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AMERICA TO ME – A PUBLIC NUISANCE REPARATIONS FRAMEWORK THROUGH THE LENS OF THE TULSA MASSACRE

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I. INTRODUCTION

O, let my land be a land where Liberty
Is crowned with no false patriotic wreath,
But opportunity is real, and life is free,
Equality is in the air we breathe.

(There's never been equality for me,
Nor freedom in this "homeland of the free.").[1]

Black Americans have been held down, subjugated, and exploited within the colonial roots of the nation and the trans-Atlantic chattel slavery system as a racial caste.[2] The post-emancipation period did not bring about harmony between the slaveholding class and the formerly enslaved. Instead, immediate gains toward racial equity as exemplified by the passage of the civil

1. Langston Hughes, *Let America Be America Again*, in THE COLLECTED POEMS OF LANGSTON HUGHES 189 (Arnold Rampersad & David Roessel, eds., 1995). Langston Hughes was a luminary figure of the Harlem Renaissance, and this shortened version of the poem – the full work is 82 lines – gives a sense of "some of the most poignant lamentations of the chasm that often exists between American social ideals and American social reality." *Id.* at 4. *See* Kenneth R. Janken, *African American and Francophone Black Intellectuals During the Harlem Renaissance*, 60 THE HISTORIAN 487 (1998) (providing an introduction in the Harlem Renaissance and its main players, including Langston Hughes).

2. Minister and abolitionist Theodore Parker summed it up when he "defined 'the American idea' as the love of freedom versus the law of slavery." JON MEACHAM, THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS 9 (2019). For a full treatise on the history of anti-Black racist ideas see IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016). For direct evidence of the racist roots of the United States and how anti-Black racism was built into our very foundations, *see* U.S. CONST. art. I § 2 (declaring representation by the "whole Number of free Persons" and "three fifths of all other Persons"). *See also id.* art. I § 9 (prohibiting Congress from banning importation of enslaved persons until 1808); *id.* art. V (prohibiting the aforementioned from being altered by amendment); *id.* art. IV § 2 (describing the fugitive slave clause). Finally *see* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 25-73 (10th ed. 2020) (discussing the development of anti-Black racism into a racial caste system).

rights amendments were short-lived and followed by ninety years of continued oppression under Jim Crow.[3] While the 1950s and 1960s is known as the Civil Rights era, and there were key judicial and legislative victories towards racial equality in the United States, the racial caste system did not dissolve, disappear, or fade away.[4] Instead, it evolved and persists in its current form—mass incarceration.[5]

In short, there have been 400 years during which Black[6] men, women, and children have not enjoyed the benefit of "liberty and justice for all."[7] Black Americans built the institutions that are the

3. The Civil Rights Amendments are the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution passed between 1865 and 1870, prohibiting slavery except as punishment for crime, extending citizenship to freedpeople, and securing the right to vote for Black men. U.S. CONST. amends. XIII, XIV, XV. *See* JAMES MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 509, 537-540 (2d ed. 1992) [hereinafter ORDEAL BY FIRE] (discussing the 12-year period known as Reconstruction (1865-1877) during which the former Confederate states were under federal rule to reincorporate back into the Union while Republican attempts to usher in equality between Black and white Americans was met with the widespread adoption of Black Codes in the South in 1865-1866, as well as the meteoric rise of the Ku Klux Klan in 1866).

4. *See* ALEXANDER, *supra* note 2, at 2-19, 25-73 (developing the concept that the end of slavery did not mean the end of racial caste in the United States).

5. *Id.*

6. Throughout this Comment, I will follow the usage rules adopted in 2020 by such organizations as the Associated Press, New York Times, and Columbia Journalism Review and capitalize Black while not capitalizing white in recognition of the "shared sense of history, identity and community among people who identify as Black." *Explaining AP Style on Black and white*, ASSOCIATED PRESS (July 20, 2020), www.apnews.com/article/9105661462 [perma.cc/D9HF-V69Y]. *See also* Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), www.nytimes.com/2020/07/05/insider/capitalized-black.html [perma.cc/747M-335G] (noting their newsroom conversations debating the change grew in earnest after the death of George Floyd); Mike Laws, *Why we capitalize 'Black' (and not 'white')*, COLUM. JOURNALISM REV. (June 16, 2020), www.cjr.org/analysis/capital-b-black-styleguide.php [perma.cc/3RCA-BKJW] (mentioning that capitalizing 'white' "risks following the lead of white supremacists."). *But see* Ann Thuy Nguyen & Maya Pendleton, *Recognizing Race in Language: Why We Capitalize "Black" and "White"*, Center for the Study of Social Policy (Mar. 23, 2020), www.cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white [perma.cc/FX5E-XX2E] ("CSSP has also made the decision to capitalize White. We will do this when referring to people who are racialized as White in the United States, including those who identify with ethnicities and nationalities that can be traced back to Europe. To not name "White" as a race is, in fact, an anti-Black act which frames Whiteness as both neutral and the standard."). I will not change the capitalization of Black or white in direct quotes from other sources.

7. Francis Bellamy, *Pledge of Allegiance*, *in* THE YOUTH'S COMPANION (1892). The original version read: "I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all." Altered in 1954 to counter the alleged threat of Communism, today it reads: "I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with liberty and

face of this Nation and powered the economic engine allowing for its growth and success.[8] Yet, the violence that has been inflicted upon them as individuals, families, communities, and as a people, has been profound.[9] The whippings, beatings, rapes, castrations, brandings, executions, auctions, and family separations under slavery have been well-documented. The Ku Klux Klan's ("KKK") role using cross-burnings, and lynching as mechanisms of fear and large-scale social control under Jim Crow are equally well-known.[10]

Another common mechanism of social control has been the so-called race riot.[11] These were violent uprisings along racial lines which often resulted in the loss of Black lives, homes, and businesses.[12] The riots occurred under the apathetic gaze of the

justice for all." *The Pledge of Allegiance*, USHISTORY.ORG (July 4, 1995) www.ushistory.org/documents/pledge.htm [perma.cc/SR63-2FGP]. *See* GARY B. NASH, RED, WHITE & BLACK: THE PEOPLES OF EARLY NORTH AMERICA (1992) (detailing early colonial history and the rise of slavery in the European colonies beginning in the mid-15th century).

8. *See* JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 7, 39 (C. Vann Woodward, ed. 1988) [hereinafter BATTLE CRY OF FREEDOM] (detailing the importance of slave-labor cotton as it "furnished three-fourths of the world's supply" with its yield doubling each decade after 1800, driving the industrial revolution in New England and England, as "Southern staples provided three-fifths of all American exports").

9. Much research has been done over the last few decades on intergenerational trauma, and the concept that a generation's response to historical traumatic events in their lives can be passed down to subsequent generations. *See* Cindy C. Sangalang & Cindy Vang, *Intergenerational Trauma in Refugee Families: A Systematic Review*, 19 J. IMMIGRANT & MINORITY HEALTH 745, 745 (2017) (providing an overview of the literature on intergenerational trauma within refugee families, explaining that intergenerational trauma is "the ways in which trauma experienced in one generation affects the health and well-being of descendants of future generations . . . including the offspring of survivors of abuse, armed conflict, and genocide."); Rachel Yehuda & Amy Lehrner, *Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms*, 17 WORLD PSYCHIATRY 243, 250 (Oct. 2018) (describing the role that gene expression may play as a biological mechanism for intergenerational trauma effects). *See also* Tori DeAngelis, *The Legacy of Trauma: An Emerging Line of Research is Exploring how Historical and Cultural Traumas Affect Survivors' Children for Generations to Come*, 50 MONITOR ON PSYCH. 36 (Feb. 2019), www.apa.org/monitor/2019/02/legacy-trauma [perma.cc/DEY3-WVJ2] (describing multiple research streams from psychology and epigenetics looking at the transmission of trauma through both nature and nurture mechanisms).

10. *See* MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 537-39 (discussing the rise of the KKK from their founding in Pulaski, Tennessee as a secret terrorist organization which used widespread violence and murder to suppress the vote in order to "restore to Southern Whites their 'birthright.'").

11. *See* Arthur H. Garrison, *Your View: A History of White Race Riots in America*, MORNING CALL (June 12, 2020), www.mcall.com/opinion/mc-opi-unrest-america-garrison-20200612-6xczgrlphjgtjiosfde2mdrvbe-story.html [perma.cc/ZH6G-2TVP] ("In America, race riots are used to settle social discontent."). Race riots emerged when "southern whites, resenting black advancement, attacked them to disenfranchise them of both the vote and economic prosperity." *Id.*

12. *Id.* (discussing the use of white racial violence to deny Black

white power structure (the local, state, and/or federal government), and sometimes with its direct assistance.[13] The Tulsa Massacre of 1921 is just one of many such race riots that has gained recent notoriety with the HBO series, *Watchmen*.[14]

Whether discussing slavery or race riots, the government at various levels was not merely a bystander or an unwitting accomplice, but an active participant in setting the environment and fomenting the discord which led to violence.[15] Additionally, government agents, be they police officers, mayors, governors, or National Guardsmen, have directly participated in and perpetrated these events. Throughout the United States' history, the government has done so because it was politically, economically, and socially expedient.[16]

Thus, the Black survivors and descendants of this country's racial caste system—instituted and maintained by slavery, Jim Crow, race riots, and mass incarceration—have not experienced an America where "opportunity is real, and life is free, [e]quality is in the air we breathe."[17] Moreover, none of them have been made

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communities the opportunity to build intergenerational wealth from the post-emancipation era through the 1920s). Garrison describes how the destruction of Black communities' property and businesses through riots, followed by government-backed racially restricted housing and loan policies (including redlining and blockbusting), concentrated Black families in urban areas. *Id.* This was followed by systematic disinvestment policies of those same neighborhoods which led to ghettoization of Black neighborhoods. *Id.*

13. *See* OKLA. COMM'N, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 20 (2001) [hereinafter TULSA RACE RIOT REPORT], www.okhistory.org/trrc/freport.pdf [perma.cc/A2UB-AZU5] (discussing the direct role of city officials and National Guard in the riot – including destruction of property and killing of Black citizens of Tulsa); *compare* C. Jeanne Bassett, Comment, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U.L. REV. 503 (1994) (finding compensation of Black victims for the *in-action* of the sheriff and governor in response to white mob violence appropriate).

14. *See* Laurie Ochoa, *'Watchmen' Revived it. But the History of the 1921 Tulsa Race Massacre Was Nearly Lost*, L.A. TIMES (Oct. 27, 2019), www.latimes.com/entertainment-arts/story/2019-10-27/history-behind-the-tulsa-race-massacre-shown-in-watchmen [perma.cc/PYG2-6KBT] (detailing the facts of the massacre behind the on-screen depiction in the first episode of HBO's drama *Watchmen*); *see also* Natalie Chang, *The Massacre of Black Wallstreet*, ATLANTIC (2019), www.theatlantic.com/sponsored/hbo-2019/the-massacre-of-black-wall-street/3217 [perma.cc/CWQ6-ZC3J] (providing the history of the Tulsa Massacre in a graphic novel format).

15. *See* TULSA RACE RIOT REPORT, *supra* note 13, at 20 (describing the active role by government officials in the Tulsa Massacre and the resultant cover-up including Tulsa city officials and police officers, Oklahoma state officials, and the National Guard).

16. *See*, *e.g.*, Teri McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 MERCER L. REV. 651, 653 (2016) [hereinafter *#SayHerName*] (discussing the policing of Black female bodies by the State according to their material value).

17. Hughes, *supra* note 1.

whole for their suffering.[18] This Comment will explore one such mechanism meant to make victims whole: reparations.

Specifically, this Comment will analyze whether a public nuisance lawsuit is an effective path to recovery for slavery and race riot reparations advocates. Part II will address what reparations are; the types of reparations historically provided in the United States; their due as a result of the racial caste system built into the Constitution and systematically upheld through slavery and Jim Crow; past reparations efforts for Black Americans that failed; the current reparations lawsuit; and public nuisance doctrine. Part III analyzes these reparations lawsuits through the lens of the Tulsa Massacre of 1921 and explores whether a public nuisance lawsuit for reparations can succeed where these earlier lawsuits failed.[19] Finally, Part IV assesses whether this public nuisance framing of reparations-based lawsuits is an effective advocacy strategy. Because, while "[b]ootstrapping isn't going to erase racial wealth divides," reparations can begin to try.[20]

II. BACKGROUND

A. What are Reparations?

Reparation is a generic term for a remedy of a harm which consists of five key elements: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[21] Restitution is restoring the victim to their original situation prior to the harm; compensation is recovery of economic damages; rehabilitation is medical and/or psychological care as well as legal and social services; satisfaction includes disclosure of the truth, apology, official declarations, and tributes to the victims; and, of course, guarantees of non-repetition should include mechanisms and law reform to prevent continued harm.[22]

Why reparations? Reparations are about bringing divided

18. *But see* Bassett, *supra* note 13 (remarking on the notable exception of the survivors and descendants of the Rosewood, FL riot. In 1994, the Florida legislature passed House Bill 591, which appropriated up to $150,000 for each survivor and a scholarship fund for minorities with preference given to direct descendants of Rosewood families); Fla. HB 591 (1994).

