diligent plaintiff discovered facts revealing an invasion of legal rights).

115 Some Justices interpret the Court's exercise of discretion in this area as judicial activism: "These cries, however, are properly directed not to us, but to Congress, whose job it is to decide how 'humane' legislation should be—or (to put the point less tendentiously) to strike the balance between remediation of all injuries and a policy of repose." *TRW Inc.*, 534 U.S. at 37–38 (Scalia, J., concurring in judgment). "'[T]he cases in which [the statute of limitations may be suspended by causes not mentioned in the statute itself] are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" *Id.* at 38 (quoting Amy v. Watertown (No. 2), 130 U.S. 320, 323–24 (1889)).

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b. The Continuing Violations Doctrine

Similar to the discovery rule, the continuing violations doctrine allows a plaintiff to bring a cause of action where there is a continuous series of injuries that stem from an initial injury.[116] The doctrine permits a plaintiff to obtain relief for a time-barred act of misconduct by connecting it to similar acts of misconduct that occurred within the limitations period.[117] The courts treat the series of acts as one continuous act that ends before the statute of limitations period expires. "[T]he statute of limitations is not tolled *per se*, but rather left open until a final injury has accrued."[118] The continuing violations doctrine is applicable to various types of "serial violations"[119] in both the criminal and civil context.[120]

Application of the continuing violations doctrine centers on the distinction between discrete acts and continuous ones,[121] and between a continued violation and the continued impact of a single violation.[122] The continuing violations doctrine is an important component of the accrual analysis. The Supreme Court has recognized its particular importance in ensuring the proper enforcement of civil rights laws.[123]

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116 *See Nat'l R.R. Passenger Corp.*, 536 U.S. at 106–07.

117 *See id.*

118 *In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1071 (N.D. Ill. 2004).

119 *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114.

120 *See* Toussie v. United States, 397 U.S. 112, 134–35 (1970) (White, J., dissenting) ("The 'continuing offense' is hardly a stranger to American jurisprudence. The concept has been extended to embrace such crimes as embezzlement, conspiracy, bigamy, nuisance, failure to provide support, repeated failure to file reports, failure to register under the Alien Registration Act, [and] failure to notify the local board of a change in address . . . ."); *see also Nat'l R.R. Passenger Corp.*, 536 U.S. at 115 (continuing violation within employment discrimination context).

121 In the employment discrimination area, the Supreme Court recognizes a hostile-environment claim as one that by its nature involves repeated conduct and therefore lends itself to accrual under the continuing violations doctrine. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114–15. The unlawful employment practice takes place over a lengthy period of time and does not become actionable until the cumulative effect of various individual acts has taken place. *Id.* at 115. In contrast, a discrete act of discrimination—such as a termination, promotion denial, or refusal to hire or transfer—constitutes its own individual actionable unlawful practice and is subject to immediate accrual. *Id.* at 114. The Court has been reluctant to extend the continuing violations doctrine to ongoing antitrust violations or a pattern of racketeering activity. *Id.* at 127 (O'Connor, J., concurring in part and dissenting in part).

122 The Supreme Court had occasion to address this issue in *Delaware State College v. Ricks*, where it held that the timeliness of an employee's Title VII and § 1981 claims were measured from the date the employee was terminated on the basis of national origin, not later. Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980). In *Ricks*, the plaintiff accepted a one-year "terminal" contract following his denial of tenure. *Id.* at 253–54. He argued that this date prolonged the limitations period. *Id.* at 257. The Court, however, was unpersuaded, holding that continuity of employment alone did not prolong the life of his employment discrimination action. *Id.* Neither did the plaintiff's pending grievance toll the statute of limitations. *Id.* at 261. The Court concluded that the moment the employer made the tenure decision and communicated it to the employee was the moment the discriminatory act occurred and the limitations period started. *Id.* at 258. Even though the employee did not experience the impact of the discriminatory act until later, this did not push back accrual. *Id.*

123 *Id.* at 262 n.16 ("We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."); *see also* Mills v. Habluetzel, 456 U.S. 91, 101 (1982).

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2. *Equitable Estoppel*

Once a statute of limitations has begun to run, it may still be arrested by two tolling doctrines: equitable estoppel and equitable tolling.[124] Equitable estoppel prohibits a defendant from being able to invoke the statute of limitations defense where he has taken active steps to prevent a plaintiff from timely filing.[125] A defendant may do this by inducing a plaintiff not to timely file (often by promising not to plead the statute of limitations defense) or by trying to fraudulently conceal his wrongdoing.[126] The key attribute of the equitable estoppel exemption is active misconduct by the defendant.[127]

3. *Equitable Tolling*

Equitable tolling permits a court to suspend the running of a limitations period for equitable reasons.[128] Equitable tolling does not require wrongdoing by the defendant.[129] So long as the plaintiff has exercised due diligence, it

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124 The tolling doctrines are distinct from the discovery rule. The discovery rule states that the statute of limitations does not actually start to run until the plaintiff becomes aware or should have become aware of her injury. The tolling doctrines state that once the statute of limitations has already started running it can still be stopped. *See* Wolin v. Smith Barney Inc., 83 F.3d 847, 850 (7th Cir. 1996).

125 *See* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–51 (7th Cir. 1990); Holmberg v. Armbrecht, 327 U.S. 392, 396–97 (1946) ("[F]raudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.").

126 *See Cada*, 920 F.2d at 450–51. Fraudulent concealment may involve the defendant's hiding his identify or other facts necessary for plaintiff to bring suit. *Wolin*, 83 F.3d at 850. Fraudulent concealment should not be confused with a defendant's attempts at concealing fraud in a fraud case. They are distinct. Where a defendant successfully conceals a fraud, this pushes back the date of accrual because the plaintiff cannot discover the injury—pursuant to the discovery rule. *Cada*, 920 F.2d at 451. Fraudulent concealment, however, means that the cause of action has already accrued. *See id.* The plaintiff has already discovered or should have discovered her injury, and the defendant has actively tried to prevent the plaintiff from timely filing through fraudulent conduct. *Id.* The courts, however, have struggled to determine how distinct the fraudulent concealment must be from the original fraud. *Wolin*, 83 F.3d at 851.

127 Courts are split over whether a plaintiff still must be diligent in order to get the benefit of this doctrine. *Wolin*, 83 F.3d at 852. *Compare* Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1094 n.17 (7th Cir. 1992), *and id.* at 1102–03 (Posner, J., concurring), *with* J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1258 (1st Cir. 1996), *and* Golden Budha Corp. v. Canadian Land Co., 931 F.2d 196, 201 (2d Cir. 1991). *See also* Wood v. Carpenter, 101 U.S. 135, 143 (1879) (requiring reasonable diligence where plaintiff seeks to toll statute of limitations because of defendant's fraudulent concealment).

128 The doctrines of equitable estoppel (fraudulent concealment) and accrual (the discovery rule) are distinct from equitable tolling. United States v. Beggerly, 524 U.S. 38, 49–50 (1998) (Stevens, J., concurring) (citing 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1056 (2d ed. Supp. 1998) (noting that equitable tolling is distinct from equitable estoppel and fraudulent concealment)); *cf. Cada*, 920 F.2d at 451 (noting confusion between equitable tolling and both fraudulent concealment and the discovery rule); United States v. Locke, 471 U.S. 84, 94 n.10 (1985) (referring to equitable tolling and equitable estoppel separately).

129 *Cada*, 920 F.2d at 451–52 ("*Holmberg* makes clear that equitable tolling does not require any conduct by the defendant." (citing *Holmberg*, 327 U.S. at 397)). *But see Wolin*, 83 F.3d at 852 ("[W]hen the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay . . . , so the plaintiff must use due diligence to be allowed to toll the statute of limitations . . . .").

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is immaterial whether the defendant is responsible for depriving the plaintiff of information vital to the existence of his claim.[130] Equitable tolling means that "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant."[131]

Equitable tolling, although exceptional, is completely normal.[132] "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."[133] As recognized recently by the Supreme Court, the propriety of applying the equitable tolling doctrine is well accepted where consistent with the text of the relevant statute.[134] The concept of tolling is so commonplace that the courts must presume that Congress drafted limitations periods with this operative principle in mind.[135]

There are numerous grounds upon which the federal courts have found it appropriate to apply the equitable tolling doctrine. The Supreme Court has permitted equitable tolling: (1) where the plaintiff has timely pursued his legal claim but filed an improper pleading;[136] (2) where the plaintiff was induced or tricked by his adversary into not timely filing his claim;[137] or (3) in other cases.[138] This third category provides considerable discretion and is very broad. Under this "catch-all" exception, the Supreme Court has equita-

130 *Cada*, 920 F.2d at 451–52 (citing *Holmberg*, 327 U.S. at 397). Because application of equitable tolling, unlike equitable estoppel, may involve two innocent parties, the courts may be less forgiving of an untimely filing. *See id.* at 453.

131 *Id.* at 451.

132 *See* Young v. United States, 535 U.S. 43, 49 (2002); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (limitations are customarily subject to tolling); Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) ("This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.").

133 *Holmberg*, 327 U.S. at 396.

134 *Young*, 535 U.S. at 49 ("It is hornbook law that limitations periods are customarily subject to equitable tolling . . . ." (quotation omitted)); United States v. Brockamp, 519 U.S. 347, 349–52 (1997); *see, e.g.*, *Young*, 535 U.S. at 50–51, 54 (permitting tolling during pendency of Chapter 13 and Chapter 7 bankruptcy petitions, where it was consistent with IRS three-year lookback period); United States v. Beggerly, 524 U.S. 38, 38 (1998) (prohibiting equitable tolling on basis that plaintiff knew or should have known of violation and case involved ownership of land); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974) (permitting tolling where it was consistent with Rule 23 of the Federal Rules of Civil Procedure and the Clayton Act's statutes of limitations).

135 *Young*, 535 U.S. at 49–50.

136 *See, e.g.*, *Irwin*, 498 U.S. at 96 (timely but defective pleading filed); *Burnett*, 380 U.S. at 429–30 (timely but filed in wrong court); Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466–67 (1962) (filing of lawsuit showed sufficient diligence to overcome untimeliness on the basis of lack of venue).

137 *Young*, 535 U.S. at 50; Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (per curiam); Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980); Leake v. Univ. of Cincinnati, 605 F.2d 255, 259 (6th Cir. 1979); *Burnett*, 380 U.S. at 428 (tolling appropriate where defendant misled plaintiff into believing he had more time to file).

138 *Young*, 535 U.S. at 50 (citing *Baldwin County Welcome Ctr.*, 466 U.S. at 151 (listing grounds for tolling)). Courts are less generous in providing equitable tolling where the dispute is over land title. For example, in interpreting the propriety of equitable tolling under the Quiet Title Act, the Supreme Court acknowledged the significance of land ownership in concluding that the extension of additional time for tolling was unwarranted: "This is particularly true given that the [Quiet Title Act] deals with ownership of land. It is of special importance that landown-

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bly tolled limitations periods for various reasons. For example, the Supreme Court has expressed approval of equitable tolling where a plaintiff did not have sufficient notice of her right to sue;[139] where a motion for appointment of counsel was pending and equity required the motion to be ruled upon prior to suit;[140] and where the court led a plaintiff to believe she had done everything necessary to bring suit.[141] Equitable tolling has been permitted where, despite due diligence, a plaintiff is unable to collect critical information related to the existence of his claim,[142] or where a plaintiff is rendered unable to protect his claim during the statutory filing period.[143] For example, if the courts are unavailable—as they often are during wartime—the courts have equitably tolled the limitations period.[144] The doctrine is appropriate under extraordinary circumstances[145] and when the underlying purposes of the statute of limitations have nonetheless been served.[146]

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ers know with certainty what their rights are, and the period during which those rights may be subject to challenge." *Beggerly*, 524 U.S. at 49.

139 *Baldwin County Welcome Ctr.*, 466 U.S. at 151 (citing Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974)).

140 *Id.* (citing Harris v. Walgreen's Distrib. Ctr., 456 F.2d 588 (6th Cir. 1972)).

141 *Id.* (citing Carlile v. S. Routt Sch. Dist. RE 3-J, 652 F.2d 981 (10th Cir. 1981)).

142 Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990); *see, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

143 In *Young v. United States*, the Supreme Court held that tolling was appropriate where the "IRS was disabled from protecting its [tax collection] claim" during the pendency of the taxpayer's bankruptcy. *Young*, 535 U.S. at 50–51. Given the historical equitable nature of bankruptcy court, the courts are more generous in providing equitable tolling where the dispute is related to bankruptcy. For example, the Supreme Court recognized how customary it is for courts to provide equitable tolling of limitations periods where it is consistent with the relevant federal statute, especially where the case involves bankruptcy: "Congress must be presumed to draft limitations periods in light of this background principle . . . . That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and appl[y] the principles and rules of equity jurisprudence." *Id.* at 49–50 (quotation omitted). A defendant's failure to demonstrate that it was prejudiced by plaintiff's delay is not an independent basis for tolling, but a factor that may apply once another basis for tolling has been established. *See Baldwin County Welcome Ctr.*, 466 U.S. at 151–52.

144 *See, e.g.*, Brown v. Hiatts, 82 U.S. (15 Wall.) 177, 183–85 (1872) ("It is unnecessary to go at length over the grounds upon which the court has repeatedly held that the statutes of limitation of the several States did not run against the right of action of parties during the continuance of the civil war."); Levy v. Stewart, 78 U.S. (11 Wall.) 244, 253–55 (1870) (holding that statute of limitations was suspended during Civil War for claims to enforce contracts); United States v. Wiley, 78 U.S. (11 Wall.) 508, 513–14 (1870) (holding that time during which courts were closed because of Civil War is excluded from computation of time fixed by the statute of limitations for suits brought by the government against citizens residing in rebellious states); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 539–41 (1867) (holding that time in which courts were closed in Arkansas because of rebellion was excluded from computation of time fixed by statute of limitations to bring contract claims, even where statute did not provide for this exclusion); Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428–29 (1965) (war as basis for tolling).

145 Hardin v. Straub, 490 U.S. 536, 543–44 (1989).

146 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974) ("Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute."). In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that the filing of a class action lawsuit tolled the statute of limitations for putative class members who timely moved to intervene once class certification was denied on numerosity grounds. *Id.* at 539. The Supreme Court concluded that this ruling was consistent

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In sum, there are as many reasons for carving out exceptions to limitations periods as there are for enforcing them. The courts have the power to exercise discretion and flexibility in enforcing limitations periods, and the legislature has the power to eradicate them altogether. The shelter of statutes of limitations is not guaranteed and has come into law by legislative grace, not as a natural right.[147]

Given the various competing interests served by limitations periods and their exemptions, one would expect significant decisional law and scholarship on their application to reparations cases. Surprisingly, very little has been written about this difficult issue. Part IV addresses this void by analyzing the principles upon which the court in the Tulsa case recently dismissed riot victims' reparations claims as time-barred. Part V illustrates how under existing norms for limitations exemptions, reparations claims should survive to the merits.

IV. The Court's Misapplication of Limitations Exceptions in the Tulsa Reparations Litigation

The Tulsa case provides an interesting and important lens through which one can critique the current propriety of courts' application of statutes of limitations and their exemptions to reparations litigation.[148] The story of Tulsa is a tragic example of the principle that justice delayed is often justice denied. It tragically demonstrates the judiciary's failure to seriously examine whether and how a procedural mechanism—the statute of limitations—should be applied, given its myriad underlying purposes and exemptions.

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with the functional operation of a limitations period because the policies of promoting fairness to the defendants and encouraging plaintiff diligence were met; the defendants were sufficiently put on notice of the nature and scope of the litigation, and the named plaintiff's timely filing of a representative action demonstrated proper diligence. *Id.* at 553–56. Where the procedures of Rule 23 of the Federal Rules of Civil Procedure and the relevant limitations statute were met, the Court permitted tolling. *Id.* at 555–56; *see also Burnett*, 380 U.S. at 434 ("Finally, the humanitarian purpose of the [Federal Employers' Liability Act] makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so."); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 473–76 (1975) (Marshall, J., concurring in part and dissenting in part) (arguing that tolling should be permitted for untimely § 1981 claim where plaintiff's timely Title VII charge gave defendant notice of claim, plaintiff acted diligently, and defendant was not unfairly surprised or unable to collect and preserve evidence because § 1981 claim was identical to Title VII claim).

147 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988) ("[S]tatute of limitations defenses are not a fundamental right . . . ."); G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982) (same); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("[Statutes of limitations] represent a public policy about the privilege to litigate.").

148 A similar critique can be done of litigation where plaintiffs seek reparations for slavery from private corporations. *See In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1038–44 (N.D. Ill. 2004) (seeking to hold eighteen present-day companies liable for the commercial activities of their alleged predecessors before, during, and after the Civil War for claims that arose out of the institution of human chattel slavery). Claims for reparations for slavery and its vestiges are admittedly even more complex because of their greater remoteness in time and the additional complications related to identification of the parties, causation, and injury. This critique is beyond the scope of this Article and will be explored in a subsequent article.

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A. *The Story of Tulsa*

On May 31, 1921, up to three hundred African-Americans were killed[149] and thousands left homeless[150] after they were attacked by a white mob. Deputized by the City of Tulsa, and aided by the State of Oklahoma,[151] the mob burned the entire African-American community to the ground—destroying schools, churches, businesses, a hospital, and a library[152] in a prosperous community and business district affectionately called the "Negro's Wall Street."[153] Civic leaders at the time promised reparations for one of the worst race riots in United States history, condemned nationwide, but none came.[154]

Many riot victims—homeless, destitute, and terrorized—were in no position to pursue a judicial remedy at the time.[155] Other riot victims who sought relief in the courts soon realized its futility[156] because law enforcement and the political process were infected by extremist organizations, such as the Ku Klux Klan.[157]

Moreover, city and state officials buried evidence and discouraged litigation, impeding riot victims from preparing the record needed to prevail.[158] Victims were buried in unmarked graves[159] and the government failed to investigate or prosecute perpetrators for arson and murder.[160] Indeed, the African-American community of Greenwood was initially blamed for the

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149 *See supra* note 1.

150 *See* Goble, *supra* note 1, at 12 (approximately 1256 homes burned or destroyed).

151 *See supra* note 3.

152 Goble, *supra* note 1, at 12; *see also* Larry O'Dell, *Riot Property Loss*, *in* TULSA RACE RIOT, *supra* note 1, at 145, 149 (almost $2 million in 1921 dollars estimated in property damage from the riot).

153 SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921, at 22 (1982); *see also* Goble, *supra* note 1, at 12 ("Little Africa").

154 *See supra* note 7 and accompanying text.

155 *See* Caine, *supra* note 4, at 5 ("Thus it is difficult (unto implausible) to imagine the residents of Greenwood banding together and having the necessary individual or collective psychological strengths to sue for restitution in the courts of Oklahoma at that time, given what had happened to them, as well as the social and legal environment of that era."); *see also* Brophy, *supra* note 6, at 41–45.

156 Approximately 150 lawsuits were filed after the riot. Goble, *supra* note 1, at 7; *see, e.g.*, Redfearn v. Am. Cent. Ins. Co., 243 P. 929, 931 (Okla. 1926) (denying recovery under insurance policy for owner of theater and hotel burned to ground during riot). "[T]here were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot." OKLA. STAT. ANN. tit. 74, § 8000.1.3 (West 2002). Instead, the government attempted to block rebuilding efforts in Greenwood. *Id.*

157 *See supra* note 6.

158 1921 Tulsa Race Riot Commission—Creation, No. 1035, 1997 Okla. Sess. Laws 2835 (creating the Tulsa Riot Commission and stating "black persons of that era were practically denied equal access to the civil or criminal justice system in order to obtain damages or other relief for the tortious and criminal conduct which had been committed"); *see, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984) ("Though [riot victim] Dolphus Bell filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress . . . .").

159 *See* Brooks & Witten, *supra* note 2, at 124–32 (exploring evidence of potential mass graves based on geophysical study and eyewitness testimony).

160 *See* Goble, *supra* note 1, at 13–14 (noting that not a single criminal act has ever been

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riot.[161] Evidence was hidden or destroyed and talk of the riot's occurrence squelched.[162] The suppression was so complete that the current and former mayors of Tulsa had never heard of it.[163] Oklahoma history textbooks and historical accounts of Tulsa excluded it.[164] In such an environment, no litigants could successfully vindicate their claims.

Almost eighty years later, in an effort to address the conspiracy of silence[165] that surrounded the riot and its aftermath, the State of Oklahoma commissioned a study of the riot.[166] Based on over ten thousand pages of materials,[167] some of which implicated the government in the riot and its aftermath, the Tulsa Commission ("Commission") issued a report, recommending reparations to riot victims.[168] Again, none came.

Armed with critical evidence never made available before,[169] over 130 survivors of the riot[170] sought relief in federal court, claiming that the governments of Tulsa and Oklahoma violated the Federal Constitution and various federal statutes.[171] Specifically, the plaintiffs claimed that the government

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prosecuted by any level of government, and, in fact, the municipal government initially tried to impede Greenwood's rebuilding); *see also* tit. 74, § 8000.1.3.

161 Ellsworth, *supra* note 3, at 69 (riot called "Negro uprising"); *see also Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated*, TULSA DAILY WORLD, June 26, 1921, at 1 (blaming group of African-American men for riot); *Negroes Blamed for Race Riots*, TULSA DAILY WORLD, June 14, 1921, at 2 (describing a resolution passed by the Tulsa Silver Plume Lodge Knights of Pythias, which stated that the riot was an "awful tragedy . . . [and] a premeditated, unlawful uprising of a large number of armed negroes who . . . without cause or justification fired upon white men, women and children"); TULSA TRIB., June 14, 1921, at 2 (Mayor blaming negroes for "Negro uprising" and exonerating whites "in no uncertain language"); TULSA TRIB., June 4, 1921, at 88 ("[T]he bad niggers started it.").

162 *See* tit. 74, § 8000.1.4–.1.5 (riot was "virtually forgotten" for seventy-five years, which changed after publication of the Commission Report). "Before there was this commission, much was known about the Tulsa race riot. More was unknown. It was buried somewhere, lost somewhere, or somewhere undiscovered. No longer. Old records have been reopened, missing files have been recovered, new sources have been found." Goble, *supra* note 1, at 8.

163 In 1996, then-Tulsa District Attorney (now Mayor) Bill LaFortune admitted, "I was born and raised here, and I had never heard of the riot." John Hope Franklin & Scott Ellsworth, *History Knows No Fences: An Overview*, *in* TULSA RACE RIOT, *supra* note 1, at 21, 25 (2001) (quotation omitted). Former Mayor Susan Savage admitted the same. Sam Howe Verhovek, *75 Years Later, Tulsa Confronts Its Race Riot*, N.Y. TIMES, May 31, 1996, at A12.

164 Franklin & Ellsworth, *supra* note 163, at 26.

165 *Id.* at 25 (noting that important missing documents and reluctance to talk of the riot has led some to conclude that nothing short of a "conspiracy of silence" existed regarding the riot).

166 Tit. 74, § 8000.1.5 (stating that work of Tulsa Commission has "forever ended the 'conspiracy of silence'").

167 Goble, *supra* note 1, at 8 (stating that amount of material "passed ten thousand pages some time ago and well may reach twenty thousand by the time everything is done").

168 *Id.* at 15.

169 *See id.* at 6–8. The Commission concluded:

> Until recently, the Tulsa race riot has been the most important least known event in the state's entire history. Even the most resourceful of scholars stumbled as they neared it for it was dimly lit by evidence and the evidentiary record faded more with every passing year. That is not now and never will be true again.

Id. at 6.

170 As of February 28, 2001, there were 118 persons registered as living survivors of the riot and 176 persons registered as descendants of riot victims. *Id.* at 6.

171 *See* Second Amended Complaint ¶ 1, Alexander v. Oklahoma, No. 03-CV-133-E(C) (N.D. Okla. Apr. 29, 2003).

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deprived them of their due process and equal protection rights in violation of the Fourteenth Amendment and engaged in a policy of intentional race discrimination in violation of a number of federal civil rights statutes.[172]

The court acknowledged the complexity and seriousness of whether such claims should be adjudicated on the merits.[173] Nonetheless, the court dismissed the case, concluding that plaintiffs' claims were barred by the statute of limitations.[174] The court admonished the defendants to take moral responsibility for their conduct in the riot and its aftermath, even though legal responsibility was not found.[175]

African-American riot victims—some over 100 years old—were told once again that despite the Commission Report's conclusion of government participation and culpability, the legal system would not provide a remedy. Implicitly, the court concluded that because of the lapse of time, it was too late for justice to be done.

B. Accrual

The district court gave short shrift to the main bases for exempting the Tulsa plaintiffs' claims from the statute of limitations: accrual, equitable estoppel, and equitable tolling. Although the court applied the discovery rule of accrual, like other courts in similar reparations litigation,[176] it took an unnecessarily narrow and cramped interpretation of what constitutes the requisite injury and causation.

Where the plaintiffs sought reparations against state and municipal government for their alleged complicity in the Tulsa race riot of 1921, the court concluded that the plaintiffs had sufficient knowledge of their injuries such that their various claims arising out of the riot accrued over eighty years ago. The court rejected the plaintiffs' contention that they were insufficiently aware of the City's complicity in the riot until the publication of the Commission Report in 2001,[177] and concluded that it was "obvious" that victims of the riot would have observed the City's misconduct during the riot.[178]

The district court's analysis of what constituted the plaintiffs' injuries and their cause is too simple. The court based its conclusion on the misguided notion that the plaintiffs' injuries were individual torts committed by individual state actors, rather than an official government plan and policy to deprive the plaintiffs of their constitutional and statutory rights. The plain-

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172 *See id.* ¶¶ 543–576. In addition to federal claims, plaintiffs also brought common law claims under the State of Oklahoma's common law: promissory estoppel and negligence. *Id.* ¶¶ 577–594. The riot victims argued that they relied to their detriment on defendants' promise to provide restitution for the riot, and negligence. *Id.*

173 Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *35–36 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

174 *Id.* at *37.

175 *Id.* at *36.

176 *See In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1070–71 (N.D. Ill. 2004). *But see* Cato v. United States, 70 F.3d 1103, 1108–09 (9th Cir. 1995) (discussing, in dicta, some tolling doctrines in the context of the slave reparations case, but not addressing accrual).

177 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *25–28.

178 *Id.* at *26.

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tiffs alleged that the City of Tulsa organized, armed, and deputized white citizens who then committed gross atrocities against the residents of Greenwood under color of law.[179] In the middle of perhaps one of the most brutal race riots in American history, Greenwood residents would hardly have been in the position to know that many of those who terrorized them were cloaked under color of law. Many deputized whites who killed, looted, and burned Greenwood to the ground did not wear badges or uniforms; their names were not even recorded.[180] It is unreasonable to believe that riot victims would be able to accurately ascertain the government's role in such mayhem—especially where the conduct plaintiffs challenge is not aberrant behavior by individual government officials, but an orchestrated plan by the government to deprive plaintiffs of their civil rights.[181]

The court further misunderstood various allegations in the complaint to mean that the plaintiffs were aware of the defendants' misconduct. For example, the court concluded that riot victims "would have had to" observe the improper conduct of the Oklahoma National Guardsmen and those citizens deputized by the government.[182] But with only roughly 2% of the mob—comprising between 15,000 to 25,000 men—having been deputized,[183] it is not at all clear that riot victims would have been able to identify the government's role. The court also concluded that the plaintiffs were aware of the government's role in the riot on the basis of newspaper accounts shortly after the riot, stating that Blacks condemned the actions of the Tulsa Police and Oklahoma National Guard.[184] The plaintiffs' condemnation of the government for its laxity in policing, however, is not the same as the plaintiffs' recognizing the government's affirmative participation in the riot.[185] The court seems to have mistakenly imputed knowledge the plaintiffs currently have about the government's complicity—obtained from the Commission Report—to their knowledge within the limitations period. The Commission Report itself acknowledges the degree to which crucial information about the government's role in the riot had never before been known or knowable.[186] Despite this concession, the court was unconvinced that accrual took place on the date of the Commission Report's publication.[187]

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179 *See* Second Amended Complaint ¶¶ 469–471, *Alexander*, No. 03-CV-133-E(C) (N.D. Okla. Apr. 29, 2003).

180 *See* Ellsworth, *supra* note 3, at 64.

181 *See* Goble, *supra* note 1, at 16–19 (concluding attack was on a community and riot was designed to "keep one race 'in its place'").