19. *E.g.,* Cato v. United States, 70 F.3d 1103, 1103 (9th Cir. 1995*)*; *In re* African-American Slave Descendants Litig., 471 F.3d 754, 754 (7th Cir. 2006).

20. Rashawn Ray & Andre M. Perry, *Why we need reparations for Black Americans*, BROOKINGS (Apr. 15, 2020), www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans [perma.cc/WG49-PPFU].

21. CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT, 13 (2012).

22. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶¶18-23 (Dec. 16, 2005).

people—communities—together.[23] "[I]ndividual acts of reparation will stand as symbols that fully acknowledge and finally discharge a collective responsibility. Because we must face it: There is no way but by government to represent the collective, and there is no way but by reparations to make real the responsibility."[24] In short, we as citizens have a collective responsibility to remedy the harm done by America's white-supremacist roots and only the government itself can represent us in making restitution.

B. Types of Reparations Provided by the United States in the Past

The United States has made reparations to other groups for their suffering and past harms.[25] What differentiates those claims from those brought by Black Americans for slavery or race riots?[26] How were groups (mostly) not of African descent able to overcome judicial hurdles in order to receive reparations? The answer lies somewhere in the weighted rhetoric used to describe the United States' very founding.[27]

1. The Rhetoric of Race and Understanding United States History

The reparations debate centers around a fundamental disagreement on the understanding of United States history, the integral role of race in that history, and thus the "collective and cultural memories in 'Black' and 'White[.]'"[28] Most disagreement, however, "relate[s] to slavery and its actual and perceived harms to

23. TULSA RACE RIOT REPORT, *supra* note 13, at 20.

24. *Id.* (discussing the need for government to take collective responsibility so that the riot "can be about something else. It can be about making two Oklahomas one – but only if we understand that this is what reparation is all about.").

25. *See* cases discussed *infra* Sections II.B.2-4.

26. For examples of unsuccessful slavery cases other than the ones that we will discuss here, *see* Bell v. United States, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex., July 10, 2001); Long v. United States, 2007 U.S. Dist. LEXIS 68385 (W.D. Ky., Sept. 14, 2007); Greene v. United States Dep't of Educ., 2008 U.S. Dist. LEXIS 118828 (N.D. Ind., Feb. 7, 2008); Hamilton v. United States, 2012 U.S. Dist. LEXIS 31214 (E.D. Tex., Mar. 7, 2012); Green v. United States, 2012 U.S. Dist. LEXIS 190394 (W.D. Wis. Aug. 6, 2012); Prince v. Alabama, 2015 U.S. Dist. LEXIS 162192 (M.D. Ala., Nov. 9, 2015); Hannon v. Lynch, 2016 U.S. Dist. LEXIS 15618 (S.D. Ohio, Feb. 9, 2016); African Americans United All. v. United States, 2018 U.S. Dist. LEXIS 88274 (S.D. Fla. 2018).

27. *See* Teri A. McMurtry-Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 U. MEM. L. REV. 889, 895 (2018) [hereinafter *The Rhetoric of Race*] (using JOHN GRISHAM, SYCAMORE ROW (2013) as a jumping off point to discuss the racialization of reparations discourse and how individual action could be the way forward to racial reconciliation).

28. *Id.*

people of African descent."[29]

White Americans' collective and cultural memories include a "rhetoric of honor and remembrance" which has wrapped the debate around Confederate memorabilia into one of Confederate heritage and not racial hate."[30] This "heritage vs. hate framework fixes memories of slavery as past, having no impact on the present."[31] Conversely, Black Americans' collective and cultural memory "is by nature oppositional because it exists in the context of American culture, which normalizes White supremacy as White social memory."[32] Black American rhetoric then is one of "perseverance, endurance, and hope"[33] which cries for White America to concede its generational complicity while recognizing Black generational strength.[34]

Portrayed as binary, this is a "dangerous racial rhetoric that renders our country brittle and prone to shattering, threatening America with irreparable brokenness"[35] by "exacerbat[ing] the racial divide."[36] Instead, "racial reconciliation begins with acknowledgment of harm done, presents a plan to address the harm, and contains an action or actions to implement the plan."[37] Reparations are one such action that has been proposed to address the harm.[38]

2. Reparations to the Sioux Nation

In the 1980 case of *United States v. Sioux Nation of Indians*, the Supreme Court upheld a claims court decision that Congress had effected a taking of tribal lands by breaking the Laramie Treaty of 1868 after gold was discovered in the Black Hills.[39] The claims court

29. *Id.*

30. *Id.* at 906-07, 909.

31. *Id.* at 908. *But see* Juliana Menasce Horowitz, *Most Americans say the legacy of slavery still affects black people in the U.S. today*, PEW RES. CTR. (June 17, 2019), www.pewresearch.org/fact-tank/2019/06/17/most-americans-say-the-legacy-of-slavery-still-affects-black-people-in-the-u-s-today [perma.cc/FNQ4-WP3H] (showing that a majority of Americans do think that the legacy of slavery lingers, though the answers vary depending upon race and political affiliation of respondent).

32. McMurtry-Chubb, *The Rhetoric of Race*, *supra* note 27, at 900 (citing DEXTER B. GORDON, BLACK IDENTITY: RHETORIC, IDEOLOGY, AND NINETEENTH CENTURY BLACK NATIONALISM 10-11) (2003).

33. *Id.* at 903 (citing AARON DAVID GRESSON III, RECOVERY OF RACE IN AMERICA (1995).

34. *Id.*

35. *Id.* at 893.

36. *Id.* at 910.

37. *Id.* at 892-893.

38. *See*, *e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [perma.cc/S8YD-WSCR].

39. *See Sioux Nation of Indians*, 448 U.S. 371, 376-378 (detailing General Custer's illegal expedition into the Black Hills which had been reserved to the

held that the Sioux Nation was due over $100 million for the value of the land in 1877 plus interest.[40] The Sioux Nation refused the payment and continues today to insist for the return of the land instead, as that land was never for sale.[41]

3. Reparations to Japanese-Americans Internment Survivors

President Roosevelt's executive order[42] two months after Japan's attack on Pearl Harbor led to the internment of some 120,000 Japanese Americans in concentration camps during World War II.[43] Several Japanese Americans filed lawsuits challenging

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Lakota by the Laramie Treaty of 1866, the discovery of gold, and the government's decision to encourage white settlers and prospectors rather than to enforce the Treaty they had made). *But see* Flute v. United States, 808 F.3d 1234, 1247 (10th Cir. 2015) (denying a suit by descendants of the victims of the Sand Creek Massacre an accounting of unpaid reparations under the Treaty of Little Arkansas (1865) or the Appropriations Act of 1866).

40. Sioux Nation of Indians v. United States, 220 Ct. Cl. 442, 469 (1979). A plaintiff's attempt to use this case as the basis for slavery reparations was shot down by Judge Armstrong who recognized, "there is nothing in the relationship between the United States and any other persons, including African American slaves and their descendants, that is legally comparable to the unique relationship between the United States and Indian Tribes." *Cato*, 70 F.3d at 1111.

41. *See* Maria Streshinsky, *Saying No to $1 Billion: Why the Impoverished Sioux Nation Won't Take Federal Money*, ATLANTIC (Mar. 2011), www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380 [perma.cc/P5L8-RLSY] (remarking that the value of the trust from the original appropriated fund of $102 million is over $1 billion and that there is precedent for land to be returned to the tribes, as "Congress returned 48,000 acres of federal land in Carson National Forest in New Mexico to the Taos Pueblo."); *See also* Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741 [perma.cc/JZ8F-MUUM] (explaining how Congress redrew the lines of the Fort Laramie Treaty illegally after General Custer found gold in the Black Hills in 1874 and then perished at the Battle of the Little Bighorn).

42. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); 56 Stat. 173 (1942).

43. *See* T.A. Frail, *The Injustice of Japanese-American Internment Camps Resonates Strongly to This Day*: *During WWII, 120,000 Japanese-Americans were forced into camps, a government action that still haunts victims, and their descendants*, SMITHSONIAN MAG. (Jan. 2017), www.smithsonianmag.com/history/injustice-japanese-americans-internment-camps-resonates-strongly-180961422 [perma.cc/3FEL-BSZU] (explaining that while the language of the law did not specify persons of any nationality and merely created military zones, the sentiment of the commanding General DeWitt was that "A Jap's a Jap. They are a dangerous element, whether loyal or not."); *Japanese-American Internment During World War II*, NAT'L ARCHIVES (Mar. 17, 2020), www.archives.gov/education/lessons/japanese-relocation [perma.cc/6D3V-4ZA9] (noting that these "assembly sites" and "relocation centers" consisted of rudimentary shelter and sites included Tule Lake, California; Minidoka, Idaho; Manzanar, California; Topaz, Utah; Jerome, Arkansas; Heart Mountain,

the racially derived internment, the deprivations endured, and the resultant loss of property with mixed results.[44] The Civil Liberties Act signed by President Reagan in 1988 issued formal letters of apology to all remaining survivors and provided for $20,000 in restitution.[45] While it was legislative action that finally approved these reparations forty years later,[46] there were stipulations made for heirs (spouses, children, and/or parents) to receive payment if the intended beneficiary was already deceased,[47] as well as "damages for human suffering."[48]

Wyoming; Poston, Arizona; Granada, Colorado; and Rohwer, Arkansas).

44. *Compare* Hirabayashi v. United States, 320 U.S. 81, 105 (1943) (upholding the conviction for disregarding a curfew order imposed by a military commander as a constitutional exercise of governmental war powers and that it did not unconstitutionally discriminate against persons of Japanese ancestry), *and* Korematsu v. United States, 323 U.S. 214, 223-24 (1944) (upholding the conviction for not removing from the area as required by the military exclusion order), *with Ex parte* Mitsuye Endo, 323 U.S. 283, 302 (1944) (calling for the unconditional release of a loyal American citizen of Japanese ancestry as "[a] citizen who is concededly loyal presents no problem of espionage or sabotage" and thus where "the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."), *and* Tadayasu Abo v. Clark, 77 F. Supp. 806, 811 (N.D. Cal. 1948) (cancelling the renunciations of American citizenship made by citizens of Japanese ancestry while detained and "under duress and restraint" and declaring plaintiffs to be United States citizens).

45. Civil Liberties Act of 1988, 50 U.S.C.S. Appx. §§1989b – 1989b-8 (amended 1989, 1992).

46. *See id.* at 904-08 (apologizing for the "fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry"; establishing the Civil Liberties Public Education Fund with $1.25 billion in trust "to sponsor research and public educational activities, and to publish the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood"; and finally allotting $20,000 each for United States citizens or permanent resident aliens who were discriminated against by the United States government for their Japanese ancestry "during the evacuation, relocation, and internment period").

47. *Id.* at 907. *Contra In re* African-American Slave Descendants Litig., 471 F.3d at 759 ("When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not the wrong to the descendants."). The court in *In re African-American Slave Descendants Litigation* further distinguished between those descendants claiming to be the representatives of their ancestor's estate as having been wronged versus those making claims merely as descendants of enslaved persons as not being able to prove any wrong. *Id.*

48. Civil Liberties Act of 1988, 50 U.S.C.S. Appx. §§1989b – 1989b-8 (amended 1989, 1992). *But see* Obadale v. United States, 52 Fed. Cl. 432, 433 (2002) (requesting unsuccessfully the extension of reparations under that act to African-Americans as a matter of equal protection and due process).