182 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *27.

183 *See* CHARLES F. BARRETT, OKLAHOMA AFTER FIFTY YEARS: A HISTORY OF THE SOONER STATE AND ITS PEOPLE 1889–1939 (1941).

184 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *26–28.

185 *See Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated*, *supra* note 161 (noting "laxity of law enforcement on the part of the officers of the city and county"); *It Must Not Be Again*, TULSA TRIB., June 12, 1921 ("Why were these niggers not made to feel the force of the law and made to respect the law?"); Niles, *supra* note 7, at 4; *Aide to Police Answers Critics*, TULSA DAILY WORLD, June 6, 1921.

186 *See* Goble, *supra* note 1, at 6–8 ("Commissioners were surprised to receive so much new evidence and pleased to see that it contributed so much . . . . This commission's work changes the game forever.").

187 *See Alexander*, 2004 U.S. Dist. LEXIS 5131, at *24–28.

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The court's interpretation of what the plaintiffs should have known about their injury and its source is devoid of context and reason. Holding that the plaintiffs' actions accrued at the moment the riot unfolded fails to account for the profoundly serious nature of the injuries and complexity of their causes.

Other courts have appropriately recognized that plaintiffs often fail to properly identify the parties responsible for misconduct or the precise causation because of inhospitable circumstances at the time.[188] For example, in actions dealing with FBI involvement in civil rights murders, the courts have held that accrual did not take place until the victims' families discovered—as many as twenty or thirty years later—the Bureau's complicity.[189] Similarly, courts have concluded that plaintiffs' claims did not accrue until plaintiffs learned of defendants' malfeasance in cases involving the government's role in Cold War drug testing and syphilis experiments on nonconsenting victims.[190] Likewise, the notice requirement for plaintiffs in reparations cases should be expanded because of the nature of the claim. As Mari Matsuda aptly observed: "[T]he need for reparations arises precisely because it takes a nation so long to recognize historical wrongs against those on the bottom. Something other than a rigid conception of timeliness is required."[191]

The Tulsa case also highlights the judiciary's limited view of what constitutes due diligence—the cornerstone of accrual and one of the fundamental policy rationales for statutes of limitations.[192] The Tulsa court, like others,[193] was unpersuaded that plaintiffs who bring claims today for Jim Crow vio-

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188 *See, e.g.*, Anderson v. Cornejo, 199 F.R.D. 228, 251 (N.D. Ill. 2000) ("A person may be well aware that she was directly harmed by a specific person without having any knowledge that it was part of a conspiracy, let alone knowing that a third party was aware of the conspiratorial plans and could have prevented the injury."); Allred v. Chynoweth, 990 F.2d 527, 531 (10th Cir. 1993); Bergman v. United States, 551 F. Supp. 407, 419–22 (W.D. Mich. 1982); Peck v. United States, 470 F. Supp. 1003, 1017–20 (S.D.N.Y. 1979).

189 *See, e.g.*, Liuzzo v. United States, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980) (holding that where plaintiffs were in the unique position of not knowing about the government's complicity in their mother's murder until long after they knew of the injury, accrual did not begin until an "investigation [was] both warranted and realistically possible"). Judge Posner reasoned in a different context that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." Drazan v. United States, 762 F.2d 56, 59 (7th Cir. 1985). Where a plaintiff knows of his injury but not the source, the cause of action does not accrue. *Id.*

190 *See, e.g.*, Cain v. United States, 643 F. Supp. 175, 181 (S.D.N.Y. 1986); Barrett v. United States, 689 F.2d 324, 327–28 (2d Cir. 1982); Pollard v. United States, 384 F. Supp. 304, 311–12 (M.D. Ala. 1974).

191 Matsuda, *supra* note 14, at 381.

192 Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2446–48 (1994).

193 Similarly, in recent consolidated litigation for slave reparations, the Northern District of Illinois found it relevant to the question of whether plaintiffs had exercised due diligence that "other former slaves were aware of their injuries and previously have attempted to recover for them well before this action was filed." *See In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1071 (N.D. Ill. 2004) (citing Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916) (claim for slavery-based reparations brought nearly a century prior), *aff'd*, 244 U.S. 643 (1917)).

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lence exercised sufficient diligence when other riot victims filed suit much earlier.[194]

What should the relevance of such prior filings be? How much weight should the court give to the fact that others were able to timely bring suit? Although prior lawsuits do not as a matter of law put plaintiffs on notice of their own claims,[195] such lawsuits suggest that plaintiffs may have been able to bring suit earlier if they had made greater effort. This standard is unfair. For no other types of claims do we hold plaintiffs to a superhero standard of diligence. There are always those few exceptional people who are able to overcome tremendous adversity and rise above no matter what the circumstances. The legal system, however, is designed not for the extraordinary, but for the norm. Disturbingly, in the context of reparations, the objective reasonableness standard has been replaced with one far more rigorous. The fact that some riot victims were able to bring suit within the limitations period should not be determinative.[196]

And where the parties are equally blameworthy (or blameless) it is unclear why plaintiffs should be the only ones to suffer. This question was considered in the context of whether statutes of limitations are fair to plaintiffs who have art stolen from them but do not make claims for it until after the limitations period has expired. Courts seem to be moving in a direction that is more sympathetic to the original owners who bring untimely claims to recover stolen art rather than the bona fide purchasers of such art.[197] This has led some scholars to propose a wholesale retreat from statutes of limitations, arguing that the discovery rule places an unfair burden on a diligent owner to justify deferring the limitations period because he was unable to locate his stolen chattel earlier.[198] Scholars analogize a plaintiff's blameless ignorance of his claim to those disabilities that toll the limitations period, suggesting

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194 Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *25–28 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

195 *See* Texas v. Allan Constr. Co., 851 F.2d 1526, 1533 (5th Cir. 1988) (holding that existence of similar lawsuit does not put plaintiffs on notice of their own claims because lawsuit could be "frivolous or baseless," and "defendants would have had to prove that the plaintiffs had access to information that would independently verify the allegations" (quotation omitted)); Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 504 (9th Cir. 1988) (same); *see also* Bibeau v. Pac. Nw. Research Found., 188 F.3d 1105, 1110 (9th Cir. 1999) (holding that public records did not put plaintiffs on notice as a matter of law).

196 Many of the prior lawsuits were unsuccessful, which deterred others from filing. Realizing the futility of such litigation, those who did not file within the limitations period may have done so out of rationality, not slothfulness. For example, most of the lawsuits filed shortly after the Tulsa race riot were against insurance companies who refused to honor their claims on the ground that individuals, not the government, were responsible for the riot damage. Moreover, the two cases actually litigated against the City of Tulsa were dismissed. Black riot victims were further dissuaded from filing suit against the government by grand jury indictments against Blacks only. *See supra* note 156.

197 Bibas, *supra* note 192, at 2448, 2460 ("We have almost come full circle. In the nineteenth century, courts abandoned the common law's absolute protection of owners by adopting adverse possession of chattels. That rule has eroded ever since, as courts have become increasingly concerned with fairness to theft victims and discouraging theft."); *see also id.* at 2449–50.

198 *Id.* at 2447, 2450–51. Bibas also criticizes the discovery rule as vague and inefficient. *Id.* at 2450–51.

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that they should be treated the same.[199] This makes sense in the context of reparations too.

C. *Equitable Estoppel*

The Tulsa case illustrates the judiciary's overly narrow vision of what circumstances justify equitable estoppel.[200] Despite the Commission Report's own admission that there existed a "conspiracy of silence" that kept the plaintiffs ignorant of the facts surrounding the riot and its aftermath—including the defendants' culpability—the court did not estop the defendants from raising the limitations defense on the grounds of fraudulent concealment. The court also held the plaintiffs to an exacting standard on the question of whether the plaintiffs reasonably relied on the defendants' promise to provide restitution—the alternative basis for equitable estoppel. The court's limited analysis of equitable estoppel is unwarranted and inconsistent with the underlying purposes of limitations law and its exemptions.

1. *Fraudulent Concealment*

The Tulsa plaintiffs contended that the government fraudulently concealed its role in the race riot of 1921, thereby precluding them from timely filing.[201] According to the Commission Report, which ultimately unearthed the government's complicity in the riot,[202] the concealment was so thorough, "[i]t was as if the greatest catastrophe in the city's history simply had not happened at all."[203]

Designed to uncover hidden or suppressed information that could not have been revealed otherwise,[204] the Commission Report is the culmination of a four-year intensive study by a team of experts—including historians, legal scholars, archeologists, anthropologists, forensic specialists, geophysicists, and others—who combed archival depositories and research libraries all over the country; searched court and municipal records; extensively reviewed magazines and newspaper outlets; and interviewed hundreds of survivors and witnesses.[205] The Commission Report had a tremendous impact on the un-

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199 *Id.* at 2455.

> [O]ne can draw an analogy between an innocent owner's ignorance and disabilities such as infancy, insanity, and imprisonment, all of which toll the running of adverse possession of land. In these cases, the law subordinates a possessor's repose to an owner's fair chance to bring an action. Likewise, where an owner cannot bring suit out of blameless ignorance of who has her chattel, the law should treat her ignorance as a disability and so toll the limitation period.

Id.; *see also id.* at 2456; Matsuda, *supra* note 14, at 381–82 (comparing injuries resulting from slavery and its vestiges to legal disabilities that justify delayed accrual).

200 *See also In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1072–73 (N.D. Ill. 2004) (rejecting equitable estoppel in slave reparations case).

201 *See* Alexander v. Oklahoma, No. 04-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *23–24 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

202 *See* Goble, *supra* note 1, at 11–14; *see also* OKLA. STAT. ANN. tit. 74, § 8000.1.2–.1.3 (West 2002).

203 *See* Franklin & Ellsworth, *supra* note 164, at 26.

204 *See* Goble, *supra* note 1, at 6–8; *see also* tit. 74, § 8000.1.5.

205 *See* Goble, *supra* note 1, at 1–4.

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derstanding of the riot and its aftermath: "Commissioners were surprised to receive so much new evidence and pleased to see that it contributed so much."[206]

After decades of concealment, the Commission Report revealed the extent to which the defendants were complicit in the horror of the race riot and its aftermath. Rather than calm or contain the riot, city officials deputized and armed members of the white mob who deliberately burned, looted, and killed.[207] Units of the Oklahoma National Guard arrested the Black residents of Greenwood and held them captive in holding centers, thereby enabling their homes, churches, schools, and businesses to be looted and burned to the ground.[208] No government official offered resistance or protection for Greenwood; no criminal acts were prosecuted or punished; and Greenwood residents were left to rebuild the community without assistance.[209]

The Commission's findings were incorporated by statute by the State of Oklahoma, which conceded that a "conspiracy of silence" had effectively concealed information about the riot and its aftermath.[210] The record was set straight. The State concluded that "[o]fficial reports and accounts of the time that viewed the Tulsa Race Riot as a 'Negro uprising' were incorrect," and, in fact, government officials had participated in the violence and destruction.[211] With the truth no longer "swept well beneath history's carpet,"[212] the plaintiffs sought restitution from the government. Although acknowledging the plaintiffs' allegations of fraudulent concealment—including the findings of the Commission and the Oklahoma state legislature[213]—the district court ignored this doctrine as a basis for equitable estoppel. Refusal to permit equitable estoppel under such circumstances is shortsighted. Other courts understand this.

For example, in 1997, Jewish victims and survivors of the Nazi Holocaust, with their families and heirs, filed class action lawsuits against banking institutions that operated in France during World War II, and their predecessors and successors, for violations that occurred over fifty years earlier.[214] The plaintiffs claimed that the banks "aided and abetted and conspired with

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206 *Id.* at 7.

207 *Id.* at 11–12.

208 *Id.* at 12.

209 *Id.* at 12–14.

210 *See* OKLA. STAT. ANN. tit. 74, § 8000.1.4, .1.6 (West 2002).

211 *Id.* § 8000.1.2.

212 *Id.* § 8000.1.4.

213 *See* Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *8–15, *23–24 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005). Specifically,

> Plaintiffs argue that the City concealed its role in the Riot through the convening of a Grand Jury that blamed the Riot on the victims, the failure to investigate the riot or prosecute persons who committed murder or arson, and the disappearance of official files from the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department. Plaintiffs further support this argument with the language from [title 74 of the Oklahoma Statutes], § 8000.1.4 referring to a "conspiracy of silence" that "served the dominant interests of the state."

Id. at *24.

214 Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 121 (E.D.N.Y. 2000).

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the Vichy and Nazi regimes" to loot the plaintiffs' assets, which promoted discrimination against Jewish citizens and disabled them from being able to finance their escape from Nazi persecution and avoid being sent to concentration camps where they were killed.[215] The plaintiffs alleged that, after the war, the "defendants unjustly refused to return the looted assets, enriched themselves with the derivative profits, and concealed information, value, and derivative profits of the looted assets from the plaintiffs."[216] The plaintiffs also accused the defendants of "misrepresenting to plaintiffs and the general public [the defendants'] role during the Vichy government and their continued retention of assets; and failing to provide an accounting and restitution to plaintiffs."[217]

Various commissions were formed to provide relief to victims of the Holocaust-related atrocities, to supervise banking institutions' compliance, and to conciliate amongst the parties. The primary commission was an independent one organized by the French government, "comprised of historians, diplomats, lawyers, and magistrates to 'study the conditions in which goods may have been illicitly acquired . . . and to publish proposals' regarding redress of Holocaust-era atrocities in France."[218] This commission generated a report that provided substantial relevant evidence to the plaintiffs' case.[219] Consequently, the plaintiffs argued that "defendants should be equitably estopped from raising a statute of limitations defense because plaintiffs have been kept in ignorance of vital information necessary to pursue their claims without any fault or lack of due diligence on the part of the plaintiffs."[220] The plaintiffs contended that the defendants engaged in a "policy of systematic and historical denial and misrepresentation" and that such deception misled and deprived the plaintiffs from knowing or successfully proving their claims.[221] The court unequivocally accepted the plaintiffs' equitable argument, concluding that the defendants' deception should not permit them to hide behind the statute of limitations:

> Should the alleged facts be supported by evidence in discovery, there is certainly a strong undercurrent to the issues at bar suggesting the [sic] a deceptive and unscrupulous deprivation of both assets and of information substantiating plaintiffs' and their ancestors' rights to these assets. There is no reason that plaintiffs should be denied a forum for addressing their claims as a result of deceitful practices by the defendants which have kept them from knowing or proving the extent of these claims, if that proves to be the case. Defendants are not entitled to benefit from whatever ignorance

215 *Id.* at 121–22.

216 *Id.* at 122.

217 *Id.*

218 *Id.* at 123 (citation omitted).

219 *Id.* at 123, 132.

220 *Id.* at 135.

221 *Id.*

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they have perpetuated in the plaintiffs. Thus, plaintiffs are entitled to the benefit of equitable tolling.[222]

Despite the passage of fifty years, the plaintiffs were able to receive some recompense for their misery. There is no reason why the same should not be true for plaintiffs seeking relief for the atrocities of Jim Crow violence in Tulsa.[223]

When confronted with the question of whether there has been fraudulent concealment sufficient to equitably estop a defendant from relying on the statute of limitations defense, the court must first ask what was concealed. What types of information fall under the fraudulent concealment rubric such that equitable estoppel will result? The courts have relied on various types of information, including the identity of the defendant and other facts vital to the plaintiffs' case.[224] Despite the wide net cast by equity, the Tulsa court reduced the inquiry to whether victims of the riot would have observed the city's misconduct during the riot.[225] Not surprisingly, the court answered this question in the affirmative, concluding that the injury was "obvious" to riot victims at the time that it was inflicted.[226]

The district court missed the point. The injury for which plaintiffs sought relief was far greater and more sophisticated than a single tort—it involved interrelationships that were not "obvious" until the publication of the Commission Report. Equitable estoppel was therefore warranted.

2. *Promise to Provide Restitution*

The alternative ground for granting equitable estoppel[227] is where a defendant has made some assurance reasonably calculated to lull plaintiff into

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222 *Id.* at 135–36. The court seems to have permitted the plaintiffs to go forward under both the equitable estoppel and equitable tolling doctrines, which often overlap.

223 Similarly, in *Hohri v. United States*, 782 F.2d 227 (D.C. Cir.), *reh'g denied*, 793 F.2d 304 (D.C. Cir. 1986) (en banc), *vacated on other grounds*, 482 U.S. 64 (1987), the U.S. Court of Appeals for the District of Columbia Circuit held that where the government had fraudulently "concealed the fact that there was no military necessity justifying the exclusion, evacuation, and internment program" of Japanese Americans, plaintiffs' claims were considered timely because of the concealment. *Id.* at 246, 250. *But see* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 467–68 (D.N.J. 1999) (concluding that alleged misrepresentations by Ford Motor Company about its involvement in German slave labor during World War II did not toll the statutes of limitations when the misstatements were made long after the end of the War). *See also* Klehr v. A.O. Smith Corp., 521 U.S. 179, 194–96 (1997) (fraudulent concealment).

224 *See* Wolin v. Smith Barney Inc., 83 F.3d 847, 850 (7th Cir. 1996) (identity of defendant and other facts necessary for suit).

225 Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *26–28 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

226 *Id.*

227 Although the plaintiffs in the Tulsa case did not argue that the defendants waived the statutes of limitations, this is another available exemption. Defendants have waived statutes of limitations in a variety of other reparations-type cases. The federal government did so in its enactment of the Civil Liberties Act of 1988 that compensated Japanese Americans for their unlawful internment. *See* Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (2000). The federal government also waived the statutes of limitations in response to *Pigford v. Glickman*, a class action brought against the Department of Agriculture on behalf of African-American farmers and ranchers for lending discrimination. Pigford v. Glickman, 185 F.R.D. 82, 86 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). Where the Department's own study (the CRAT Report)

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not timely filing. In the Tulsa case, the plaintiffs argued that that assurance was a promise by the City of Tulsa to provide restitution to the riot victims.[228] Shortly after the riot, the City promised it would "make good the damage, so far as can be done, to the last penny."[229] The State of Oklahoma, in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001, also acknowledged "its moral responsibility" for the riot.[230] The court concluded that the plaintiffs' reliance on the City's promise could not be supported because the defendants ultimately failed to provide restitution and instead tried to undermine the plaintiffs' recovery and community rebuilding.[231] Consequently, equitable estoppel was not granted.[232]

But why should the defendants be able to benefit from their own deception, in contravention of the policies underlying the statute of limitations? It does not follow that because the defendants eventually reneged on their promise to provide restitution that the plaintiffs' initial reliance on that promise was unreasonable. As the plaintiffs argued, the fact that the defendants gave conflicting messages does not mean that the plaintiffs did not reasonably rely on the defendants' assurances.

What is reasonable, of course, depends largely on the circumstances and the actors. Here, where the court itself concluded that "[t]he political and social climate after the riot simply was not one wherein the [p]laintiffs had a true opportunity to pursue their legal rights,"[233] it would be reasonable—although certainly not ideal—to rely on the government or private entities to provide some sort of restitution. Given the state of chaos, destruction, and devastation during and immediately following the riot, the plaintiffs were certainly in no condition to accurately access the government's credibility—one way or the other. The government's own culpability in the riot was not yet established, and the government purported not only to the riot victims, but to the rest of the world, that it was going to redress the plaintiffs' grievances.

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revealed that African-American farmers and ranchers had been improperly denied loans and that their complaints of such mistreatment had been routinely ignored or destroyed, the government waived the two-year statute of limitations. *Id.* at 88–89. Invoking the promise General Sherman made to provide recently freed slaves "forty acres and a mule" and the Freedmen's Bureau's relinquishment of that promise, the court endorsed the consent decree permitting Black farmers relief long after the two-year statute of limitations had expired. *Id.* at 85–86.

228 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *28–29.

229 *Tulsa*, *supra* note 7, at 839.

230 Goble, *supra* note 1, at 15, 19 (acknowledging moral responsibility and recommending reparations); *see also* OKLA. STAT. ANN. tit. 74, § 8000.1.6 (West 2002):

> The 48th Oklahoma Legislature . . . recognizes that there were moral responsibilities at the time of the riot which were ignored and has [sic] been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature . . . to freely acknowledge its moral responsibility on behalf of the State of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

Id.

231 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *28–29.

232 *Id.* at *29.

233 *Id.* at *31.

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In the context of reparations litigation, the courts should grant wide latitude to the plaintiffs' claims of reasonable reliance on the defendants' promises of restitution for wrongdoing. To do otherwise rewards the morally bankrupt and undermines the credibility of limitations law.

D. Equitable Tolling

Given the tremendous breadth of the application of the equitable tolling doctrine, the court's constricted use of it in the Tulsa litigation is unjustified. Ironically, the court recognized the unavailability of the courts and the plaintiffs' inability to access necessary information about their claims,[234] bases normally sufficient to equitably toll the limitations period, but the court did not toll the statute of limitations to the point of resurrecting the plaintiffs' claims.

The difficult issue is determining at what point it becomes reasonable to expect plaintiffs to bring reparations claims for a race riot that occurred over three-quarters of a century ago. The court's opinion is instructive, but it poses more questions than it answers.

Although the court recognized the propriety of equitable tolling where plaintiffs could not, despite due diligence, obtain vital information bearing on the existence of their claims, the court did not accept this as a basis for equitable tolling.[235] The court rejected the plaintiffs' contention that they were unaware of the role the City played in the riot and its aftermath until the publication of the Commission Report and that therefore equitable tolling was appropriate.[236] Relying on allegations in the complaint, the court concluded that because some riot victims sought relief before and some were supposedly aware of specific city officials' violent acts, the plaintiffs were not sufficiently diligent.[237] This conclusion fails to take seriously the impact of the defendants' campaign of misinformation and fraudulent concealment that extended post–Jim Crow. With many adult survivors now dead and the riot "swept well beneath history's carpet"—as recognized by the Oklahoma legislature itself[238]—the Commission Report made a challenge to the City and State for restitution possible for the first time. Riot survivors today were mere children when the riot occurred and could not realistically have been expected to have had sufficient knowledge to file suit.[239] Litigation timely

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234 *Id.* at *31–32.

235 *See id.* at *24–28.

236 *Id.* at *25–26. The court concluded:

> Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the City's involvement any sooner. While it is certain that the Commission Report has helped to gather more facts about the Riot, the Court has considerable trouble with the Plaintiffs' assertion that until the Commission issued its report, they were unaware of the City's responsibility for their injury.

Id.

237 *See id.* at *26–28.

238 OKLA. STAT. ANN. tit. 74, § 8000.1.4 (West 2002).

239 *Cf.* Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984) (noting that a plaintiff must have "an awareness of sufficient facts to identify a particular cause of action," not "hints, suspicions, hunches or rumors," to be required to file suit).

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brought by African-Americans shortly after the riot was substantially undercut by dismissals and a grand jury that exonerated only whites for their participation in the riot.[240] These circumstances understandably discouraged plaintiffs from filing suit.[241] Finally, despite the groundbreaking work of the Tulsa Commission and the significant contribution it has made to understanding the complicity of the City and State in the riot and its aftermath, the court rejected the notion that the Commission Report's publication was a requisite precursor to filing.[242] Instead, the court held the plaintiffs to a standard far beyond the reasonable person standard normally expected of plaintiffs.

The court's conception of what constitutes diligence sufficient to toll the limitations period is unreasonable and out of sync with decisional law. For

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240 The State of Oklahoma blamed African-American residents of Greenwood for the riot, returning criminal indictments against several of them. *See Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated*, *supra* note 161.

241 In a similar case, the U.S. Court of Appeals for the Tenth Circuit rightly held that the statute of limitations for a wrongful death action had been tolled, even where the plaintiffs believed the defendant had committed the murder. *See* Allred v. Chynoweth, 990 F.2d 527, 531–32 (10th Cir. 1993). There, the circuit court equitably tolled the limitations period until the publication of the defendant's book, which admitted her guilt many years after her acquittal. *Id.* at 532. The court rejected the defendant's argument that the plaintiffs were sufficiently on notice of their cause of action where the state found sufficient evidence to arrest and try the defendant and the plaintiffs knew the victim had been murdered and suspected the defendant. *Id.* at 531–32. The Tenth Circuit concluded that the plaintiffs would not have had the incentive to bring suit because the "jury's acquittal logically would have substantially undercut that suspicion, if not eliminated it altogether." *Id.*

242 The major works on the Tulsa race riot preceding the Commission's Report did not reveal the City and State's role in the riot and its aftermath. Ed Wheeler, described by *Tulsa Today* as "the historical writer that in 1971 produced the first locally researched modern publication of the 1921 story," David Arnett, *Commission Completes Final Report*, TULSA TODAY, 1996, http://www.tulsatoday.com/archive/racewar.htm, characterized the riot as a battle between Black mobs and better armed white mobs. Ed Wheeler, *It Happened in Tulsa*, TULSA TODAY, 1996, http://www.tulsatoday.com/archive/racewar.htm. Wheeler did not describe the role of the government in the violence, instead crediting white mobs for the "killing, looting and burning" of the riot. *Id.*

Dr. Ellsworth, author of the preeminent work on the riot, *Death in a Promised Land*, conceded that "[w]hat little information about the riot that was available was inadequate and incomplete" prior to the Commission's Report. Declaration of Dr. Scott Ellsworth, *appended to* Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment, Exhibit 1 at 3–4, Alexander v. Oklahoma, No. 03-CV-133-E (N.D. Okla. Feb. 23, 2004). Specifically:

> [T]he Tulsa Race Riot Commission—and here I am speaking primarily of the scholars who were attached to it—began to produce a much larger body of information about the riot than anyone, myself included, had anticipated. . . .
>
> All told, the overall effect of this new information was to help transform our historical understanding of the riot . . . [b]y using the newly uncovered historical evidence in conjunction with previously available sources, one could now discern, for the first time, not only the overall dynamics of the riot, but also how actions taken by government authorities directly affected the fate of the African American community.

Id. at 4–5; *see also* Goble, *supra* note 1, at 8 (noting that to write his accompanying report to the final Commission Report, "Scott Ellsworth used evidence he did not have—no one had it—as recently as 1982"). Moreover, resources such as the Internet, television documentaries, and others were not available to Dr. Ellsworth when he published his book.

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example, in *Rosner v. United States*,[243] Hungarian Jews and their descendants sought property expropriated by the pro-Nazi Hungarian government during World War II and seized by the United States Army from the "Hungarian Gold Train."[244] They sought information about the identification of their property to no avail.[245] The plaintiffs contended that many of the facts in their complaint did not come to light until the publication of the Presidential Advisory Commission on Holocaust Assets Report on the Gold Train.[246] Consequently, the district court tolled the limitations period on the ground that the plaintiffs "could not have known about the facts giving rise to this lawsuit."[247] Similarly, in *Bodner v. Banque Paribas*,[248] Jewish descendants sought damages from financial institutions who allegedly looted assets during the Nazi occupation in France.[249] The plaintiffs argued that the defendants engaged in a system of denial and misrepresentation about the custody of the assets that made it "impossible for them to learn critical facts underlying their claim."[250] The court equitably tolled the limitations period on the ground that a reasonably prudent person could not have possibly learned or discovered facts critical to the underlying claims.[251] Victims of the Tulsa race riot, by contrast, were not afforded the same benefit of the reasonably prudent standard, and instead were expected to bring suit in the absence of information critical to their case.

The Tulsa case demonstrates how vulnerable the due diligence standard is to discretionary abuse and caprice, but also demonstrates the federal judiciary's greater understanding of the historical reality and impact of the Jim Crow era. Even assuming—contrary to the allegations in the complaint—that the plaintiffs had actual or presumed knowledge of the role of the government in the riot, the court recognized that the riot and its aftermath presented extraordinary circumstances that warranted tolling the statute of limitations until the end of the Jim Crow era in the 1960s.[252] Although the case was ultimately dismissed, the plaintiffs enjoyed a Pyrrhic victory—that is, a tolling of the limitations period for over forty years. The enormity of this achievement should not be undervalued. For the first time in a case seeking restitution for damages incurred from a race riot, a court applied and accepted the notion that the racial violence beset upon a community and the ongoing institutionalized brutality in the decades that followed was sufficiently extraordinary to toll the limitations period. While recognizing the ex-

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243 Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002).

244 *Id.* at 1203–04.

245 *Id.* at 1205.

246 *Id.*

247 *Id.* at 1205–06, 1209.