4. Reparations for the Tuskegee Syphilis Study

In 1972, national news organizations broke the story that the United States Public Health Service (with the knowledge of the Centers for Disease Control, American Medical Association, and National Medical Association) had been conducting a long-standing syphilis study on Black men at the Tuskegee Institute.[49] The study began with 600 Black men – 399 with syphilis and a control group of 201 without syphilis.[50] Although the participants were told that they were being treated for "bad blood," they were actually being experimented on to study the untreated, "natural history of syphilis."[51] In fact, a treatment for syphilis came out in 1945 (penicillin) and these men were never treated.[52]

Pollard v. United States was filed nearly immediately on behalf of the survivors, their spouses, and their descendants, and the court held that where the government had participated in fraudulent concealment, the statute of limitations was tolled.[53] The plaintiffs were thus able to defeat the government's motions for summary judgment based on statute of limitations grounds for decedents who died more than two years prior to the filing of the case.[54] Unlike surviving victims, representatives of deceased victims did have their civil rights actions dismissed for lack of standing, as "one cannot sue for the deprivation of another's civil or constitutional rights."[55] Encapsulating some of the United States' most highly-respected medical organizations, the lawsuit settled out of court, netting reparations of $10 million and lifetime medical care benefits.[56]

The cases outlined above are a small sampling that bear witness to the fact that various levels of United States government are not immune to providing compensation where citizens have

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49. *See* Marcella Alsan & Marianne Wanamaker, *Tuskegee and the Health of Black Men*, 133 Q. J. ECON. 407, 408 (Feb. 2018) (detailing the long-term harm in health that the Black community, particularly Black men, have suffered as a result of the Tuskegee Syphilis Study because of distrust of the medical establishment).

50. *The Tuskegee Timeline*, CDC (Mar. 2, 2020), www.cdc.gov/tuskegee/timeline.htm [perma.cc/4YZH-P3H4].

51. *Id.* (explaining that the study was ostensibly undertaken to gather evidence to justify funds for a treatment program).

52. *Id.* (detailing the timeline from the beginning days of the Tuskegee Institute to the beginning of the study in 1932, through the last widow receiving benefits' death in 2009).

53. *Pollard*, 69 F.R.D. at 646.

54. *Id.*

55. Pollard v. United States, 384 F. Supp. 304, 313 (M.D. Ala. Oct. 31, 1974) (citing Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967).

56. *See Pollard*, 384 F. Supp. at 312; 69 F.R.D. at 650-52 (approving attorney's fees for the class action suit at twelve and a half percent of the total recovery of over nine million dollars); *see also The Tuskegee Timeline*, *supra* note 50.

been harmed.[57]

C. Racial Caste in the United States as a Call for Reparations

The call for reparations is not without controversy. On the contrary, surveys report only ten percent of white Americans support broad-based reparations using "taxpayer money to pay damages to descendants of enslaved people in the United States."[58] While one argument against reparations revolves around the length of time that has passed, this argument either fails to recognize or willfully ignores that there has never been a time in the United States' history in which it was willing to recompense for its "original sin."[59] The legal and moral battle by Black Americans for reparations for slavery has been documented and stretches back before the Civil War.[60]

1. Slavery as a Racial Caste

At the federal level, despite the nation's purported lofty goals and beliefs that "all men are created equal,"[61] slavery was expressly written into the Constitution.[62] This created separate castes of

57. *See* Allen J. Davis, *An Historical Timeline of Reparations Payments Made From 1783 through 2021 by the United States Government, States, Cities, Religious Institutions, Colleges and Universities, and Corporations*, UMASS AMHERST LIBRS., guides.library.umass.edu/reparations [perma.cc/LQT3-XCF5] (last updated Feb. 2, 2021) (providing an accounting of reparations made by governments and institutions from 1783 to the present day).

58. Katanga Johnson, *U.S. public more aware of racial inequality but still rejects reparations: Reuters: Ipsos polling*, U.S. NEWS (June 25, 2020), www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG [perma.cc/YAS8-T8ZX]. *Compare* Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. CIV. RTS. & ECON. DEV. 697, 697 (2011) (citing ALFRED BROPHY, REPARATIONS PRO & CON, 97-98 (2006) (claiming that in surveys at that time only five percent of white Americans supported reparations).

59. *See* Ted Barrett, *McConnell opposes paying reparations: 'None of us currently living are responsible' for slavery*, CNN (June 19, 2019) www.cnn.com/2019/06/18/politics/mitch-mcconnell-opposes-reparations-slavery/index.html [perma.cc./8TWX-QTFZ] ("I don't think reparations for something that happened 150 years ago for whom none of us currently living are responsible is a good idea. We've tried to deal with our original sin of slavery by fighting a civil war, by passing landmark civil rights legislation. We elected an African American president.").

60. *See* Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. CIV. RTS. & ECON. DEV. 697, 697 (2011) (citing BROPHY, *supra* note 58 (noting Brophy's research that some early claims predate the war and then detailing a brief history of reparations advocacy from 1865 to 2000)).

61. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

62. *See* U.S. CONST. art. I § 2 (declaring representation by the "whole

persons in the United States, distinguished by race. The "peculiar institution" of slavery drove the economic engine of the United States,[63] and it was upheld and reinforced by Supreme Court decisions such as *Scott v. Sandford* (*Dred Scott*).[64] By 1860, the issue of slavery was set to divide the nation as the Southern States seceded in order to preserve their legal rights to hold Black persons in bondage as chattel.[65]

In 1865, after four years of war with 260,000 Confederate deaths, the Civil War ended and the Thirteenth Amendment abolished slavery on its face.[66] The Fourteenth Amendment,

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Number of free Persons" and "three fifths of all other Persons"); *Id.* art. I § 9 (prohibiting Congress from banning importation of enslaved persons until 1808); *Id.* art. V (prohibiting the aforementioned from being altered by amendment); *Id.* art. IV § 2 (describing the fugitive slave clause). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 712 (2020) (discussing the inclusion of slavery provisions within the Constitution to make it palatable to the southern states and several prominent slave-owning framers including George Washington, James Madison, and John Rutledge) (citing DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 209-210 (1971)).

63. *See* MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 8, at 39 (detailing the importance of slave-labor cotton as it "furnished three-fourths of the world's supply" with its yield doubling each decade after 1800, driving the industrial revolution in New England and England, as "Southern staples provided three-fifths of all American exports"). The etymology of "peculiar institution" as a phrase referring to slavery has been traced to a speech by John C. Calhoun in 1837. John C. Calhoun, *Speech on the Reception of Abolition Petitions,* Delivered in the Senate (Feb. 6, 1837) *in* SPEECHES OF JOHN C. CALHOUN, DELIVERED IN THE HOUSE OF REPRESENTATIVES AND IN THE SENATE OF THE UNITED STATES 625-33 (Richard R. Cralle, ed.) (1853).

64. Scott v. Sandford (Dred Scott), 60 U.S 393, 451 (1857) ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property was guarantied [sic] to the citizens of the United States . . . .").

65. *See* MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 8, at 241 (detailing the issue that Southerners rallied around in their decision to secede and thus starting the Civil War was slavery). "What were these rights and liberties for which Confederates contended? The right to own slaves; the liberty to take this property into the territories; freedom from the coercive powers of a centralized government." *Id.* For primary-source historical documentation that the issue of slavery was the issue that led to secession and the Civil War *see* John Pierce, *The Reasons for Secession: A Documentary Study*, AM. BATTLEFIELD TRUST, www.battlefields.org/learn/articles/reasons-secession [perma.cc/8PK-4MAB] (last visited Jan. 3, 2022), *and The Declaration of Causes of Seceding States*, AM. BATTLEFIELD TRUST, www.battlefields.org/learn/primary-sources/declaration-causes-seceding-states [perma.cc/U7VE-KYVW] (providing the text of the declarations of causes (of secession) of Georgia, Mississippi, South Carolina, Texas, and Virginia). "Our position is thoroughly identified with the institution of slavery – the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth . . . and a blow at slavery is a blow at commerce and civilization."). *Id.* at Mississippi.

66. U.S. CONST. amend. XIII, § 1. ("Neither slavery nor involuntary servitude, *except as punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their

adopted in 1868, was enacted to assure equal protection.[67] This post-emancipation period was an opportunity for the nation to make a fresh start.[68] However, while the South may have lost the war, it was "determined to win the peace – and victory in the long shadow of Appomattox would be defined by the extent to which the old Confederacy could subjugate [Black people]."[69]

2. Racial Caste in the Post-emancipation and Jim Crow Period

While the immediate post-emancipation period is often hailed as an interlude between two repressive regimes—slavery and Jim Crow—it was actually a time of significant racial tension and violence.[70] Former owners of enslaved persons had been stripped of their primary source of wealth; they resented being subject to Northern rule and being told they were now the equals of their recently freed property.[71] Therefore, Southern states enacted Black

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jurisdiction." (emphasis added). However, Jefferson Davis was prescient when he remarked that "the principle for which we contended is bound to reassert itself, though it may be at another time and in another form." MEACHAM, *supra* note 2, at 65-66.

67. U.S. CONST. amend. XIV, § 1. ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

68. *See generally* MCPHERSON, ORDEAL BY FIRE, *supra* note 3 (detailing the post-emancipation period of Reconstruction to include its limitations).

69. MEACHAM, *supra* note 2, at 51-69 (discussing the entrenched racial views in "Southern" thinking that even four years of brutal war could not displace; while General Lee and the South "surrendered" in physical defeat at Appomattox Courthouse, they largely won the culture war with the historiography of the "Lost Cause" which reframed the war as one not over slavery, but of "states' rights" and of the industrialized North brutalizing the rural, agrarian South). Southern journalist Edward Pollard wrote that "the true cause fought for in the late war has not been 'lost' immeasurably or irrevocably but is yet in a condition to be 'regained' by the South on ultimate issues of the political contest" in reference to white supremacy as the "true hope of the South." *Id.* at 59.

70. *See generally* MCPHERSON, ORDEAL BY FIRE, *supra* note 3 (detailing the use of racial violence in the post-emancipation era).

71. *See, e.g.,* MCPHERSON, BATTLE CRY OF FREEDOM, *supra* note 8, at 97 (explaining that while "the average southern white male was nearly twice as wealthy as the average northern white man", this wealth was invested in land and enslaved persons); *see also*, MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 113 (detailing the steep escalation of slave prices in the 1850s during which the "average price of a prime male field hand rose from $1,000 to $1,700."); McMurtry-Chubb, #*SayHerName*, *supra* note 16, at 657 (2016) (discussing the economic significance of emancipation as well as the planter's struggles "to make sense of the freedom in the unrestrained bodies of the perceived inferior and formerly enslaved.").

Codes, criminal codes only governing Black people, in order to keep Black people in their place socially, economically, and politically.[72]

As the legal codification of white supremacy, these Black Codes were proxies for preserving the social order that existed under slavery and maintained the planter class's ability to draw from the existing pool of free labor.[73] The punishment for breaking many of the Black Codes was fines or imprisonment,[74] and per the Thirteenth Amendment, slavery is acceptable for prisoners.[75] The Black Codes provided a continued source of labor as the prison systems enacted convict-leasing programs.[76]

The KKK, conceived by a group of ex-Confederates, also arose in 1866 and its membership spread quickly, recruiting men from all levels of society.[77] The Klan's terrorism campaigns were successfully aimed at political, social, and economic control of the Black population and the Republican-installed governments were ineffectual against their guerrilla-style tactics.[78]

Despite the Fifteenth Amendment's 1870 ratification, which extended the right to vote to Black men,[79] white supremacy found ways to circumvent the spirit of federal law. The Southern States imposed poll taxes, literacy qualifications, "understanding" clauses, and "grandfather" clauses to ensure disenfranchisement of the

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72. *See* MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 509 (discussing the Freedmen's Bureau's actions to suspend the Black Codes that had been enacted across the South to criminalize free Blacks for "vagrancy," thus bringing them back into the nearly-free labor market under a system of convict leasing).

73. *See 1858-1865: The Crisis of the Union*, *in* 9 THE ANNALS OF AMERICA 628 (1976) (detailing four of the statutes that comprised Mississippi's Black Codes as enacted in November 1865). Examples of these Black Codes included so-called apprentice laws which were a means for Black minors to be returned to their former masters; vagrancy laws which criminalized unemployment; authority for civil officers to arrest and return Blacks who had left their employment before their term of service was due; and a restriction against carrying any firearms. *Id. See also*, McMurtry-Chubb, *#SayHerName*, *supra* note 16, at 665 (concluding that "Crime, then, became the means of funneling Black labor to the state").

74. *1858-1865: The Crisis of the Union*, *in* 9 THE ANNALS OF AMERICA 628 (1976),

75. U.S. CONST. amend. XIII, § 1. ("Neither slavery nor involuntary servitude, *except as punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (emphasis added)).

76. *See* ALEXANDER, *supra* note 2, at 35 (citing historian WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL (1991)); *see also*, McMurtry-Chubb, *#SayHerName*, *supra* note 16 (outlining how criminal statutes evolved after emancipation and the new ways laws were racialized and gendered).

77. MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 537-538.

78. *See id.* at 556-558 (describing the Klan's terroristic political campaigns of 1868 in order to suppress the Black Republican vote, including 200 political murders in Arkansas, and over 1000 killed in Louisiana).