248 Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

249 *Id.* at 121. The Tulsa court acknowledged the applicability of the principles set forth in *Bodner*. *See* Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *24–25 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

250 *Bodner*, 114 F. Supp. 2d at 135–36.

251 *Id.*

252 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *30–32.

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treme complexity of applying the equitable doctrines of estoppel and tolling,[253] the court's adoption of this scheme was unequivocal:

> Plaintiffs assert extraordinary circumstances in *a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow. There is no question that there are exceptional circumstances here.* Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights. The question is not a factual question of whether exceptional circumstances existed. They did.[254]

Where the record was replete with evidence of "intimidation, fear of a repeat of the riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow,"[255] the court concluded that the environment was unconducive to timely filing.[256] The court thus tolled the limitations period for four decades—up to the dismantling of Jim Crow.

Application of the equitable tolling doctrine where such extraordinary circumstances exist is consistent with similar decisional law. For example, in the context of reparations claims for Holocaust-related violations, district courts have equitably tolled the limitations period in part because of the exceptional nature of the circumstances. In *Rosner*, Hungarian Jews and their descendants sued the government to recover property stolen by the pro-Nazi government during World War II and seized by the United States Army.[257] The plaintiffs did not file until 1999, forty-six years after the limitations period expired. The district court conceded that what partially tipped the balance in favor of equitable tolling was the fact that "for the majority of Plaintiffs, the years following World War II were particularly difficult."[258] The court was persuaded by the plaintiffs' contentions that the "brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure" were important pieces of its equitable tolling analysis.[259]

Similarly, in *Bodner*, ancestors of Jewish customers brought suit against French financial institutions for stealing the assets of customers during the Nazi occupation and for failing to return the looted property.[260] The plaintiffs did not file until 1997, seeking damages for claims over fifty years old.[261]

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253 *Id.* at *35–36.
254 *Id.* at *30–31 (emphasis added).
255 *Id.* at *32.
256 *Id.* at *31–32.
257 Rosner v. United States, 231 F. Supp. 2d 1202, 1203–04 (S.D. Fla. 2002).
258 *Id.* at 1209.
259 *See id.* at 1208.
260 Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 121 (E.D.N.Y. 2000).
261 *See id.* at 124.

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The district court permitted equitable tolling for various reasons, including the extraordinary conditions under which the plaintiffs would have had to function: "[P]laintiffs could hardly have been expected to bring these claims at the end of World War II."[262]

Additionally, in *Hoang Van Tu v. Koster*,[263] residents of a Vietnam village sued American soldiers on behalf of the survivors and descendants of a Vietnam War massacre.[264] Although the plaintiffs were not able to persuade the appellate court to toll the statute of limitations for up to twenty-eight years, the U.S. Court of Appeals for the Tenth Circuit recognized the potential legitimacy of "some degree of equitable tolling [as] appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel."[265]

The Tulsa case suggests that the courts have come further in recognizing the impact the confluence of racial violence, government corruption, and de jure segregation has had on African-Americans' ability to timely file suit for reparations, but this case also highlights the ever-dangerous slippery slope on which everyone is purportedly terrified to fall down. Where do we draw the line? At what point do the extraordinary circumstances cease to exist, thereby forcing plaintiffs to file? In order to answer these questions, we must identify what those circumstances were, whether they were in fact truly extraordinary, and what the implications of the answers to such questions are for those seeking to procure restitution for past injury.

First, what is extraordinary? The court identified specific conditions that impeded the plaintiffs from seeking legal recourse,[266] but there is no telling whether any one of these factors alone or the confluence of them constituted the "extraordinary." Certainly, had any one of them alone sufficed to exonerate the plaintiffs from timely suing, equitable tolling would arguably be justified in a large number of cases. The court's identification of the circumstances that barred the plaintiffs from timely filing is clearly fact-driven and case-specific,[267] but its findings may have broader appeal. Certainly, accounts of African-Americans being targeted for brutal racial violence and then being prevented from pursuing meaningful legal recourse because of "intimidation, misrepresentation and denial" resonate throughout American

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262 *Id.* at 135.

263 Hoang Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 88 (2004).

264 *Id.* at 1197.

265 *Id.* at 1199–1200.

266 The court identified "a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow." Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *30 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

267 That is, it was a race riot (perhaps the worst in this country); there was a full investigation conducted that unearthed voluminous evidence, including that of government complicity; there are specific live victims who personally experienced the violence who are seeking compensation today.

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history. The Tulsa case is, all at once, both extraordinary and completely commonplace for Blacks living in America.[268]

Second, what are the implications of deeming something extraordinary? If the level of government complicity, racial violence, Klan domination, and de jure segregation in Tulsa were tragically not so unique or extraordinary as the plaintiffs contend, this may impact application of the equitable tolling doctrine. If we accept that the confluence of factors in the Tulsa case was the normal experience for many, if not most, African-Americans up to the end of the Jim Crow era, this may mean that the statute of limitations should be equitably tolled as a general matter for African-Americans seeking reparations for this time period. Or, it may mean that because African-Americans share this common experience, it ceases to be extraordinary, and therefore, does not warrant tolling. If we conclude that the Tulsa case was really an aberration, this may mean that tolling is appropriate in this case but not elsewhere. Certainly, the more unique the Tulsa case, the more credible the argument that tolling is appropriate. However, such a finding—although helpful for the plaintiffs in the Tulsa case—could harm similar race restitution cases in particular and the reparations movement in general. To the extent that the Tulsa case, or any other reparations case for that matter, is distinguishable, it stands a chance at successfully tolling the limitations period. If it fails to set itself apart, however, it may trigger the slippery slope contention.

Third, when do the extraordinary circumstances end? At what point did the extraordinary circumstances in the Tulsa case cease to exist, thereby warranting the statute's running to resume? While acknowledging the devastating impact of the Tulsa race riot and its aftermath on the plaintiffs' ability to timely bring a claim against the defendants, the court fell short of tolling the limitations period beyond the dismantling of the Jim Crow laws. Relying on the testimony of an expert witness, Dr. Leon Litwack, that the Jim Crow era ended in the 1960s,[269] the court used this arbitrary date as the cutoff date for extraordinary conditions.

As the plaintiffs argued, this line is much more blurry. The plaintiffs contended that the brutality, fear, and denial that characterized the period from 1921 to the 1960s in Tulsa did not immediately cease upon the dismantling of the de jure Jim Crow system. To the contrary, the plaintiffs argued that these unfortunate circumstances—generally and in Tulsa specifically—continued, thereby leaving the victims of the race riot with the reasonable expectation that the judicial system would not be receptive to their claims and that pressing such claims would be futile and possibly dangerous.[270] The

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268 *See* Goble, *supra* note 1, at 19 ("The 1921 riot is, at once, a representative historical example and a unique historical event.").

269 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *32.

270 Tulsa blamed African-American community leaders such as A.J. Smitherman, J.B. Stradford, and Charles T. Smithie for inciting the riot and unsuccessfully sought to extradite them from other cities to which they fled for their lives; thousands of other Greenwood residents fled. *See, e.g.*, *All Trains out of City Jammed with Refugees; Hundreds of Negroes Buy One-Way Tickets out of Tulsa Agents Say*, TULSA TRIB., June 5, 1921.

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plaintiffs' arguments notwithstanding, the court did not accept the ongoing nature of such extraordinary circumstances.

The Tulsa case highlights the arbitrary and artificial nature of the extraordinary-conditions determination. Although the limitations period normally resumes once the filing obstacle has been removed—e.g., peace after wartime[271] or the end of a brutal government regime[272]—the model does not fit in the context of reparations cases. What happens when the line of demarcation is not that stark—when there is no moment when "peace" is declared or an oppressive regime is ousted from office? What if the oppressive conditions continue to exist on a more limited scale or the plaintiffs still suffer from fear and intimidation long after the initial injury has occurred? In reparations cases, a more nuanced approach is warranted. There have clearly been great strides made in the area of race relations and the justice system, but this does not resolve the question of whether conditions are extraordinary enough to justify tolling. In the Tulsa case, for example, the plaintiffs argued that the conditions that made it impossible for them to file pre–Jim Crow bled over into the roughly thirty years that followed.

Finally, who gets to decide what constitutes extraordinary circumstances? Who should determine whether and when it is reasonable to seek legal redress for racial violence? Whose voice, perspective, and experience counts when determining whether conditions are so excessive that it is impossible for victims to vindicate their civil rights? Courts enjoy tremendous discretion to make such determinations, but perhaps they should borrow the conceptual framework of the "eggshell skull defense"[273] used in torts or the related "reasonable woman" standard used in the sexual harassment context[274] and judge the propriety of equitable tolling from the vantage point of the victim. The plaintiffs' arguments seem to hint at the adoption of such a framework. The plaintiffs posit that even assuming that the level of intimidation, fear of racial violence, inequities in the justice system, Klan domination in the courts, and Jim Crow discrimination diminished to the point of making it more plausible that African-Americans would bring suit for past wrongs

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271 *See, e.g.*, Levy v. Stewart, 78 U.S. (11 Wall.) 244, 250, 255 (1870) ("[T]he right to sue revives when peace is restored . . . ."); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 537, 539–41 (1867) ("[R]estoration of peace removes the disability, and opens the doors of the courts.").

272 *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) ("Given these extraordinary conditions, any claims against Marcos for injury from torture, 'disappearance', [sic] or summary execution were tolled until he left office in February 1986.").

273 *See, e.g.*, Primm v. U.S. Fid. & Guar. Ins. Corp., 922 S.W.2d 319, 321 (Ark. 1996) ("[The eggshell plaintiff] rule embraces the principles that a tortfeasor must accept a plaintiff as he finds him and may not escape or reduce damages by highlighting the injured party's susceptibility to injury.").

274 *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) ("[T]he reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men . . . . [U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.").

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post–Jim Crow, *these plaintiffs in particular*[275] continued to labor under extraordinary conditions.[276]

Given that it was impossible for plaintiffs to successfully bring suit until the publication of the Commission Report, equity demands that they be allowed to bring suit now. Shortly after the Civil War, the Supreme Court recognized this connection between the limitations period and legal disability: "The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other."[277] Here, logic dictates that the court suspend the statute of limitations for that period of time where the courts were unavailable and plaintiffs could not access information vital to bringing their claims. Until just recently, there has been no legal theory under which the plaintiffs could seek reparations from the government.

V. The Underlying Policy Rationales for Statutes of Limitations Are Not Served by Time-Barring Reparations Cases

Regardless of whether the recent Tulsa reparations case fits within the exemptions commonly used by the courts to permit the litigation of stale claims, the case warrants consideration based on public policy. Even if the court had not misapplied the statute of limitations exemptions, the court could have entertained the litigation on the grounds that it is consistent with the relevant underlying policy rationales of limitations law.[278] The primary

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275 *See* Caine, *supra* note 4, at 3 (noting the "profound and lasting effect" of the riot on some of its victims today). The preeminent scholar on the Tulsa race riot, Dr. Ellsworth, has concluded:

> A half century after the riot, there were still plenty of black survivors who were fearful even to merely discuss the riot. (And, indeed, as recently as 2001, a riot survivor informed me that he was afraid that both he and his family would be punished for taking part in the lawsuit.).

Declaration of Dr. Scott Ellsworth, *supra* note 242, at 2–3; *see also* Franklin & Ellsworth, *supra* note 163, at 25 ("Of course, any one who lived through the riot could never forget what had taken place. And in Tulsa's African American neighborhoods, the physical, psychological, and spiritual damage caused by the riot remained highly apparent for years. Indeed, even today there are places in the city where the scars of the riot can still be observed.").

Similarly, in *Hilao v. Estate of Marcos*, the U.S. Court of Appeals for the Ninth Circuit tolled the limitations period until the President of the Philippines, Ferdinand Marcos, left office, for persons bringing claims against him for injuries due to "torture, 'disappearance', [sic] or summary execution." *Hilao*, 103 F.3d at 773. The Ninth Circuit credited plaintiffs' explanation of fear and intimidation as appropriate grounds for tolling:

> Another expert witness testified that many victims of torture in the Philippines did not report the human-rights abuses they suffered out of intimidation and fear of reprisals; this fear seems particularly understandable in light of testimony on the suspension of habeas corpus between 1972 and 1981, and on the effective dependence of the judiciary on Marcos.

Id.

276 The problem, of course, is more complex when the concept is applied to those persons who continue to labor under the extraordinary conditions of slavery and its aftermath.

277 Brown v. Hiatts, 82 U.S. (15 Wall.) 177, 184–85 (1872).

278 *See, e.g.*, Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 473–76 (1975) (Marshall, J., concurring in part and dissenting in part) (arguing that where underlying policies of statute of limitations are not frustrated and settlement and reconciliation are enhanced, tolling should be permitted).

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goals of ensuring fairness to the defendant, promoting efficiency, and bolstering institutional legitimacy are not undermined by permitting such claims.

A. Fairness to the Defendant

Rather than ensuring fairness for the defendant, foreclosing reparations claims because of untimeliness devalues fairness for the plaintiff.

1. Exposing Repose

The court's refusal to hear the Tulsa case as a means of providing repose for defendants and society at large is unjustified. Providing peace of mind and protecting a defendant's well-established expectations have been a hallmark of the Anglo-American legal system,[279] but very few have sought to explain why.[280] Examining repose as a preeminent rationale for limitations periods in reparations cases reveals its many shortcomings.

First, it is not at all clear why society should care more about satisfying a defendant's settled expectations that he escape liability than a plaintiff's settled expectations that the legal system will hold wrongdoers accountable for their misdeeds. Justice Holmes, in *The Path of the Law*, suggested that the pull towards repose is human nature.[281] Relying on the law of adverse possession, Justice Holmes suggested that from a defense point of view, the defendant has gained a right that transcends, if not supplants, that of the plaintiff.[282] The defendant's right stems from the intrinsic human act of self-preservation and entitlement:

> It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.[283]

Certainly, claims for reparations have provoked deep resentment, defensiveness, and outright hostility. Mere discussion and research of the topic and its impact engender rage and intolerance.[284] A corporation unjustly enriched by generations of cheap slave labor, a governmental system built on

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279 *See* Ochoa & Wistrich, *supra* note 23, at 460–61, 464 n.42 ("One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not be defeated." (quotation omitted)); 1 WOOD, *supra* note 51, at 8–9 ("The underlying purpose of statutes of limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution."); *see, e.g.*, A'Court v. Cross, 130 Eng. Rep. 540, 541 (K.B. 1825) ("Long dormant claims have often more of cruelty than of justice in them.").