79. U.S. CONST. amend. XV § 1. ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

Black vote.[80] As if those hurdles were not enough, violence increased before elections, Black schoolhouses were burned, and there was the ever-present threat of the lynch mob.[81]

By 1877, the illusion of Reconstruction ended, federal troops withdrew, and Southern Democrats were firmly back in control of the government, ushering in Jim Crow.[82] Segregating the races under Jim Crow was enshrined into law by the Supreme Court with the *Plessy v. Ferguson* decision in 1896.[83] Segregation under the law affected nearly "every aspect of Southern public life – streetcars, water fountains, restaurants, recreational facilities, and so on. [These] Jim Crow laws formally placed [B]lack [persons] in a separate caste . . . ."[84]

The Jim Crow era, and the years that followed, was a time of social and political upheaval. For Black Americans, this included continued convict leasing and debt servitude as "lynchings, church burnings, and the denial of access to equal education and to the ballot box were the order of the decades."[85] The release of *The Birth of a Nation* fueled a resurgence in the Ku Klux Klan's popularity.[86] By 1924, all forty-eight states had a Klan presence, which included eleven governors, sixteen senators, upwards of seventy-five representatives, and a future justice of the Supreme Court.[87] As the

80. *See* MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 608 (explaining how one-party Democratic rule was imposed throughout the South by disenfranchising Black voters – a state which would last until at least the 1960s and is still being fought today).

81. *See id.* (detailing the struggles that Republican law enforcement and militia leaders faced in ending Klan violence). Cases against the Klan were fraught with danger – a case in northern Mississippi "fell apart when five key witnesses were murdered. The example was not lost on witnesses and jurors elsewhere." *Id.* at 558. *See* KENDI, *supra* note 2, at 259 (revealing that "[s]omeone was lynched, on average, every four days from 1889 to 1929."); *see also* EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: TARGETING BLACK VETERANS (2017), www.eji.org/reports/targeting-black-veterans [perma.cc/S7MN-ZZHH] (detailing lynching specific to the Black veteran experience). According to Mississippi senator and Klansman Theodore Bilbo, "You and I know what's the best way to keep [Black people] from voting. You do it the night before the election." Coates, *supra* note 38.

82. *See* MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 581-609 (discussing what the author refers to as a "retreat from reconstruction"); *see also* ALEXANDER, *supra* note 2, at 35-36 (describing the birth of Jim Crow).

83. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

84. MCPHERSON, ORDEAL BY FIRE, *supra* note 3, at 608. *But see Plessy*, 163 U.S. at 559 (1896) (Harlan, J., dissenting) ("in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.").

85. MEACHAM, *supra* note 2, at 69.

86. *See id.* at 12, 107-111 (detailing the resurrection in the Ku Klux Klan in the early 20th century in conjunction with the release of the extremely popular film); BIRTH OF A NATION (Triangle Film Corp. 1915).

87. MEACHAM, *supra* note 2, at 110-111. Supreme Court Justice Hugo Black was a KKK member from 1923-1925 and may have had a lifetime membership. *See* Todd Peppers, *Justice Hugo L. Black, His Chambers Staff, and the Ku Klux Klan Controversy of 1937*, SUP. CT. HIST. SOC'Y (last accessed 22 May 2022),

next section will demonstrate, this led to normalizing racial violence as a way to ensure the racial caste system remained intact into the twentieth century.

3. Racial Violence as a Mechanism to Enforce Racial Caste

Racialized violence was widespread, and from 1900 to the 1930s, some 3,500 Black men, women, and children across the United States had been lynched by white supremacists.[88] This violent racial intimidation was well-known and practiced in Oklahoma, site of the Tulsa Massacre of 1921, with thirty-three persons lynched between 1907 and 1920, twenty-seven of whom were Black.[89]

From 1917 through 1921, multiple cities across the United States suffered so-called race riots as long-simmering racial tensions boiled over.[90] Heightened tensions in northern and midwestern cities resulted from the Great Migration of Black Americans fleeing Southern racial terrorism,[91] coupled with the

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www.supremecourthistory.org/scotus-scoops/justice-hugo-black-ku-klux-klan-controversy-1937/ [perma.cc/W5E7-JPGG] (describing how Justice Black attempted to overcome the stigma by selecting staff that were Black, Catholic and/or Jewish).

88. MEACHAM, *supra* note 2, at 162 (detailing that only 67 indictments and 12 convictions had come from these 3,500 murders).

89. *See* TULSA RACE RIOT REPORT, *supra* note 13, at 16-18 (noting the significance of lynching and race riots was "a collective body – acting as one body – [that] had coldly and deliberately and systematically assaulted one victim, a whole community, intending to eliminate it as a community."). "When Laura Nelson was lynched years earlier in Okemah, it was not to punish her by death. It was to terrify the living. Why else would the lynchers have taken (and printed and copied and posted and distributed) that photograph of her hanging from the bridge, her little boy dangling beside her?" *Id.* Similarly, photos of the Greenwood community burning as well as murdered and burned Black victims of the Tulsa massacre were taken and distributed as postcards. *Id.* While there was little evidence of Klan activity in Tulsa prior to the riot, the Klan used the riot as a means to recruit new members, and in 1922, a year after the riot, initiated more than one thousand new members in one ceremony. *See id.* at 46-47 (explaining that Oklahoma had over 100,000 Klan members by the mid-1920s, including 3,200 members by December 1921). Notably, Tulsa was also home to both a Women of the Ku Klux Klan chapter as well as a Junior Ku Klux Klan chapter for youth. *Id.*

90. *See* Garrison, *supra* note 11 (explaining that a significant effect of the race riots – besides terrorizing people to remain in their "place" – was the systematic destruction of the ability of former enslaved people to create intergenerational wealth). In 1919 alone, during what is called the Red Summer, there were 240 recorded race riots in the United States. Thomas J. Sugrue, *2020 is not 1968: To Understand Today's Protests, You Must Look Further Back*, NAT'L GEOGRAPHIC (June 11, 2020), www.nationalgeographic.com/history/2020/06/2020-not-1968 [perma.cc/A82F-N6PR] (noting that "in all of these cities, the police swept in, taking the side of white rioters.").

91. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 273-275 (2010) (chronicling the exodus of nearly 6 million Black people from the South to northern and western cities from 1915 to 1970).

return of Black soldiers from their military service in World War I.[92] The influx of cheap Black labor was used as a weapon against white labor interests leading to resentment and violence.[93] Black soldiers were viewed as a threat to the racial caste system, and just being in the wrong place at the wrong time could end in a lynching.[94] One of these race riots decimated the Greenwood community in Tulsa, Oklahoma,[95] which is key to understanding the context of a recently filed complaint that will be discussed in Section II.E.

4. The Tulsa Massacre

Greenwood was a thriving Black community ten-thousand strong within Tulsa, Oklahoma, itself a bustling city with a population greater than one hundred thousand in the early twentieth century.[96] Known as "Black Wall Street," Greenwood was 35 square blocks of homes, churches, and businesses—including hotels, 750-seat and 1000-seat theaters, two newspapers, and a library.[97]

On May 30, 1921, Sarah Page, a white elevator operator, encountered Dick Rowland, a Black shoe-shiner, in the elevator of a downtown building and accused Rowland of attempted rape.[98] He was arrested on May 31, 1921.[99]

Word spread that there was going to be a lynching, and a white mob of hundreds formed outside the courthouse.[100] Twice that day Black men, many of them World War I veterans, armed themselves and went to the jailhouse to protect Rowland from being lynched and were turned away.[101] As they were leaving the second time, a

92. *See*, *e.g.,* EQUAL JUST. INITIATIVE, *supra* note 81 (detailing the hatred and violence that Black veterans faced on the home front, even during peacetime).

93. *See, e.g.,* WILKERSON, *supra* note 91. (comparing race riots in the North to lynching in the South as "display[s] of uncontained rage by put-upon people directed toward the scapegoats of their condition" and describing a riot in East St. Louis, Illinois in 1917 when companies hired Black migrants to replace striking white workers resulting in 39 Blacks and 8 whites killed, more than 100 Blacks wounded, and 5000 Blacks homeless).

94. *See* EQUAL JUST. INITIATIVE, *supra* note 81, at 8 (explaining that "whites' fears that black veterans asserting and demanding equality would disrupt the social order built on white supremacy and the racialized economic order from which many benefitted").

95. *See generally* TULSA RACE RIOT REPORT, *supra* note 13.

96. *Id.* at 38 (noting that the population of Tulsa had grown from just 10,000 persons to over 100,000 in a single decade, from 1910-1920).

97. *Id.* at 40-41 (taking note that there were also grocery stores, meat markets, clothing stores, beauty and barber shops, drug stores, jewelry stores, tailors, cleaners, sandwich shops, barbecue joints, business leagues, fraternal orders, a YMCA branch, women's clubs, and brand-new housing developments).

98. *Id.* at 57.

99. *Id.*

100. *Id.* at 60.

101. *Id.* at 62 (noting that the arrival of 25 Black men armed with rifles and shotguns offering to defend the courthouse shocked the authorities and the

white man approached a Black veteran and attempted to disarm him.[102] A shot rang out and fighting ensued between the two groups.[103] The Black men were well-outnumbered and retreated.[104]

Shortly after the skirmishes began, five hundred white men and boys were deputized at police headquarters and given guns, while white men broke into downtown stores to steal guns and ammunition, reportedly assisted by a Tulsa police officer.[105] The all-white Tulsa National Guard units also reported for duty and established their fighting position along the neighborhood border, took part in the attacks, and took Black Tulsans as prisoners for the white police officers.[106]

Overnight and into the morning, white mobs methodically destroyed Greenwood, with Black homes and businesses broken into, looted, and set on fire while the occupants were either shot or led away as prisoners.[107] Late morning on June 1st, an Oklahoma City-based National Guard unit arrived and instituted martial law, rounding up all remaining Black Tulsans.[108] When it was over, Greenwood was left entirely in smoldering ruins, 150-300 Black citizens were killed,[109] and those that survived were taken to internment camps at gunpoint,[110] forcing many to spend the winter in tents with no homes to return to.[111]

While Dick Rowland was exonerated, an all-white grand jury blamed Black Tulsans for the "riot" and no white person was ever indicted for the murders or arson.[112] Four million dollars of

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white mob, now a thousand strong, some of whom left to fetch their own guns from home and that while there only 5 officers on duty, even as the white mob numbers swelled to two thousand people, the Chief left the scene and returned to his office at police headquarters).

102. *Id.* at 63 (noting the veteran carried his Army-issued revolver).

103. *Id.*

104. *Id.* (detailing how one of them was shot and that he was discovered by a white physician who said he "had been shot so many times in his chest, and men from the onlookers were slashing him with knives").

105. *Id.* at 64 (stating that police officers told them to "get a gun and get a [Black person]" and noting that the sports goods shop was directly across from police headquarters).

106. *See id.* at 74 (describing criminal actions taken by white police officers as witnessed by both Black and white eyewitnesses – including a Black deputy sheriff*); Id.* at 78-79 (describing the active participation in the massacre by the Tulsa National Guard troops). *But see id.* at 86 ("Everyone with whom I met was loud in praise of the State Troops who so gallantly came to the rescue of stricken Tulsa," wrote Mary Parrish, "They used no partiality in quieting the disorder. It is the general belief that if they had reached the scene sooner, many lives and valuable property would have been saved.").

107. *Id.* at 74.

108. *Id.* at 82-84.

109. *See id.* at 124 (discussing the varying accounts and approximations used to establish body counts).

110. *Id.* at 85.

111. *Id.* at 88-89 (noting this necessity "despite the Herculean efforts of the American Red Cross").

112. *Id.* at 89 (stating that the grand jury found that the arrival of the

insurance claims were filed for loss of businesses, homes, and property.[113] Yet, other than two five thousand dollar claims by white storefront owners for loss of weapons (ostensibly those stolen and used to arm fellow white citizens during the massacre), no insurance losses were ever paid nor reparations made to Black Tulsans.[114] Instead, the city "took further action to prevent rebuilding by passing a zoning ordinance that required the use of fireproof material in rebuilding."[115] Other city planning initiatives aimed at isolating the Black community followed, including "the Tulsa Development Authority us[ing] it's 'urban renewal powers to take property from Greenwood residents' to create I-244," which was followed by decades of neglect by Tulsa city officials.[116]

A 1997 directive from the Oklahoma Legislature to study the riot led to the issuance of the Tulsa Race Riot Commission Report in 2001.[117] The Commission's mandate was to create a historical record of the events surrounding the riot and make recommendations as to whether reparations were appropriate.[118]

The commissioners recommended reparations and restitution be made in "real and tangible form" to the historic Greenwood community with the following order of priority: direct payment of reparations to survivors; direct payment of reparations to descendants of the survivors; a scholarship fund available to affected students; establishment of an economic development zone in the historic Greenwood District; and a memorial for the reburial of any human remains found in unmarked graves of riot victims.[119]

Instead, the Oklahoma Legislature passed the 1921 Tulsa Race Riot Reconciliation Act of 2001, which created a committee to design The 1921 Tulsa Race Riot Memorial of Reconciliation; identified parkland for said memorial; empowered the Oklahoma Historical Society to identify and exhume the victims' remains; created the

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concerned and armed Black citizens of Greenwood at the courthouse to protect Dick Rowland from lynching "was the direct cause of the entire affair.").