280 As Justice Holmes posed, "[W]hy is peace more desirable after twenty years than before?" Holmes, *supra* note 24, at 476.

281 *Id.* at 477.

282 *Id.* ("Has the defendant gained a right or not? . . . But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser.").

283 *Id.*

284 For example, U.S. Representative John Conyers has tried unsuccessfully for years to get Congress to enact legislation that would merely study the issue of slavery and its impact and

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legally sanctioned discrimination, and many individuals unfairly privileged by generations of racial favoritism[285] each hold onto their unmerited privilege as an entitlement. Is this response simply the product of the "deepest instincts of man" for which we cannot ask for more? Or is it possible to expect something greater? Even assuming that this sense of entitlement is intrinsically human, this does not countenance designing legal principles to accommodate a quality so base. Law is designed to establish rules that transcend instinctual human behavior so that justice and order prevail.

As an initial matter, there is no reasonable expectation of repose by the defendants in the Tulsa reparations litigation. In 1997, the defendants themselves commissioned the most comprehensive investigation of the Tulsa race riot to identify its victims, determine culpability, and ascertain the propriety of reparations, and then issued a report[286] whose findings were adopted by the Oklahoma legislature.[287] The Commission Report clearly established the moral responsibility of the City of Tulsa and the State of Oklahoma for their wrongdoing.[288] What should follow is some measure of compensation for that wrongdoing. Upon failing to provide restitution voluntarily, the defendants cannot credibly argue that they were caught by surprise or that their settled expectations were altered when the plaintiffs shortly thereafter filed a lawsuit to force the defendants to take legal responsibility for their moral wrongdoing. Defendants should not be able to invoke repose as a defense where their culpability has been established—using repose as a shield from liability. Permitting such defense makes a mockery of the principle of repose. Had there been any expectation of repose, it was shattered by the defendants themselves.

Second, the erosion of repose in the context of criminal prosecutions for civil rights violence[289] suggests that the same may be appropriate in the civil context. Prosecutors have recently seen it fit to reopen numerous criminal

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make recommendations regarding reparations. *See* Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 108th Cong. (2003).

285 These are not the only persons and entities that oppose reparations litigation. Some African-Americans, for example, also oppose reparations for a variety of reasons, including: fear that it will create a negative stigma, concern that it demonstrates dependence on the majority, a preference for other means for redressing slavery and past discrimination, and concern over how such a scheme would practically work. *See, e.g.*, Jordan, *supra* note 14, at 558 (arguing that the "exclusive focus on slavery [by reparations litigators] is misguided" and proposing alternative of focusing on lynchings and race riots of more recent past).

286 In 1997, Oklahoma House Joint Resolution 1035 initiated the creation of The 1921 Tulsa Race Riot Commission. Goble, *supra* note 1, at 1. The Act was amended twice and enacted into law on April 6, 2000. *Id.* The Commission's authority was extended to February 28, 2001. *Id.* The Commission issued its report on February 28, 2001. *Id.*

287 OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002).

288 *See supra* note 10.

289 The victims' rights movement also suggests that many in society—at least in the criminal context—have grown weary of defendants' interests predominating the legal system. *See* Ogletree, *supra* note 13, at 1058. The notion of providing repose for the defendant as justification for depriving plaintiffs the opportunity to seek restitution may be waning. Ochoa and Wistrich conclude:

> In assessing the validity and weight of this purpose . . . it is necessary to ask how much value should be placed on the desire of wrongdoers, or of persons who are uncertain whether they are wrongdoers, for freedom from worry about being called

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cases involving civil rights violence perpetrated decades ago.[290] If in criminal law, where the stakes for finding a defendant guilty are much greater—i.e., a defendant could lose his freedom or even his life[291]—society has thought it appropriate to entertain stale claims, why shouldn't the same be true in the civil context? Finally, prioritizing repose wrongly protects and deflects American society from the critical and difficult job of coming to terms with the historical and current oppression of African-Americans. Recognition and reconciliation have not and will not take place until they replace repose as a preeminent value. Not even masked in language of restoration or healing for plaintiffs, some argue that plaintiffs seeking restitution for past acts of racial violence need to just "get over it."[292] The opposition contends that the topic is too divisive and painful to deal with; however, such avoidance encourages not repose for defendants, but amnesia.[293]

2. *Putting Evidentiary Problems into Perspective*

Reparations cases present significant evidentiary problems, but it is important to put these problems into perspective. The difficulty and complexity of identifying plaintiffs, defendants, causation, and damages so remote in time is unquestionably daunting.[294] Yet, it is important to ask ourselves

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> to account for past misdeeds. *Currently, society appears to place relatively little value on such considerations.*

Ochoa & Wistrich, *supra* note 23, at 461 (emphasis added); *see* Russell, *supra* note 17, at 1227–47; *see also* Bibas, *supra* note 192, at 2466 ("Thieves deserve no repose from the rightful owner's claim.").

290 *See* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1141 (2003); Todd Taylor, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith*, 16 B.C. THIRD WORLD L.J. 359, 359 (1996). Disrupting repose also works to help defendants. The Innocence Project is a case in point. In an effort to protect the innocent, there has been a groundswell of support for reopening cases where DNA or other evidence suggests that a defendant was wrongly convicted.

291 *See In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring). The Court recognized this critical distinction between the criminal and civil context:

> In a civil suit between two private parties for money damages . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor . . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

Id.

292 *See* John McWhorter, *supra* note 14, at 36–37; Epstein, *supra* note 14, at 1192; Ogletree, *supra* note 13, at 1054–55 ("The victims' families and communities are told to 'get over it,' even by the citizens of the towns still traumatized by their history of racial and ethnic violence as well as by black and white critics of reparations around the country."); HOROWITZ, *supra* note 20, at 14; Horowitz, *supra* note 20; *see also* Brophy, *supra* note 20, at 1201–02 (categorizing the arguments opposing reparations).

293 *See* Leon F. Litwack, *Black Southerners in the Age of Jim Crow*, *appended to* Plaintiffs' Response to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment and Brief in Support, at Exhibit 15, Alexander v. Oklahoma, No. 03-CV-133-E (N.D. Okla. Jan. 6, 2004) ("It has been far easier to take refuge in historical amnesia, as Americans chose to do for much of the twentieth century, and not view these experiences as part of our heritage.").

294 That the evidentiary issues in reparations cases are difficult to surmount does not mean that such cases should be abandoned altogether. Other types of massive litigation, such as those involving asbestos and tobacco, have also posed daunting evidentiary challenges. Where the

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whether the Supreme Court was correct when it stated more than a century ago: "[T]ime is constantly destroying the evidence of rights."[295] Although experience and logic suggest that the answer is yes,[296] the answer within the context of reparations claims is more nuanced.

First, the presumption that evidence is less reliable over time in the context of reparations cases is not necessarily true. This is because statutes of limitations are overinclusive: they ban not only those claims that are based on inaccurate factual findings, but those claims based on accurate ones as well. *Wood v. Carpenter* concludes that the "bane and antidote go together."[297] But does a statute of limitations remedy the problem of deteriorating evidence? Do prohibiting a lawsuit from going forward and preventing inaccurate fact finding "go together"? Not necessarily.[298] Some meritorious claims thus are barred by what is inevitably an arbitrary cutoff. The limitations bar does not neatly divide claims into those based on accuracies and inaccuracies. Its efficacy as a means of protecting evidence is crude at best.

Critical to the inquiry is the type of evidence under consideration. For example, testimonial evidence—although subjected to the ravages of time[299]—may be more forthcoming today than it would have been in the past. The passage of time itself may heal wounds that enable victims to overcome suppressed memories and their fear of coming forward. Additionally, the greater the distance from the events themselves, the easier it may be for defendants to disclose their involvement without having to take personal and direct responsibility for the wrongdoing. The passage of time may be healing and cathartic, allowing the parties to articulate the unspeakable.

The passage of time has resulted in circumstances that make it much more likely that reliable evidence will surface. The creation of impartial, bipartisan investigative commissions has unearthed long-buried evidence and jogged collective memories. The very existence of investigative commissions and a legal system committed to eradicating at least the most egregious forms of de jure civil rights violations may resurrect testimonial evidence. Certainly, within the criminal context, aggressive and reinvigorated investiga-

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judiciary has taken creative, albeit controversial, approaches to such litigation, the legal system has been able to provide relief. *See* Weinstein & Schwartz, *supra* note 92, at 379–85.

295 *See* Wood v. Carpenter, 101 U.S. 135, 139 (1879).

296 *See* Ochoa & Wistrich, *supra* note 23, at 474–75; *see also* Epstein, *supra* note 62, at 1181 ("With the passage of time, the evidence available regarding a given legal issue necessarily becomes stale."); Letsou, *supra* note 62, at 227 ("The passage of time magnifies uncertainty and evidentiary problems."); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 446 (1973) ("Court delay increases error costs . . . because evidence decays over time, increasing the probability of an erroneous decision.").

297 *Wood*, 101 U.S. at 139.

298 *See* Ochoa & Wistrich, *supra* note 23, at 477 ("Limitation of actions is a rather blunt instrument for ensuring accuracy."); Callahan, *supra* note 23, at 134 (concluding that given that statutes of limitations bar "good" claims based on accurate facts as well as "bad" ones, the preservation of evidence is not a justification for such statutes).

299 Despite the passage of time, "hundreds and hundreds . . . tell us that what happened in 1921 in Tulsa is as alive today as it was back then. What happened in Tulsa stays as important and remains as unresolved today as in 1921." Goble, *supra* note 1, at 4.

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tions of civil rights murders have led to new convictions or confirmation of prior ones.[300]

Other evidence—although not contemporaneous to Jim Crow violence—may be reliable despite the passage of time. With major advances in modern technology, communications, and science—such as the computer, Internet, and DNA testing—it is easier to collect, record, and preserve evidence than ever before. Witnesses, whose general longevity has increased, may be found through computer search engines and contacted by cellular phone, facsimile, or e-mail. Persons can be identified positively through DNA testing and genealogy records. Such advances have enabled prosecutors today to successfully pursue those responsible for some of the most notorious and well-known acts of civil rights violence. It is thus important to recognize that there are times when evidence, like a fine wine, improves over time.[301]

Second, even assuming that issues such as the identification of plaintiffs, defendants, causation, and damages in reparations cases cannot be determined with absolute certainty, it is important to recognize that the legal system often provides at best "rough justice." On the one hand, it seems obvious that the more accurate the fact finding the better.[302] Accurate fact finding in the legal system accomplishes important objectives: the guilty are punished and the innocent exonerated; accurate adjudication deters misconduct; and the legal system is legitimized.[303] On the other hand, although accuracy is a laudable goal,[304] it is often neither attained nor attainable.[305] Decision making based on perfect information is admittedly aspirational.[306] The Anglo-American legal system is arguably designed to play the limited role of resolving disputes, as opposed to determining truth.[307] This reality is reflected in the "preponderance of the evidence" standard in civil cases. Plaintiffs are charged with convincing the fact finder that it is more likely than not that their version of the facts is true, not that their version is abso-

300 *See supra* note 290 and accompanying text.

301 *See also* Ochoa & Wistrich, *supra* note 23, at 475 (noting that claims based primarily on documentary evidence may survive the passage of time); Green, *supra* note 54, at 989–1003 (arguing that in toxic tort cases, statutes of limitations diminish the accuracy of fact finding because they require claims to be filed prematurely—before adequate scientific data showing causation is developed, before the plaintiff has suffered significant loss, and before it is possible to assess the course of the plaintiff's condition).

302 *See* Ochoa & Wistrich, *supra* note 23, at 472 n.80 ("The degree of accuracy is a central concern of adjudication." (quotation omitted)); Daniel R. Ortiz, *Neoactuarialism: Comment on Kaplow (1)*, 23 J. LEGAL STUD. 403, 403 (1994) ("Accuracy is a central, if not *the* central, value of adjudication."); Stephen McG. Bundy, *Valuing Accuracy—Filling Out the Framework: Comment on Kaplow (2)*, 23 J. LEGAL STUD. 411, 433 (1994) ("Accuracy is a central aspiration of any procedural system, but it cannot be the only aspiration.").

303 *See* Ochoa & Wistrich, *supra* note 23, at 472–73.

304 Some argue that accuracy is more important in certain types of civil cases than others. *See, e.g.*, Bundy, *supra* note 302, at 431 (identifying civil rights, torts, and employment cases as those where accuracy is paramount because of a defendant's "hazy sense of how much harm they are doing").

305 *See* Ochoa & Wistrich, *supra* note 23, at 473.

306 *See id.*

307 *See id.* at 473 n.87 ("Of course, the principal purpose of the legal process is not to obtain correct answers; it is to resolve disputes." (quotation omitted)).

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lutely true. In cases where plaintiffs seek a group remedy, such as class actions and other aggregate litigation, our legal system regularly provides "rough justice." The argument for a group remedy in reparations cases has been made persuasively by others.[308] Certainly, the judiciary's overwhelming encouragement of settlements of mass litigation—which are by definition massive compromises—illustrates the legal system's tolerance, if not endorsement, of "rough justice" outcomes. To the extent that the legal system is already limited in its capacity to determine the truth, maximizing the accuracy of fact finding is critical.[309] But once that maximization has occurred, it behooves the court at that point to provide some measure of relief.

Over a century ago, the Supreme Court concluded that where evidence is destroyed by the ravages of time, a presumption in favor of the defendant should result.[310] *Wood* concluded that mere delay should result in a conclusive bar.[311] In the context of reparations claims, however, the potential inability to obtain the most accurate evidence should not foreclose a cause of action altogether. Rather than providing fairness to the defendant, such an outcome would only result in unfairness to the plaintiff. It is better for the judiciary to provide "rough justice" than no justice at all.