113. *Id.* at viii, 154 (The competing testimony of Redfearn and the insurance company "present one of the most complete stories of the riot now available."). *See also* Redfearn v. Am. Cent. Ins. Co., 243 P. 929, 931 (Okla. 1926) (holding that a riot exclusion clause precluded an insurance claim by a white Tulsan after the Tulsa Massacre in order to recover from the loss of two buildings he owned in Greenwood (the Dixie Theatre and the Redwing Hotel)). Four million dollars in claims in 1921 is equivalent to over fifty-seven million dollars today. Saving.org, www.saving.org/inflation/inflation.php?amount=1,000,000&year=1921 [perma.cc/WY8L-Z4GA] (last visited June 30, 2022).

114. TULSA RACE RIOT REPORT, *supra* note 13, at 153-154.

115. *Id.* (discussing the culpability of government officials). "In the end, black Tulsans did rebuild their community, and the fire ordinance was declared unconstitutional by the Oklahoma Supreme Court." *Id.* at 88.

116. Vincent Hill, *Lawsuit filed over 1921 Tulsa Race Massacre*, 2 NEWS OKLA. (Sept. 1, 2020), www.kjrh.com/news/local-news/local-attorneys-to-hold-news-conference-on-1921-tulsa-race-massacre-lawsuit [perma.cc/D5QF-LTBA].

117. TULSA RACE RIOT REPORT, *supra* note 13, at 20.

118. *Id.* at 23.

119. *Id.* at 20.

Greenwood Area Redevelopment Authority to analyze and make redevelopment recommendations; and established a Tulsa Reconciliation Education and Scholarship Program.[120] Recently, new focus has been placed on locating the unmarked mass gravesites of Black Tulsa Massacre victims.[121] However, these actions have provided no relief for Black Tulsans, many of whom feel that city officials are now trying to monetize the harm and trauma inflicted, yet ignoring the report's reparations recommendations.[122]

D. History of Failed Black Reparations in the United States

1. Early Reparation Attempts

Initial reparations attempts originated during the Civil War and prior to slavery's "end" in 1865.[123] On January 16, 1865, General Sherman, after meeting with Black leaders, issued Special

120. H.B. 1178, 2001 Leg., 48th Sess. (Okla. 2001). The scholarship only considers lineal descendancy as a secondary factor if there are too many otherwise qualified applicants. *Id.*

121. *See, e.g.*, *1921 Graves Investigation*, CITY OF TULSA, www.cityoftulsa.org/1921graves [perma.cc/4PG9-4P89] (last visited Feb. 27, 2021) (providing updates to current or planned excavations).

122. *See* Randle v. City of Tulsa, No. CV-2020-1179 (Okla. Dist. Ct. Tulsa Cnty. Sept. 1, 2020), available at www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=cv-2020-1179 [perma.cc/7E6H-JQ7U] (describing the new 1921 Tulsa Race Massacre Centennial Commission which is pursuing a museum, art installation, and vague promises of economic revitalization without addressing the recommendations of the 2001 Commission, including the call for reparations). *See also* GREENWOOD RISING, www.greenwoodrising.org/ [perma.cc/BE2P-NY79] (last accessed Feb. 13, 2021) (demonstrating the new initiatives including building a new history center, a public art project, a teaching curriculum, a commemorative grants program, and a centennial commemoration event); HUMAN RIGHTS WATCH, THE CASE FOR REPARATIONS IN TULSA, OKLAHOMA: A HUMAN RIGHTS ARGUMENT 20 (May 2020), www.hrw.org/sites/default/files/media_2020/11/tulsa-reparations0520_web.pdf [perma.cc/99N3-3C3G] (detailing that North Tulsans (who are primarily Black) have a 33% poverty rate compared to 13% of (predominantly white) South Tulsans with an unemployment rate 2.4 times as high). These high poverty rates combined with geographic food deserts are severely impacting the health of Black Tulsans leaving them with an 11-year shorter lifespan than white Tulsans, and with infant mortality rates nearly triple. *Id.* at 31-32.

123. *See generally* Elizabeth Nix, *What is Juneteenth? Juneteenth commemorates the effective end of slavery in the United States History,* HISTORY.COM (Jun 18, 2020), www.history.com/news/what-is-juneteenth [perma.cc/7S2X-Q3N7] (explaining the history of the celebration of the end of slavery as June 19th, 1865 – the day celebrated as Juneteenth in commemoration of the day that General Granger arrived in Galveston, Texas and read the notice that the war was ended and all those enslaved were freed). Beginning the next year this date was celebrated as "Jubilee Day" and is now recognized in 47 states as a holiday. *Id.*

Order 15, designating an area thirty miles in from the coastline from Charleston to Jacksonville as a resettlement area in which each Black family would get forty acres.[124] In March of 1865, Congress created a Freedman's Bureau and "stipulated that forty acres of abandoned or confiscated land could be leased to each Southern freeman or Unionist with an option to buy after three years."[125] These attempts were destined to fail under President Andrew Johnson, who used military force to remove the freed Black families from the land and "by the end of 1866, nearly all the arable land . . . had been returned to its ex-Confederate owners."[126]

Later forays into reparations were an economic endeavor to boost the flagging southern economy.[127] Two examples are the ex-slave pension bill of 1890 and "National Ex-Slave Mutual Relief, Bounty and Pension Association" in Nashville, TN, which fostered the reparations movement of the 1890s.[128] However, these reparations attempts failed and the South soon created its own methods to improve its economy and recapture its free labor costs by criminalizing blackness and utilizing hard labor, convict leasing, debt peonage, and sharecropping to mimic the chattel slavery system by creating Black Codes.[129] These codes were enacted putting all Black persons at risk of being arrested and sentenced to hard labor, leased to industry (railroads, mining, etc.) or to their former owners under convict leasing programs, or sold into debt

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124. MCPHERSON, ORDEAL BY FIRE, *supra* note 3 (pointing out that each family "would receive possessory titles to this land until Congress shall regulate the title." (internal quotation marks omitted)).

125. *Id.* at 399-400. *See also id.* at 504 (elaborating that "By June 1865 the Freedmen's Bureau had placed nearly ten thousand families on almost half a million acres of plantation lands abandoned by planters who had fled Union armies along the coastal rivers in Georgia and South Carolina" as assigned by Sherman's Special Order No. 15 and often with "horses and mules captured from the enemy").

126. *Id.* at 505.

127. *See* KENDI, *supra* note 2, at 270-71.

128. *Id.*

129. *See 1858-1865: The Crisis of the Union*, *supra* note 73 (providing the statutes of four of Mississippi's Black Codes); ALEXANDER, *supra* note 2, at 35 ("Nine Southern states adopted vagrancy laws – which essentially made it a criminal offense not to work and were applied selectively to blacks – and eight of those states enacted convict laws allowing for the hiring-out of people in country prisons to plantation owners and private companies."); McMurtry-Chubb, *#SayHerName*, *supra* note 16, at 665 (detailing the linkage of certain crimes to Black women as after the passage of the Thirteenth Amendment crime "became the means of funneling Black labor back to the State."); Teri McMurtry-Chubb, *The Codification of Racism: Blacks, Criminal Sentencing, and the Legacy of Slavery in Georgia*, 31 T. MARSHALL L. REV. 139, 141-143 (2005) (detailing the criminalization of "Blackness" through criminal codes that punished Black persons with hard labor thorough chain gangs or convict leasing); SLAVERY BY ANOTHER NAME (TPT National Productions & Two Dollars & A Dream, Inc. 2012) (illustrating the horrors of convict leasing and peonage in a ninety-minute documentary film).

peonage.[130] In Mississippi for example, Black Codes included the apprentice law, providing former owners first dibs on taking back control of their freed Black youth, as well as a vagrancy law, which criminalized unemployed Black adults or Black adults who assembled together.[131] The Mississippi Black Codes also included the civil rights of freedmen, which limited where Black people could rent or lease housing or land, prohibited interracial marriage, and dictated continual proof of employment. In addition, the penal code prohibited Black persons from owning or carrying firearms or large knives.[132]

Because the post-emancipation period was not one in which Black persons were likely to find any redress from the courts, the arguments for reparations to compensate for the harms inflicted by slavery and Jim Crow continue to resurface.[133] While the "badges of slavery" were officially outlawed, those that remain were, and often still are, found to be nonjusticiable.[134] Instead, cases seeking redress are routinely dismissed for lack of standing, the political question doctrine, sovereign immunity, and/or statute of limitations.[135]

2. Cato v. United States (1995)

Cato v. United States was a claim by descendants of enslaved Black people against the United States filed in federal court in the Northern District of California.[136] The plaintiffs sought $100 million in compensation for "forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character."[137] Besides damages, the plaintiffs also sought a court-ordered acknowledgement of the injustice of slavery, and a formal apology from the United States.[138] The plaintiffs in *Cato* contended

130. *See* SLAVERY BY ANOTHER NAME, *supra* note 129.

131. *1858-1865: The Crisis of the Union*, *supra* note 73, at 628-635.

132. *Id.*

133. *See Cato*, 70 F.3d 1103 at 1103; *In re* African-American Slave Descendants Litig., 471 F.3d at 754; Coates, *supra* note 38.

134. *See* Green v. United States, 2012 U.S. Dist. LEXIS 190394, at *11 (W.D. Wis., Aug. 6, 2012) (explaining "there are prudential limitations that bar consideration of political questions [that] counsel against the finding of a justiciable controversy that is capable or appropriate for litigation."). *But see In re* African-American Slave Descendants Litig., 471 F.3d at 758-59 (allowing that if the plaintiffs could overcome the other barriers to standing, that "there would be a justiciable controversy.").

135. S*ee, e.g.*, *Cato*, 70 F.3d at 1111 (noting "the legislature, rather than the judiciary, is the appropriate forum for this relief.").

136. *Id.* at 1106.

137. *Id.*

138. *Id.*

that the continuing violations doctrine[139] applied due to continued discrimination, and that under the Thirteenth Amendment, the "federal government had an obligation to end the vestiges of slavery, but has failed to keep the promise."[140] But while the court recognized the continuing violation doctrine, and agreed that it applied to both constitutional and statutory violations, it failed to consider its application in the case because of jurisdictional hurdles.[141] Filed pro se,[142] *in forma pauperis*,[143] the claim failed for raising a political question, lack of standing, and being barred by the sovereign immunity of the United States.[144]

3. In re African-American Slave Descendants Litigation (2006)

The *In re African-American Slave Descendants Litigation* lawsuit is noteworthy in that, while the plaintiffs were putative descendants from enslaved persons, the defendants were businesses known to have operated during and profited off of slavery.[145] In four separate actions that were consolidated under the

139. *Continuing Violation Doctrine*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012) ("Discrimination or harassment arising from repetitious conduct. A continuing violation is a pattern of conduct that, over time, amounts to employment discrimination or harassment. An element of the discriminatory or harassing nature is the repetition or persistence of behavior, such that a reasonable person in the plaintiff's position might not have considered the initial instances of the conduct to be actionable but over time the conduct became injurious. A continuing violation may be brought after the 300-day limitations period for discrimination or harassment claims would have run from the initial conduct, as an equitable exception to the limitation and based on the initial lack of an apparent claim.").

140. *Cato*, 70 F.3d at 1108-09 (contending that "the continuing violations doctrine applies because African Americans are still subjected to the badges and indicia of slavery."); *See also* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *Id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

141. *Cato*, 70 F.3d at 1108-09 (citing the court's recognition of the continuing violations doctrine in the following cases: Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588 (9th Cir. 1990) and Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982)).

142. *Pro se*, BLACK'S LAW DICTIONARY (2d ed. 2001) (defining the term as "[f]or oneself; on one's own behalf; without a lawyer.").

143. *In forma pauperis*, BLACK'S LAW DICTIONARY (2d ed. 2001) (defining the term as "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs.").

144. *See Cato*, 70 F.3d at 1111 (further holding as to her non-monetary claims that "the legislature, rather than the judiciary, is the appropriate forum for this relief.").