3. *Curtailing Plaintiff Misconduct*

Although a statute of limitations purports to provide fairness to the defendant by curtailing plaintiff misconduct, it is not obvious that in reparations cases such a statute prevents plaintiff fraud, promotes diligence, or ensures an equal playing field between the parties. First, those opposing tolling fear that plaintiffs will inflate their injuries and fraudulently identify themselves as victims and, therefore, beneficiaries of reparations litigation. It is not clear, however, that a plaintiff's incentive and ability to commit fraud is deterred by limitations law. Some scholars have suggested that other mechanisms may more effectively curtail plaintiff misconduct and prevent the admission of unreliable evidence.[312] It is also unclear whether the defendant would not be equally tempted to commit fraud in the absence of a limitations period. There is nothing to suggest that, upon being sued, a defendant would not also resort to fabricating evidence. A defendant might fraudulently deny itself as a party, diminish its involvement in the plaintiff's injury, or devalue the injury itself. There is no reason to believe that a defendant's evidence would escape the ravages of time any more than a plaintiff's.[313] Limitations law may thus fail to curtail fraudulent behavior by either party. In any event, in the Tulsa case, where the plaintiffs are live victims of the race riot or their

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308 *See generally* Russell, *supra* note 17.

309 *See* Ochoa & Wistrich, *supra* note 23, at 473.

310 Wood v. Carpenter, 101 U.S. 135, 139 (1879).

311 *Id.*

312 *See* Ochoa & Wistrich, *supra* note 23, at 480; *Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1186. For example, some scholars contend that measures such as the parol evidence rule, statute of frauds, and strict evidence rules may better address concerns about fraud. *See* Ochoa & Wistrich, *supra* note 23, at 480; *Developments in the Law—Statutes of Limitations*, *supra* note 22, at 1186.

313 *See* Ochoa & Wistrich, *supra* note 23, at 480.

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direct descendants, and the defendants have conceded culpability in the riot, concerns about fraudulent identity are greatly diminished.

Second, those opposing tolling statutes of limitations fear that in the absence of such temporal restrictions, plaintiffs will be dilatory in bringing their claims. It is unclear whether barring a plaintiff from seeking recovery is a sensible punishment for dilatory conduct. Professor Ochoa and Judge Wistrich suggest that it is not, because denying an innocent plaintiff the right to vindicate his rights would unfairly give the guilty defendant a windfall.[314] This is hardly good policy. Instead, they propose other types of punishment for the plaintiff, such as making him forfeit his damages to charity.[315]

Statutes of limitations are also a poor deterrent of plaintiff misconduct where the plaintiff is unaware of her potential claim.[316] Under such circumstances, a punitive approach does nothing to encourage diligence. For example, in the Tulsa case, the plaintiffs had no way of knowing or fully understanding their claims until the release of the Commission Report. The court makes much ado over the fact that a small minority of plaintiffs actually brought claims contemporaneous with the Tulsa riot. The judiciary may want to encourage plaintiffs to overcome their adverse circumstances and pursue their rights in a timely manner, but it should not *expect* them to overcome such extraordinary circumstances in order to enjoy the protection of the law.

Finally, the notion that limitations law is necessary to ensure that plaintiffs do not have an unfair advantage over defendants in the preservation of evidence is inapplicable here. Where a plaintiff is unaware of a potential claim, there is no risk that the plaintiff will deprive defendants of notice of the lawsuit. If both parties are ignorant of the potential claim, they may be equally vulnerable to the risk of evidence deterioration over time.[317] Under these circumstances, the plaintiff may suffer more because he bears the primary burden of proof.[318] More important, if the plaintiff is ignorant of his potential claim, and the defendant is knowledgeable, the defendant is in a superior position.[319] In this situation, the defendant has the opportunity to preserve helpful evidence (or worse, destroy unhelpful evidence) for his defense, thereby allowing the plaintiff's evidence to deteriorate and her concomitant claim to die.

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314 *Id.* at 491.

315 *See id.* at 492.

316 *Id.*

317 *Id.* at 486. Where both parties are aware of a potential claim, they can both take measures to preserve evidence. *Id.*

318 *See* Hardin v. Straub, 490 U.S. 536, 543 n.12 (1989) (noting that an open-ended tolling provision would not result in plaintiffs frequently filing claims based on antiquated events because plaintiff bears burden of proof).

319 *See* Ochoa & Wistrich, *supra* note 23, at 486–87. Rather than the plaintiff being perceived as the knowledgeable party, hoarding evidence and lying in wait to sue the unsuspecting and ill-prepared defendant, just the opposite may be true. In the cases of a corporate or institutional defendant, it may be accustomed to being sued. As a "repeat player," the defendant may hoard evidence for its benefit and lie in wait for ill-informed plaintiffs to let the statute of limitations expire. The advantages repeat players have in the context of alternative dispute resolution and settling cases are well known.

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Whether society should condone, if not promote, such defendant misconduct has been the subject of concern.[320] Where a principal goal of limitations law—equalizing the playing field between the parties—is not served because the defendant has notice of a potential claim, some courts have contended that the statute of limitations should be liberally construed.[321]

Application of this principle to the Tulsa case favors the plaintiffs being able to pursue claims remote in time. For example, the defendants were admittedly aware of the plaintiffs' potential claims and worked hard to conceal them. The defendants' efforts were in large measure successful. To the extent that the plaintiffs were unaware of their potential claims—an argument the plaintiffs persuasively make—and the defendants were aware of those claims, the playing field tipped in favor of the defendants. Under this scenario, "the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied."[322]

B. Promoting Efficiency

Although statutes of limitations generally promote efficiency in our legal system, this is not necessarily so for reparations cases. First, the presumption that transaction costs are greater the more remote in time a cause of action is does not necessarily hold true for reparations litigation. The costs of tracking down documents, witnesses, and other reliable evidence in such cases are indeed high, as evidenced by the amount of money the Tulsa Commission spent on its investigation and report, but there is no telling what they would have been in 1921. Given the lengths to which evidence was covered up and the extent to which the legal system was corrupted and co-opted by the Ku Klux Klan and others, contemporaneous litigation would have encountered its own significant evidentiary challenges. Controlling for inflation, it is not obvious that the costs associated with these evidentiary concerns would have been significantly less than those incurred today.

Second, although limitations law is a procedural mechanism that may curtail courts' burgeoning dockets,[323] this modern justification for its application is weak, especially in the context of reparations cases. Smaller dockets—although a beneficial byproduct of limitations periods—should not drive courts to deprive plaintiffs of their substantive rights. Given the tiny fraction of cases involving reparations claims, barring such cases because of limitations periods would have a nominal effect on the federal judiciary's caseload.

Third, the notion that limitations law reduces undesirable claims because stale claims are more likely to be meritless is suspect.[324] The premise for this belief—that a plaintiff is more likely to timely file a claim if she believes it is strong and important—is unfounded in the reparations context.[325] There are

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320 *See, e.g., id.* at 486–87.

321 *See* N.Y. Cent. & Hudson River R.R. v. Kinney, 260 U.S. 340, 346 (1922) (Holmes, J.).

322 *Id.*

323 *See, e.g.*, Bowen v. City of New York, 476 U.S. 467, 481 (1986) (noting that the statute of limitations is also designed "to move cases to speedy resolution in a bureaucracy").

324 *See* Ochoa & Wistrich, *supra* note 23, at 498.

325 It is also unfounded in other cases where people have been seriously victimized. For example, the propriety of limitations periods is being examined in the context of rape and child

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numerous reasons why a plaintiff seeking relief for damages resulting from a race riot might delay litigation, or eschew it altogether. As discussed above, certainly the physical, material, and psychological devastation of being assaulted, having your home burned to the ground, or watching a parent get shot and killed—at the hands of not only individuals but the government itself—would potentially disable anyone from timely filing a lawsuit. This "disability"—although not recognized as a legal one—operates as effectively as a formally recognized incapacity.[326] Tremendous fear and intimidation shortly thereafter would also explain why victims would delay filing suit; indeed, some victims of the Tulsa race riot remain fearful of the possible repercussions for giving deposition testimony and speaking out.[327] Ignorance of the requisite facts for bringing a cause of action and false assurances by the responsible parties that relief will be provided also may delay timely filing. Victims of the Tulsa race riot allege that they did not have sufficient knowledge of their cause of action until publication of the Commission Report and that the government had lulled them into not filing earlier by promising it would voluntarily provide restitution.[328] These conditions—alone or considered separately—explain why the courts should not use timeliness as a proxy for merit when determining whether reparations claims should be time-barred.

Finally, statutes of limitations are efficient because they provide a cutoff date for barring claims, but the courts exercise sufficient discretion to undermine the certainty that such a cutoff might provide. The nature of reparations litigation requires the courts to carefully and seriously scrutinize the applicability of equity principles and the exemptions doctrines. In the Tulsa case alone, litigation over the limitations issue has been going on for years—replete with discovery, hearings, and full briefings. Both the federal district court and the Tenth Circuit Court of Appeals have issued opinions on this crucial topic.[329]

In sum, an efficiency rationale fails to adequately justify barring reparations claims that are brought after the statute of limitations has expired.

C. Bolstering Institutional Legitimacy

One of the most important, yet unspoken, rationales for statutes of limitations is legitimization of the legal system. Courts are not permitted to exercise unfettered discretion, but instead are checked by clear boundaries embodied in limitations law. Dismissal of reparations cases thus may simply demonstrate a reasonable application of the time bars established by the leg-

abuse. Because of the degree of trauma, victims with valid claims may not come forward until years after the limitations period has expired.

326 *See, e.g.*, Alexander v. Oklahoma, 382 F.3d 1206, 1217 (10th Cir. 2004) (disabilities include competency and age), *cert. denied*, 125 S. Ct. 2257 (2005).

327 *See* Caine, *supra* note 4, at 3–4 (noting the "profound and lasting effect" of the riot on some of its victims today).

328 *See supra* Part IV.C.

329 *See Alexander*, 382 F.3d at 1206 (affirming district court's dismissal on statute of limitations grounds); Alexander v. Oklahoma, 391 F.3d 1155, 1159 (10th Cir. 2004) (denying en banc review), *cert. denied*, 125 S. Ct. 2257 (2005).

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islature. The problem with this reasoning is that it fails to properly contextualize the plaintiffs' claims. The purported absurdity of seeking relief for claims so old is dissipated when one considers why it is that such claims are being brought now. The reasons the plaintiffs have chosen to file suit recently (like all plaintiffs) are varied and complicated,[330] but they all stem from the fact that the prior timely attempts of the plaintiffs' predecessors were unsuccessful, through no fault of their own. There would be no need for the plaintiffs to seek redress now, had restitution been initially provided. Some African-Americans immediately sought relief in the aftermath of the Tulsa race riot to no avail. It is no wonder that such efforts were unsuccessful, as the courts were unavailable to the plaintiffs at that time—a reality the court conceded.[331] Taken within context, it is reasonable that the plaintiffs would only seek reparations now.

The validity of the legal system is also undermined by the court's recent dismissal of the case because it grants guilty defendants a windfall to the detriment of blameless plaintiffs. The Tulsa government conceded its failure to protect its citizens from mob violence and even admitted to participating in it—leaving up to three hundred dead, thousands homeless, and many businesses destroyed.[332] The victims of the Tulsa race riot were assured restitution by the government in the aftermath of the riot. The district court and Tenth Circuit concluded respectively that, following the riot, the courts were unavailable to the riot victims and the circumstances so extraordinary that the plaintiffs could not have possibly brought suit until at least the 1960s, with the dismantling of Jim Crow, or as late as 1982, with the publication of *Death in a Promised Land*.[333] The most comprehensive and exhaustive study of the Tulsa race riot, which for the first time disclosed to riot victims the full nature and scope of their legal claims, was not published until 2001.[334] Consequently, the plaintiffs timely filed for restitution two years[335] after the publication of the Commission's Report. The injustice of the Tulsa circumstances is unsettling.

The legitimacy of the legal system is also undermined by the court's ahistorical and unrealistic expectations of the plaintiffs—as victims of government-sanctioned extreme racial violence and discrimination—to pursue litigation shortly after the "injury" occurred. The court diminishes the nature and scope of the injury by parsing out individual tort-related injuries, as opposed to recognizing the systemic nature of the violation. The extraordinary nature of the Jim Crow era and its troubling legacy today warrant a different approach to traditional litigation. The legitimacy of a legal system that pur-

330 They may range from strategic, to political, to psychological, to practical, to circumstantial, or a combination of them all.

331 Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *30–32 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

332 *See* Goble, *supra* note 1, at 11–13, 16; *see also* O'Dell, *supra* note 152, at 144.

333 *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *30–32; *Alexander*, 382 F.3d at 1216–20.

334 The Commission Report conceded that Scott Ellsworth's book in 1982, *Death in a Promised Land*, was only a quarter the size of his accompanying report to the Commission Report and contained far less evidence than what is available today. Goble, *supra* note 1, at 8.

335 It is undisputed that Oklahoma's two-year statute of limitations applies. *See Alexander*, 382 F.3d at 1215.

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ports to value every citizen's right to be heard and the equal protection of the laws, but fails to adhere to such values when the implications are most profound, must be called into question. Foreclosing reparations claims because of untimeliness inappropriately elevates procedural norms over the pursuit of just outcomes.[336]

Although limitations law is designed to curb judicial discretion and inoculate decisions from bias, such law does not forbid courts from applying (or failing to apply) equitable doctrine in a biased manner. There exists a collective blind spot when it comes to understanding the residual and ongoing effects of the legacy of Jim Crow violence on society as a whole. It is fundamentally unfair that the courts regretfully eschew reparations claims as beyond the scope of their mandate and pass it on to the legislature,[337] and the legislature responds with an equal unwillingness to consider the issue.[338] Consequently, there is no relief for the victims and their descendents for some of the most profound human rights violations in this country's history.

VI. Conclusion

In the context of reparations claims, it is time for the courts to take a different approach to the equitable tolling doctrines of statutes of limitations. Reparations claims push the concepts of statutes of limitations and equitable tolling doctrine to their outer edge. Where the claims are so horrendous they cry out for equitable relief and yet so remote in time they seem insurmountable, the legal system must reexamine the underlying policies of statutes of limitations and recognize when they are not being served.

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336 *See* Russell, *supra* note 17, at 1225–27, 1258–59. Although there has not been any legislative alteration of the applicable statute of limitations, a few congressional representatives have been receptive to hearing the plaintiffs' argument for tolling in this case.

337 *Cf.* Kavanagh v. Noble, 332 U.S. 535, 539 (1947) ("Remedies for resulting inequities are to be provided by Congress, not the courts."); Soriano v. United States, 352 U.S. 270, 275–76 (1957).

338 *See supra* note 284.