145. *In re* African-American Slave Descendants Litig., 471 F.3d at 757 ("[D]efendants are companies or the successors to companies that provided services, such as transportation, finance, and insurance, to slaveowners. At least two of the defendants *were* slaveowners; the predecessor of one of the bank

Northern District of Illinois, the plaintiffs filed claims under 42 U.S.C. § 1982 and state law, "careful to cast the litigation as a quest for conventional legal relief" in order to avoid the political question doctrine.[146] The case ultimately failed due to a lack of standing and the running of the statute of limitations.[147]

In finding a lack of standing, the court held that "there is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants."[148] In short, the court ruled "the causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all."[149]

The fatal flaw in this case was the connection between the plaintiffs and the defendants. While the plaintiffs were descendants of enslaved persons, and the defendants engaged in the slave trade in some manner (even if just by propping it up with insurance), there was no direct line between plaintiffs and defendants. No plaintiff could say that their ancestor was owned or transported by one of these companies or that this resulted in a particular, concrete harm to the descendant.[150] The court also distinguished between those descendants claiming to be the representatives of their ancestor's estate versus those making claims merely as descendants of enslaved persons.[151]

4. Alexander v. Oklahoma (2004)

Similarly, claims for the egregious harms suffered by victims and survivors of race riots have found little relief in the court system.[152] The Tenth Circuit rejected a 2004 claim by Tulsa Massacre Survivors on the basis that it was barred by the statute

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defendants once accepted 13,000 slaves as collateral on loans and ended up owning 1,250 of them when the borrowers defaulted, and the predecessor of another defendant ended up owning 346 slaves, also as a consequence of a borrower's default." (emphasis original)).

146. *Id.* at 758; *See also* 42 U.S.C. § 1982 (stating that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

147. *See In re* African-American Slave Descendants Litig., 471 F.3d at 760, 762 (holding that "if there were a legal wrong, it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors" and those who claimed to be such authorized representatives, their claims were long barred by the statute of limitations, even if tolled).

148. *Id.* at 759.

149. *Id.*

150. *See id.* at 759-60 (detailing the remoteness argument).

151. *Id.* at 759.

152. *Contra* Bassett, *supra* note 13 (illustrating the case of Rosewood, Florida as an outlier as reparations were approved by legislative action); Fla. HB 591 (1994).

of limitations and even tolling would not allow it to survive past the 1960s and the enactment of civil rights legislation.[153] In that case, *Alexander v. Oklahoma*, the plaintiffs filed suit in federal court, alleging Civil Rights claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as under the Fourteenth Amendment's Equal Protection Clause.[154] The plaintiffs also filed state law claims under Oklahoma authority based on negligence and promissory estoppel.[155]

One of the points of contention in *Alexander* was whether the plaintiffs had or should have had knowledge of their rights along with the role of the government agencies charged with involvement in both the riot and the subsequent cover-up.[156] The plaintiffs

153. *See* Alexander v. Oklahoma, 382 F.3d 1206, 1219-20 (10th Cir. 2004) (discussing tolling under extraordinary circumstances and holding that "While exceptional circumstances may have prevented victims from seeking timely legal redress based on that evidence, the emergence of civil rights legislation in the 1960s gave them the ability to do so.").

154. *Id.* at 1206. 42 U.S.C. § 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to [enjoy] the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1983 (1996) states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1985(3) states that "[i]f two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." The Equal Protection Clause is part of the Fourteenth Amendment to the United States Constitution, which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

155. *Alexander*, 382 F.3d at 1212. "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 1965). Promissory Estoppel is "[t]he principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment." *Promissory Estoppel*, BLACK'S LAW DICTIONARY (2d ed. 2001).

156. *See Alexander*, 382 F.3d at 1213, 1217-19 (discussing the district court's

argued that there was a "conspiracy of silence" as "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."[157] One angle the courts took in determining that plaintiffs should have known that they had claims available to them were the hundreds of insurance claims which Black property owners filed after the riot.[158] It is noteworthy, however, that none of the insurance claims were successful.[159]

Despite the plaintiffs' "conspiracy of silence" argument, the court claimed that the conditions necessary to permit equitable tolling had expired.[160] On appeal to the Tenth Circuit, the plaintiffs argued the court had erred by making factual findings in the motion to dismiss and for attributing to plaintiffs' knowledge of facts (the city's official involvement) that only came to light after the Tulsa Race Riot Commission's report was issued in 2001.[161]

The Tenth Circuit affirmed the district court's ruling that claims were time barred and that extraordinary circumstances that would allow for tolling had ceased in the 1960s.[162] While the petition for rehearing en banc was denied, the dissent pointed out multiple lines of error at the district court and panel level.

> 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

issues with Plaintiffs' claims that they were "unaware of the City's responsibility for their injury" and the Plaintiffs' claims that there was deliberate concealment by the City of Tulsa, the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department of their involvement).

157. Alexander v. Oklahoma, 2004 U.S. Dist. LEXIS 5131 at *24 (N.D. Okla. Mar. 19, 2004).

158. *See Redfearn*, 243 P. 929 (holding that a riot exclusion precluded an insurance payment to the white property owner of the Dixie Theater and Red Wing Hotel in Greenwood).

159. *See* Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court, - Redfearn v. American Central Insurance Company, 243 P.929, 930 (Okla. 1926)*, 54 OKLA. L. REV. 67 (2001) (detailing the crucial role this case played in providing eye-witness testimony for the Tulsa Riot Commission on the role of Tulsa officials in the burning and destruction of property).

160. *See Alexander*, 2004 U.S. Dist. LEXIS 5131 at *30-32 (discussing that even if such extraordinary circumstances as "a legal system that was openly hostile to [the plaintiffs], 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" were sufficient to toll the statute of limitations, it would only have tolled until the 1960s with the passage of civil rights legislation).

161. *Alexander*, 382 F.3d at 1213.

162. *Id.* at 1212, 1219-20.

> plaintiffs should have brought their claims . . . Our equitable duties require more from us than to place plaintiffs in such an untenable position.[163]

5. Current Reparations Complaint – Randle v. City of Tulsa (2020)

The survivors of the Tulsa Massacre have now waited one hundred years for justice, and twenty years for the State of Oklahoma to follow through on its own Commission's recommendations for reparations.[164] This is the second lawsuit since the Tulsa Race Riot Commission Report's 2001 publication demanding some type of amends to those harmed.[165]

The current complaint was filed in September 2020, as *Randle v. City of Tulsa*, with plaintiffs including two 106-year-old survivors and one 100-year-old survivor, a historic church, a local association, and various descendants of massacre victims and survivors.[166] The

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163. Alexander v. Oklahoma, 391 F.3d 1155, 1163 (10th Cir. 2004) (Lucero, J. & Seymour, J., dissenting). The dissent argued that the motion to dismiss based on the statute of limitations should be determined by the facts, and where those facts are in controversy should be determined by the jury; there was an abuse of discretion by the district court by not viewing the facts in the light most favorable to the plaintiff and not putting it to the jury as to when (or if) the exceptional circumstances ended; the fraudulent concealment claim should have gone to the jury. *Id.* at 1162-1165 (Lucero, J. & Seymour, J., dissenting).

164. TULSA RACE RIOT REPORT, *supra* note 13, at 20.

165. *See generally Alexander*, 382 F.3d at 1213 (detailing the history and outcome of the first litigation attempt).

166. Complaint at 1-2, Randle v. City of Tulsa, No. CV-2020-1179 (Okla. Dist. Sept. 1, 2020), first accessed from Brakkton Booker, *Oklahoma Lawsuit Seeks Reparations in Connection to 1921 Tulsa Massacre*, NPR (Sept. 3, 2020), www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/03/909151983/oklahoma-lawsuit-seeks-reparations-in-connection-to-1921-tulsa-massacre [perma.cc/T242-KQM7], also available at www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=cv-2020-1179 [perma.cc/57JN-7HQM]. The plaintiffs include: Lessie Benningfield Randle, 106-year-old survivor; Historic Vernon A.M.E. Church, Inc., not-for-profit corporation in Greenwood; Laurel Stradford, great-granddaughter of J.B. Stradford (owned the Stradford Hotel in Greenwood – the largest Black-owned hotel in the United States at the time); Ellouise Cochrane-Price, daughter and cousin of massacre victims Clarence Rowland and Dick Rowland, respectively; Tedra Williams, granddaughter of massacre survivor Wess Young; Don M. Adams, nephew and next-of-kin of massacre victim Dr. A.C. Jackson; Don W. Adams, grandson of massacre survivor Attorney H.A. Guess; Stephen Williams, grandson of massacre survivor Attorney A.J. Smitherman; The Tulsa African Ancestral Society, not-for-profit corporation whose membership includes descendants of massacre survivors. *Id.* The First Amended Complaint added 106-year-old survivor Viola Fletcher, and 100-year-old survivor Hughes Van Elliss, Sr. to the pool of plaintiffs. First Amended Petition, Randle v. City of Tulsa, No. CV-2020-1179 (Okla. Dist. Feb. 2, 2021), www.7f71937d-3875-4a5d-8642bfb10d690e0f.filesusr.com/ugd/7b82e9_6f2ce917ef5b4ff7aaa1b0fcf282cc2a.pdf [perma.cc/PT64-NHFV]. As of the writing of this comment the survivors are now 108 (Viola Fletcher), 107 (Lessie Benningfield Randle), and 101 (Hughes Van

plaintiffs brought suit against the City of Tulsa, various Tulsa agencies and commissions, the sheriff, and the Oklahoma Military Department.[167]

The plaintiffs based their claim on theories of public nuisance and unjust enrichment.[168] The unjust enrichment claims surround Tulsa's current plans to develop "cultural tourism" around the Greenwood community and the Tulsa Massacre while ignoring the plight of the citizens living in the community.[169] Thus, the plaintiffs contend that the city is unjustly enriching itself by profiting off the suffering of the Tulsa Massacre's victims and survivors.[170] These plans include expanding the Greenwood Community Center to incorporate a museum featuring the story of the race massacre and the destroyed Greenwood neighborhood to promote tourism in Tulsa.[171]

Ellis). Amir Vera, et al., *Tulsa Race Massacre: Reparations lawsuit survives motion to deny and will move forward, judge rules*, CNN (May 3, 2022), www.edition.cnn.com/2022/05/02/us/tulsa-race-massacre-hearing-trial/index.html [perma.cc/7WD7-R4VD].

167. *Id.* at 1-2 (listing the defendants as the City of Tulsa, Tulsa Regional Chamber, Tulsa Development Authority, Tulsa Metropolitan Area Planning Commission, Board of County Commissioners for Tulsa County, Oklahoma, Vic Regaldo, in his official capacity as Sheriff of Tulsa County, and the Oklahoma Military Department).

168. Because the Randle plaintiffs' claims are based on state law doctrine (public nuisance and unjust enrichment), they should be able to avoid the pitfalls seen in *Cato* and *In re African-American Slave Descendants Litigation*, such as sovereign immunity of the United States government, the political question doctrine, and the statute of limitations. *Compare* Randle v. City of Tulsa, No. CV-2020-1179, at 38-40 *with Cato*, 70 F.3d at 1111, *and In re* African-American Slave Descendants Litig., 471 F.3d 754, *and Alexander*, 382 F.3d at 1213, 1217-19. *See also* Jackson v. Grider, 691 P.2d 468, 469 (Okla. Civ. App. 1984) (explaining that there is no particular statute of limitations under § 1983 claims, so that the federal and state courts use the "the most closely analogous state period of limitation."); OKLA. STAT. tit. 12, § 95 (West 2017) ("Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards . . . [w]ithin two (2) years: An action for . . . injury to the rights of another, not arising on contract, and not hereinafter enumerated . . .").

169. Randle v. City of Tulsa, No. CV-2020-1179, at 36-37.

170. *Id.*

171. *See* Randy Krehbiel, *$9 million renovation and expansion of Greenwood Cultural Center announced, coincides with Tulsa Race Massacre centennial*, TULSA WORLD (May 10, 2019), www.tulsaworld.com/news/million-renovation-and-expansion-of-greenwood-cultural-center-announced-coincides/article_d41c8f41-a821-5ab7-a1b2-d64eca170292.html [perma.cc/85RH-VLXU] (highlighting community concerns including "lack of community engagement", as well as questioning potential impact and whether it would benefit Black-owned businesses or the neighborhood financially). The expansion is slated to cost between $9-25 million and has seemingly been planned without much input from the community whose story it will purport to tell, or any assurances that any of the profit or contracts involved in the project will benefit those in the community. *Id. See also* Kendrick Marshall, *City leaders, 1921 centennial commission visit national memorials to get ideas for future race massacre center*, TULSA WORLD (May 20, 2019), www.tulsaworld.com/news/city-leaders-1921-

Unjust enrichment is an equitable or legal claim that exists in the intersection of contract and tort law liability, on the general theory that "one party should not be permitted to be enriched unjustly at the expense of a second party unless the first party makes compensation to the second party for the value of the benefit conferred."[172] Because unjust enrichment has been frequently discussed in regard to slavery reparations and is generally disregarded,[173] this Comment is not going to examine unjust enrichment as it may apply to this (or other) cases. Rather, it will focus on the application of the public nuisance doctrine in Section III.A.