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WILLIAMS BREAKWATER
WILLIAMS BREAKWATER

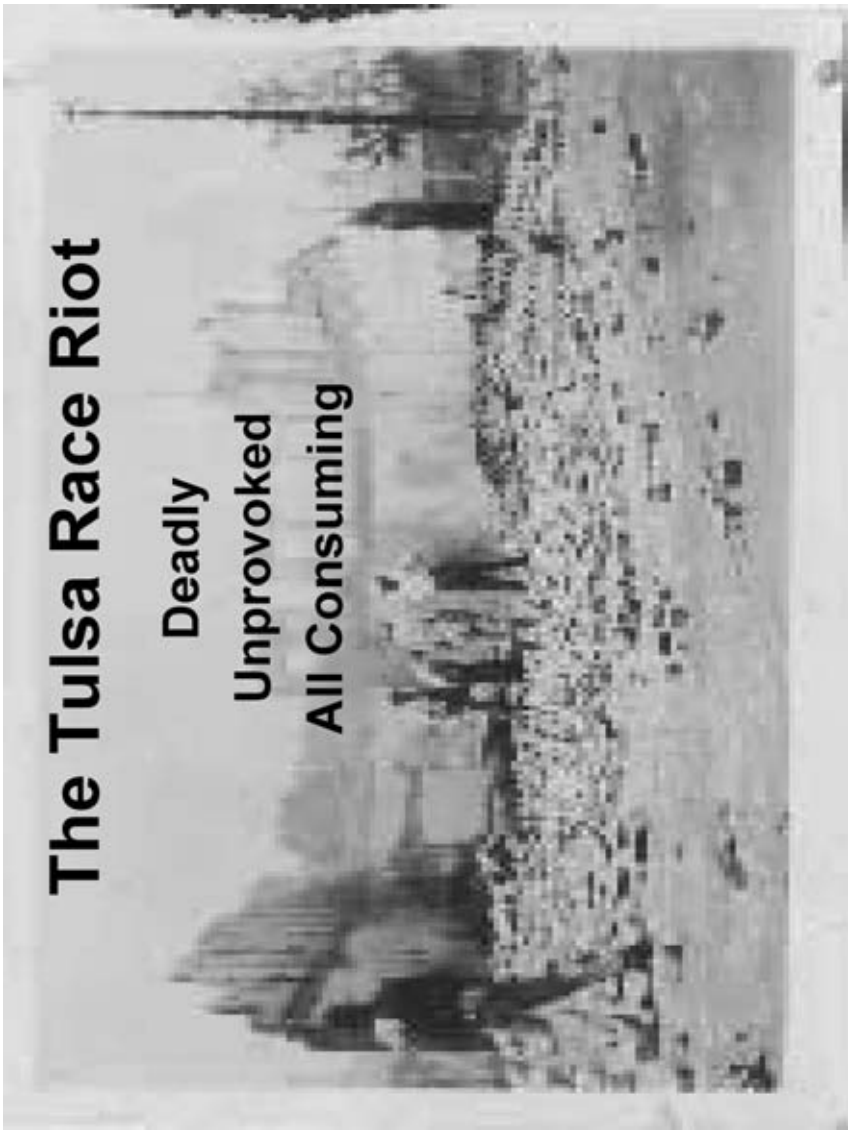
Testimony of Charles J. Ogletree Jr. before the House Judiciary Committee
Subcommittee on Constitution, Civil Rights and Civil Liberties

on the

Tulsa Greenwood Riot Accountability Act of 2007

Professor Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Founding & Executive Director of the Charles Hamilton Houston Institute for Race & Justice

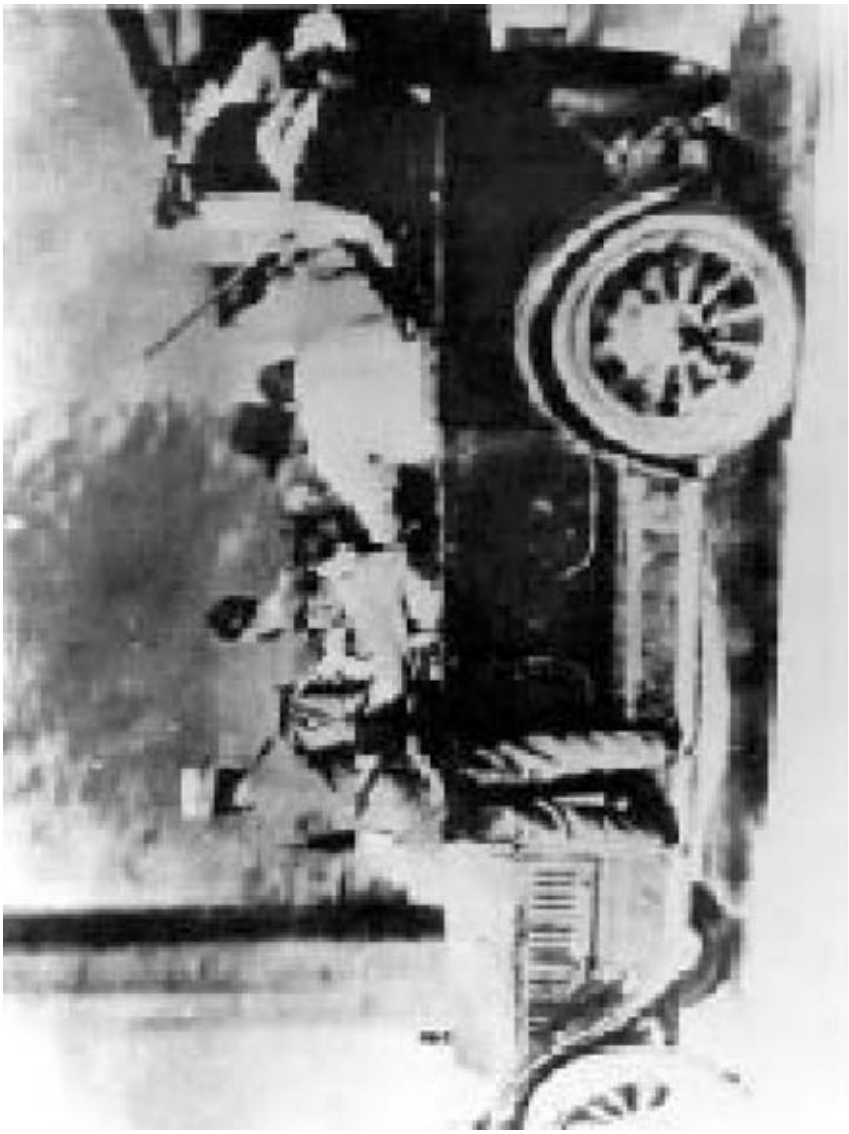
April 24, 2007


The Tulsa Race Riot
Deadly
Unprovoked
All Consuming

Statute of Limitations
The Interests of Justice

Tulsa riot

Extraordinary Circumstances:
Intimidation



"During the 1920's, 'mayors, city commissioners, sheriffs, district attorneys and many other city and county office holders who were either Klansmen or Klan supporters were elected and reelected, with regularity.'"

- Scott Ellsworth, The Tulsa Race Riot at 47, citing *Tulsa World*, July 30, 1922

"This uprising was inevitable. If that be true and this judgment had come upon us, then I say it was good generalship to let the destruction come to that section where the trouble was hatched up, put in motion and where it had its inception. . . ."

- Mayor T.D. Evans, June 14, 1921

- "[A]n aged colored couple [were] saying their evening prayers. . .A mob broke into the house, shot both of the old people in the backs of their heads, blowing their brains out and spattering them over the bed, pillaged the home, and then set fire to it."

  -Walter White, "Eruption of Tulsa", *The Nation*, June 29, 1921

- "[T]hey killed that good, old, colored man that was blind. He had amputated legs. His body was attached at the hips to a small wooden platform with wheels. One leg stub was longer than the other, and hung slightly over the edge. . . He was helpless. . . . These white thugs had roped this colored man on the longer stump of his one leg, and were dragging him behind the car up Main Street. He was hollering. His head was being bashed in, bouncing on the steel rails and bricks."

  -Oral history interview, E.W. Maxey by Ruth Avery, 1971 and 1985

LITTLE AFRICA ON FIRE
TULSA RACE RIOT 6-1-1921
TULSA

- "I am able to state that the Tulsa riot, in sheer brutality and willful destruction of life and property, stands without parallel in America."
  - Walter White, *New York Call*, June 10, 1921

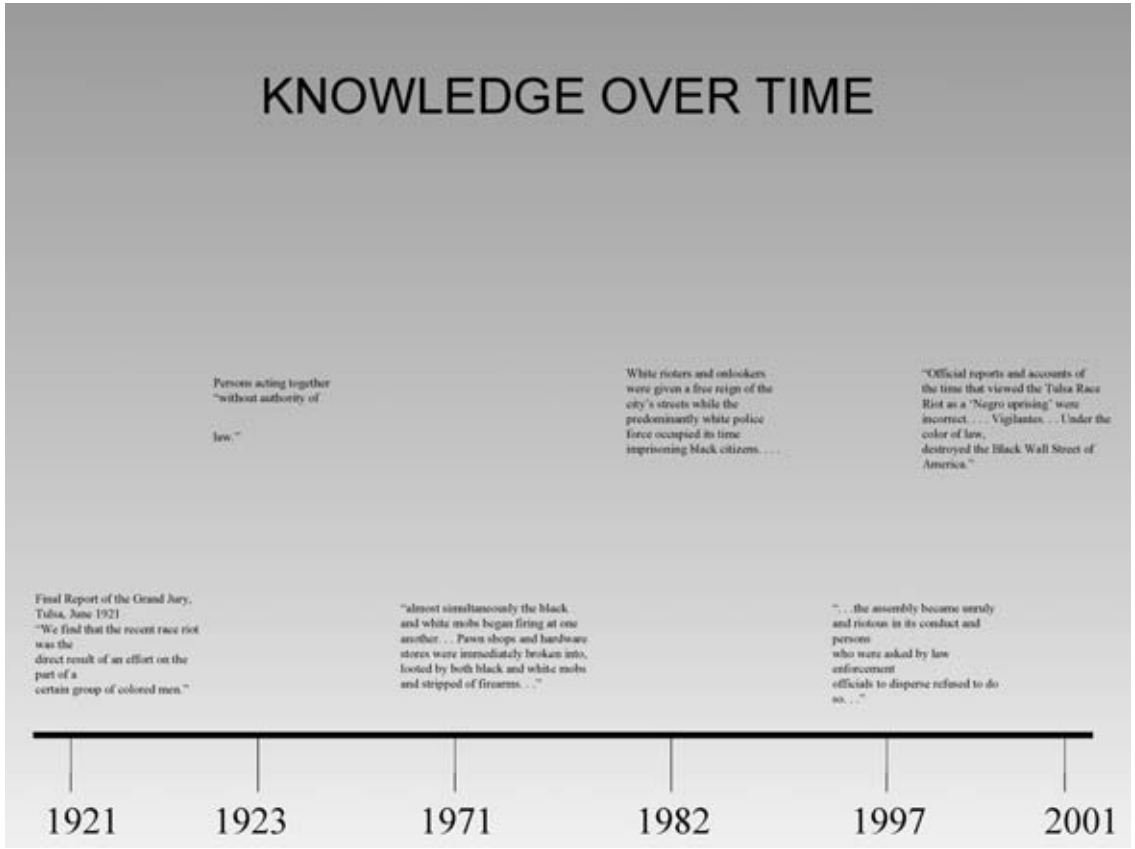
- "[T]he staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters."
  -Okla. St. Ann. 74 §8000.1

- "During the first two days…120 graves [were dug] in each of which a dead Negro was buried. No coffins were used. The bodies were dumped into the holes and covered with dirt."
  -Walter F. White, "The Eruption of Tulsa", *The Nation*, June 29, 1921

Due Diligence

"Until recently, the Tulsa race riot has been the most important least known event in the state's entire history. Even the most resourceful of scholars stumbled as they neared it for it was dimly lit by evidence."

- Riot Commission Report at 6


KNOWLEDGE OVER TIME
Persons acting together "without authority of law."
White rioters and onlookers were given a free reign of the city's streets while the predominantly white police force occupied its time imprisoning black citizens. . . .
"Official reports and accounts of the time that viewed the Tulsa Race Riot as a 'Negro uprising' were incorrect. . . . Vigilantes. . . Under the color of law, destroyed the Black Wall Street of America."
Final Report of the Grand Jury, Tulsa, June 1921 "We find that the recent race riot was the direct result of an effort on the part of a certain group of colored men."
"almost simultaneously the black and white mobs began firing at one another. . . Pawn shops and hardware stores were immediately broken into, looted by both black and white mobs and stripped of firearms. . ."
". . .the assembly became unruly and riotous in its conduct and persons who were asked by law enforcement officials to disperse refused to do so. . ."
1921
1923
1971
1982
1997
2001

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1921
1923
1971
1982
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2001

"Tulsa can only redeem herself from the country-wide shame and humiliation in which she is today plunged by complete restitution of the destroyed black belt. The rest of the United States must know that the real citizenship of Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny."

-Judge L.J. Martin, Chairman of Executive Committee, *The Nation*, June 15, 1921

"*City to Meet Demands Out of Own Purse*. . . Tulsa is going to take care of this problem herself. That was made certain at the reconstruction Board hearing this morning. The $1,000 offered by the Chicago Tribune will be sent back at once with the courteous statement that the city is able to take care of its own problems here. Private funds are to be stopped at once."

-*Tulsa Tribune*, June 3, 1921 at 8

"We have neglected our duties and our city government has fallen down. We have had a failing of police protection here, and now we have to pay the costs of it. The city and county are legally liable for every dollar of the damage which has been done. Other cities have had to pay the bill of race riots, and we shall have to do so, probably, because we have neglected our duty as citizens."

- Judge L.J. Martin, Chairman of Executive Committee, *The Nation*, June 15, 1921

Buck Colbert Franklin working with his staff under a tent to file lawsuits

No. 04-___

IN THE

Supreme Court of the United States

John Melvin Alexander, *et al.*,
Petitioners,

v.

State of Oklahoma, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 9, 2005

Survivors Robert Holloway, Otis Clark, Thelma Knight, and Wes Young with Professor Ogletree at Supreme Court Rally

Justice for the 1921 Tulsa Race Riot Survivors: Before They Die