6. Public Nuisance Doctrine

Public nuisance has a long-standing basis in criminal and tort law.[174] It is generally defined as "an unreasonable interference

centennial-commission-visit-national-memorials-to-get-ideas-for-future-race-massacre/article_ae662e87-adc2-50d8-a6dd-567a2e10f548.html [perma.cc/9NNZ-CQKC] (highlighting commission members' desire to build a "world-class" facility that can "tell this story the right way" and showcasing the work of the new commission through various initiatives including art and education).

172. DAVID G. EPSTEIN ET AL., CONTRACTS: MAKING AND DOING DEALS 949 (5th ed. 2018). *See also Unjust Enrichment*, BLACK'S LAW DICTIONARY (2nd ed. 2001) (defining unjust enrichment as "1. the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. 2. a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.").

173. *See* Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. TOL. L. REV. 673, 675 (2011) (focusing on a defendant's liability under an unjust enrichment claim for slavery reparations); 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, 657 (2003) (cautioning against using unjust enrichment due to the moral framing of the issue because the issue is not that they were not paid, the issue is that "chattel slavery is rooted in the ideology of racial oppression."); Emily Sherwin, *The Jurisprudence of Slavery Reparations: Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1465 (2004) (arguing that unjust enrichment is wrong for a reparations framework in that it "invites resentment and highlights the retaliatory aspects of the claim" and instead calling for "group-based claims to compensate for injuries.").

174. The Supreme Court recognized early on the concepts of public and private nuisance and even foresaw their future role in determining the boundaries of these cases questioning whether Congress could "provide by its laws for the abatement of a public nuisance? Or give a right of action to an individual for a private nuisance?" Gibbons v. Ogden, 22 U.S. 1, 68 (1824). *See generally*, RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST., 1979) (sketching the history of public nuisance); Matthew Russo, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 18 U. ILL. L. REV. 1969, 1976-1982 (2018) (providing a more detailed historical background of the evolution of public nuisance from a criminal offense to a tort).

with a right common to the general public."[175] Although ordinarily redressable through a public agency, private parties may bring public nuisance claims if the party has suffered a "special injury" not common to the public.[176] This "special injury" claim is significant; to have standing to sue, the party must have an injury-in-fact that is concrete and particularized, as well as actual or imminent.[177] Further, there must be a causal connection between the injury and the defendant's conduct, and this injury must be redressable by a favorable decision.[178]

In Oklahoma, public nuisance law is regulated by statute which changes the terms in some significant ways. Per the Oklahoma statute, a nuisance is defined as follows:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[179]

Furthermore, "[a] public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."[180] Significantly, the statute also says that "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence"[181] and "no lapse of time can legalize a public nuisance, amounting to an actual obstruction

175. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST., 1979). *See also* Georgetown v. Alexandria Canal Co., 37 U.S. 91, 98 (1838) (stating "a party may maintain a private action for special damage, even in case of a public nuisance…where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy.").

176. JOHN L. DIAMOND, ET AL., UNDERSTANDING TORTS 301-305 (6th ed., 2018) (providing several examples from case law which would satisfy the "special injury" requirement). *See* Burgess v. M/V Tomano, 370 F. Supp. 247, 251 (D. Me. 1973) (holding that commercial fishermen were able to pursue a public nuisance claim after a coastal oil spill); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Mass. 1986) (allowing plaintiffs who had suffered physical injury including leukemia to pursue a public nuisance claim due to groundwater poisoning from toxic chemicals). *But see* City of Chicago v. Beretta USA Corp., 821 N.E. 2d 1099, 1148 (Ill. 2004) (rejecting a public nuisance claim against handgun manufacturers for disregarding illegal sales probability).

177. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (detailing the requirements for Article III standing).

178. *Id.* at 560-61.

179. OKLA. STAT. tit. 50 § 1 (1981).

180. *Id.* at § 2.

181. *Id.* at § 6.

of public right."[182] Finally, it allows "[a] private person [to] maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise."[183]

The plain text reading of the statute suggests that in Oklahoma, public nuisances are not limited to property.[184] This differs from many states, where whether by statute or common law, public nuisances are limited to issues involving real property.[185] Case law supporting that understanding of the Oklahoma statute is slim but significant with Judge Balkman holding Purdue Pharma, Inc. et al., liable in 2019 for public nuisance under Oklahoma state law for their role in the opioid crisis.[186]

III. ANALYSIS

This section will analyze the applicability of public nuisance law to the current *Randle v. City of Tulsa* reparations lawsuit as well as to past reparations lawsuits for slavery and the Tulsa Massacre. It will also examine current legislative reparations initiatives from varying levels of government across the United States.

182. *Id.* at § 7.

183. *Id.* at § 10.

184. *See id.* at § 1 ("In any way renders other persons insecure in life, *or* in the use of property.") (emphasis added); State *ex rel.* Hunter v. Purdue Pharma L.P., 2019 Okla. Dist. LEXIS 3486, at *33-34 ("Oklahoma's nuisance law extends beyond the regulation of real property and encompasses the corporate activity complained of here."). *Contra* David Missirian, *The Opioid Dragon of Johnson & Johnson is Slayed. All Hail the Killing of the Not Guilty*, 47 RUTGERS L. REV. 305, 307 (2019-2020) (railing against the decision and its divesture of public nuisance from real property as "giv[ing] society what they wanted: a bad guy to blame and then hang."); Eric G. Lasker & Jessica L. Lu, *Oklahoma Opioid Ruling: Another Instance of Improper Judicial Governance Through Public Nuisance Litigation*, WASH. LEGAL. FOUND. (Dec. 13, 2019), www.wlf.org/2019/12/13/publishing/oklahoma-opioid-ruling-another-instance-of-improper-judicial-governance-through-public-nuisance-litigation [perma.cc/A2TR-ZM73] (discussing their concerns with the ruling abandoning traditional application of public nuisance doctrine to real property).

185. *See, e.g.,* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001) (stating that New Jersey law maintains the traditional understanding that "the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.").

186. *State ex rel. Hunter*, 2019 Okla. Dist. LEXIS 3486, at *32-63. *See also*, Briscoe v. Harper Oil Co., 702 P.2d 33, 36 (Okla. 1985) ("Thus, the term 'nuisance' signifies in law such a use of property or such a course of conduct irrespective of actual trespass against others . . . ."); Reaves v. Territory 74 P. 951, 954 (Okla. 1903) ("There is no claim of damages to property rights in this case, but it is only by reason of the injury to good morals and public decency, to refuse to enforce which rights would unquestionably be against public policy.").

A. Applying Public Nuisance Doctrine to Randle v. City of Tulsa

This section analyzes the *Randle* complaint under the public nuisance doctrine as established by Oklahoma statute to determine what issues the court must address and the likely outcome of the case.

The plaintiffs' public nuisance claim in *Randle* seeks for "Defendants to abate the public nuisance of racial disparities, economic inequalities, insecurity, and trauma their unlawful actions and omissions caused in 1921 and continue to cause ninety-nine years after the Massacre."[187] The argument is that the trauma inflicted on the Greenwood community did not cease concurrently with the end of the destruction of their homes, the arson of their businesses, the killing of their families and neighbors, or even with their detention in "concentration camps."[188] Rather, the trauma was continuous, in the way of the "curtailed economic, social and cultural opportunities in the Greenwood and North Tulsa communities, [with Defendants] redirecting those benefits to White business and institutions in other parts of Tulsa."[189] The plaintiffs charge that many survivors lived in the internment camps for over a year. [190] Meanwhile, the city and chamber changed zoning laws and fire regulations, depriving residents of their property, rejected aid to assist the displaced, prevented them from collecting on insurance claims, and failed to indict those responsible for the massacre.[191] The systemic and institutional neglect is alleged to continue to this day through lack of services provided, a dearth of public infrastructure and development, and the exclusion of Black community leaders from city leadership positions and business renewal.[192]

In sum, the argument is that the continued nuisance in the Black neighborhoods of Tulsa "endangered their comfort, repose, health, and safety, and rendered them insecure in life and in the use of their property . . . [which] accelerate aging, shorten life expectancy, and cause Black Tulsans to experience significant psychological and emotional injury."[193] Additionally, the plaintiffs argue that this nuisance contravenes the Oklahoma statute which

187. Randle v. City of Tulsa, No. CV-2020-1179, at 3.

188. *Id.* at 19 (citing Tulsa Daily World, 5,000 Negroes Held in Fairgrounds Camp 2 (June 2, 1921), www.chroniclingamerica.loc.gov/lccn/sn85042345/1921-06-02/ed-1/seq-2/) [perma.cc/S4PZ-U6Y2].). The paper also stated that the estimates of the dead were 100 people, 90 Black and 10 white, but that it was difficult to estimate as many bodies were likely in the burned-out ruins of homes and buildings. *Id.* at 1.

189. *Id.* at 21.

190. *Id.* at 22-24

191. *Id.*

192. *Id.* at 25-31.

193. *Id.* at 38.

defines a nuisance as an act which "injures or endangers the comfort, repose, health, or safety of others; or . . . offends decency; or . . . renders other persons insecure in life, or in the use of property."[194] The plaintiffs further claim that the public nuisance has continued throughout this period, as "residents continue to face racially disparate treatment and City-created barriers to basic human needs, including jobs, financial security, education, housing, justice, and health."[195]

In order to sustain a public nuisance cause of action, the plaintiffs will have to first prove there were either unlawful acts or omissions to perform a duty by the various named city officials and the Oklahoma Military Department.[196] The historical record, as established by the city itself through the historical fact-finding mission of the Tulsa Race Riot Commission Report in 2001, establishes both acts and omissions to perform a duty by Tulsa city officials both during the Tulsa Massacre and in its aftermath.[197] These facts have further been accepted as true by the Oklahoma State Legislature in its 1921 Tulsa Race Riot Reconciliation Act of 2001.[198] Facts more likely to be in dispute are those around whether there has been continued neglect of Black residents and the Greenwood community in the intervening years.[199]

The next issue is whether the act or omission either "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others" or "[i]n any way renders other persons insecure in life, or in the use of property . . . ."[200] The facts show that: the Tulsa sheriff deputized and armed five hundred white men and boys; a Tulsa police officer helped white men break into and steal weapons from sporting goods stores near the police station; Tulsa police officers were widely

194. OKLA. STAT. tit. 50, § 1 (1981).

195. *Randle*, No. CV-2020-1179, at 39. *See also* OKLA. STAT. tit. 50, § 7 (West 1980) (detailing that "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.").

196. OKLA. STAT. tit. 50, § 1 (1981).

197. *See* TULSA RACE RIOT REPORT, *supra* note 13, at 153-168 (detailing the various actions and inactions taken by Tulsa officials throughout the massacre).

198. H.B. 1178, 2001 Leg., 48th Sess. (Okla. 2001) ("The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and has 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 in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 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.").

199. *See* Randle v. City of Tulsa, No. CV-2020-1179, at 39 (describing the public nuisance as "continuing" and "an obstruction of public rights.").

200. OKLA. STAT. tit. 50, § 1 (1981).

reported to have taken direct action in the massacre; and the Tulsa sheriff failed (omitted) to perform his duty when he left the courthouse and returned to the police station even while the numbers of white men outside the courthouse were growing.[201] Local National Guardsmen also reportedly fired upon Black citizens, disarmed them and took them prisoner (effectively preventing them from protecting their property), and declared martial law such that all remaining Black citizens were detained.[202] Additionally, the City of Tulsa erected numerous roadblocks to recovery in the massacre's aftermath, including passing new rezoning laws and approving the interstate to go through the neighborhood, further isolating Black Tulsans.[203] This conduct clearly caused harm with up to 300 lives lost, thousands left homeless, four million dollars in property damages sustained and the complete destruction of 35 city blocks.[204]

Causation for public nuisance generally involves consideration of "whether the defendant created or assisted in the creation of the nuisance, and second, whether the defendant had 'control of the instrumentality.'"[205] Therefore, per the facts above, there were no superseding causes insulating either the City of Tulsa (and its agencies), the sheriff, or the Oklahoma Military Department from their responsibilities to act in the best interest of *all* of their citizens.[206]

The Oklahoma statute further provides that a public nuisance "is one which affects at the same time an entire community or neighborhood,"[207] which clearly applies as the entire vibrant Greenwood community was destroyed overnight.[208]

Significantly, in order to maintain a private action of public nuisance, the harm must be "specially injurious to himself."[209] The special injury rule is the sticking point for many private actions for public nuisance as it requires a harm of a different kind than the

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201. TULSA RACE RIOT REPORT, *supra* note 13, at 62-64.

202. *Id.* at 159-164.

203. *Id.* at 168. *See also* Hill, *supra* note 116 (discussing the efforts of the city to stop Black redevelopment of Greenwood).

204. TULSA RACE RIOT REPORT, *supra* note 13, at 40-41.

205. Russo, *supra* note 174, at 1994 (citing Steven Sarno, *Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance*, 26 PACE ENV'T L. REV. 225, 246 (2009)).

206. *See State ex rel. Hunter*, 2019 Okla. Dist. LEXIS 3486, at *43 (finding direct and proximate cause where "no intervening causes that supervened or superseded Defendants' acts and omissions as a direct cause of the State's injuries.").

207. OKLA. STAT. tit. 50, § 2 (1981).

208. TULSA RACE RIOT REPORT, *supra* note 13, at 40-41.

209. OKLA. STAT. tit. 50, § 10 (1981). This only applies to private persons attempting to enforce public nuisance, government entities do not have to prove this element. *See id.* tit. 50, § 11 (1981) ("A public nuisance may be abated by any public body or officer authorized thereto by law."). *See*, *e.g.*, *State ex rel. Hunter,* 2019 Okla. Dist. LEXIS 3486, at *32-37.

harmed community, not just different in degree.[210] In this way, "the most unrepresentative plaintiff has a better chance of making a representative public nuisance claim despite the plaintiff having a cause of action only due to an actual or threatened injury to a public interest."[211] In particular, Ms. Randle herself, as a 106-year-old *survivor* of the Tulsa Massacre, versus a descendant of survivors and victims, should be able to claim a "specially injurious" harm.[212]

The defendants will likely argue that circumstances have changed or claim that the statute of limitations has run. However, by Oklahoma statute, "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence"[213] and "[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."[214] This could be significant, because without a statute of limitations barring the claim, there is also no need to plead special circumstances in order to prove tolling like other slavery and race riot reparations claims.[215]

Therefore, there is no foreseeable justification for the court to reject this claim. At the very least, it should survive any of the defendants' attempts to have the claims dismissed and be heard by a jury – a rare feat in and of itself for reparations litigation.

B. Applying Public Nuisance Doctrine to Other Reparations Lawsuits

1. Applying Public Nuisance Doctrine to Alexander v. Oklahoma

After applying the public nuisance doctrine to *Randle*, the analysis for *Alexander* is quite straightforward. Had *Alexander* been filed as a state claim only, and included a claim for public nuisance, the plaintiffs may have had a different result. The underlying facts, including the harm done to the community at

210. *See* Russo, *supra* note 174, at 1995 (discussing the paradox of the special injury rule).

211. *Id.* at 1996.

212. OKLA. STAT. tit. 50, § 10 (1981).

213. *Id.* § 6.

214. *Id.*§ 7. *See also* Revard v. Hunt, 29 Okla. 835, 843 (1911) (explaining the statute in that "it is clear that no lapse of time can legalize a public nuisance, nor can any right or title be acquired by prescription to permit or continue the same…[this] doctrine applies to a suit brought by the private person who has sustained special injuries from a public nuisance as to a suit brought by the public authorities."); RESTATEMENT (SECOND) OF TORTS 821C cmt. e (AM. LAW INST. 1979) ("One important advantage of the action grounded on the public nuisance is that prescriptive rights, the statute of limitations and laches do not run against the public right, even when the action is brought by a private person for particular harm.").

215. *See*, *e.g.*, *Alexander*, 382 F.3d at 1219-20 (discussing tolling under extraordinary circumstances).

large, the city and government officials being the cause, and the applicable statutes are the same.

Thus, the only element to consider is the special injury rule. In *Alexander*, there were some four hundred plaintiffs, including some 150 survivors of the massacre.[216] The key, as it was in *Randle*, would be determining the least representative candidate to satisfy the special injury rule.[217]

2. Applying Public Nuisance Doctrine to Slavery Reparations Cases

All of the slavery cases fail because they are unable to overcome the standing elements, the political question doctrine, the federal government's sovereign immunity, and/or the statute of limitations.[218] State claims based on the public nuisance doctrine could overcome these issues and allow them to proceed.[219] This, of course, would be complicated by the diversity of jurisdictions represented and the fact that public nuisance statutes vary by state.[220]

In a state like Oklahoma, however, there is reason to believe that the right claim could succeed. Of course, per the analysis above, the suit would need to select the least representative of the group harmed, one that can claim "specially injurious" harm.[221] Under the statute, "[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right" making public nuisance doctrine uniquely suited for slavery and Jim Crow reparations claims, provided the right circumstances (including specificity of state statute) are present. [222]

Furthermore, while a continuing violation doctrine argument like that in *Cato* could prevail (provided the claimant could overcome all of the other hurdles discussed under federal law), one

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216. *See* Javier C. Hernandez, *Court Rejects Reparations Case*, HARV. CRIMSON (May 23, 2005) www.thecrimson.com/article/2005/5/23/court-rejects-reparations-case-the-us [perma.cc/3LLB-KR2K] (detailing the attorney's worry about finding relief for the remaining survivors as thirty of them had already died since filing the suit two years prior).

217. *See* Russo, *supra* note 174, at 1995 (detailing the difficulties in overcoming the special injury rule).

218. *See*, *e.g.*, *In re* African-American Slave Descendants Litig., 471 F.3d at 758.

219. For an example of a successful claim under public nuisance in Oklahoma, *see State ex rel. Hunter*, 2019 Okla. Dist. LEXIS 3486. *See also* Russo, *supra* note 174, at 1976-1982 (demonstrating the utility of using specific state's unique public nuisance statutes to full effect).

220. *Compare* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001) (noting the traditional use of public nuisance with real property), *with State ex rel. Hunter*, 2019 Okla. Dist. LEXIS 3486, at *33 (stating that Oklahoma statute does not require property to be involved in a public nuisance claim).

221. OKLA. STAT. tit. 50, § 10 (1981).

222. *Id.* at § 7.

need not argue that the conduct, harm, or its effects, are continuing under the Oklahoma statute.[223] That is because "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.[224] Additionally, while the actions under slavery were legal under the Constitution at the time, "it is only by reason of the injury to good morals and public decency, to refuse to enforce which rights would unquestionably be against public policy."[225] Morally, it has always been the time for reparations, but these suits could be a tool in advancing the initiative.

C. Examination of Current Legislative Reparations Initiatives

Finally, there are several legislative proposals, either for reparations study or reparations themselves, at all levels of government from Congress to California to North Carolina.[226] While some of these are long-standing efforts, others are new and from surprising corners.[227] A legislative effort would avoid many of the issues common in the lawsuits discussed, including political

223. *Id.* at § 6.

224. *Id.*

225. Reaves v. Territory, 74 P. 951, 954 (Okla. 1903).

226. In Congress, H.R. 40. – Commission to Study and Develop Reparation Proposals for African-Americans Act – has been introduced every year since 1989 by the late Rep. John Conyer (MI); since his death, H.R. 40 has been proposed by Rep. Sheila Jackson Lee (D- TX-18) and in the Senate by Sen. Corey Booker (NJ) (S-1083). Commission to Study and Develop Reparation Proposals for African-Americans Act H.R. 40, 116th Cong. (2019). *See also* Coates, *supra* note 38 (giving background information on the call for reparations); Tom Tapp, *California Gov. Newsom Signs bill Opening Door To Slavery Reparations*, DEADLINE (Sept. 30, 2020), www.deadline.com/2020/09/newsom-california-bill-slavery-reparations-1234589050 [perma.cc/NPC4-EPNB] (detailing California's efforts to study reparations); Neil Vigdor, *North Carolina Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html [perma.cc/8GXN-FLW3] (explaining reparation efforts in Asheville, North Carolina).

227. *See* Shelby Stewart, *A North Carolina city approves reparations for slavery. What does that mean for the Black community?* HOUSTON CHRONICLE (July 17, 2020), www.chron.com/politics/article/What-does-reparations-actually-look-like-for-15415497.php [perma.cc/D2NA-YZ49] (discussing a unanimous measure promoting home ownership and business opportunities passed by the Asheville City Council). *See also* Patryk Labuda, *Racial Reconciliation in Mississippi: An Evaluation of the Proposal to Establish a Mississippi Truth and Reconciliation Commission*, 27 HARV. J. RACIAL & ETHNIC JUST. 1 (2011) (examining the proposal of a truth and reconciliation commission in Mississippi). *But see* Susan M. Glisson, *The Sum of Its Parts: The Importance of Deconstructing Truth Commissions*, 5 RACE & JUST. 192 (2015) (addressing the ultimate failure of the Mississippi Truth Project to gain momentum and achieve status and backing as an official commission but arguing that positive change can still be achieved by deconstructing truth commissions into their component parts and implementing those parts on the local level).

question, standing, and the statute of limitations.[228]

Proposed in Congress every year since 1989 is H.R.40 – Commission to Study and Develop Reparation Proposals for African-Americans Act.[229] This Act is "to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery . . . [and] racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, [and] to make recommendations to the Congress on appropriate remedies."[230] As such, it would "identify, compile and synthesize" slavery-related documentation, the role of the governments, and the laws that discriminated against formerly enslaved persons and their descendants.[231] Furthermore, it would recommend educational opportunities, remedies including apologies, compensation, rehabilitation, and/or restitution, and report back to Congress on its findings.[232] This Act would be funded by appropriating $12 million for the work of 13 committee members but has yet to gather the requisite congressional support to get it passed.[233]

States and cities have been more successful in passing reparations bills, however.[234] California passed a bill in 2020 creating a 9-person task force to investigate the role of businesses and insurers in slavery operations.[235] The city council of Asheville,

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228. *In re* African-American Slave Descendants Litig., 471 F.3d at 758 ("The political question doctrine bars the federal courts from adjudicating disputes that the Constitution has been interpreted to entrust to other branches of the federal government."). Therefore, many of the slavery lawsuits have specifically pointed to the legislature as the appropriate forum for these types of issues. *See Cato*, 70 F.3d at 1105 (stating that "The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."); Hannon v. Lynch, 2016 U.S. Dist. LEXIS 15618, at *4 (S.D. Ohio, Feb. 9, 2016) ("This Court agrees that the Constitution commits to the representative branches of the federal government the issue of reparations for slavery."); Green v. United States, 2012 U.S. Dist. LEXIS 190394, at *11 (W.D. Wis., Aug. 6, 2012) (explaining "there are prudential limitations that bar consideration of political questions [that] counsel against the finding of a justiciable controversy that is capable or appropriate for litigation."). *But see In re* African-American Slave Descendants Litig., 471 F.3d at 758-59 (allowing that if the plaintiffs could overcome the other barriers to standing, that "there would be a justiciable controversy.").

229. Commission to Study and Develop Reparation Proposals for African-Americans Act H.R. 40, 116th Cong. (2019).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *See* Tapp, *supra* note 226 (detailing California's efforts to study reparations); Vigdor, *supra* note 226 (explaining reparation efforts in Asheville, North Carolina).

235. Tapp, *supra* note 226 (detailing California's additional wins towards racial equity in the passage of AB 979 requiring publicly-held corporations headquartered in California to have at least one director from an underrepresented community as well as AB 3070 which combats racial discrimination in jury selection).

North Carolina, with a twelve percent Black population, voted unanimously for reparations, and, although they did not authorize monetary payment directly to Black residents, they called upon the state and federal governments to do so.[236] Instead, their resolution focused on the power of apology and creating generational wealth, including examining "increasing minority homeownership and access to other affordable housing, increasing minority business ownership and career opportunities, strategies to grow equity and generational wealth, closing the gaps in health care, education, employment and pay, neighborhood safety, and fairness within criminal justice."[237]

Following the Asheville vote, Buncombe County, of which Asheville is the county seat, voted for reparations for Black residents, similarly focusing on racial equity reforms over direct payments.[238] Their focus is on reducing the opportunity gap in the local public school systems, increasing Black home ownership, business ownership and other strategies to support upward mobility and build generational wealth.[239] Buncombe County is also focused on reducing disparities in health care and the justice system.[240] Significantly, this example demonstrates the power of local change to expand its reach and to encourage larger jurisdictions to follow course.

IV. PROPOSAL

Part IV will explore whether framing reparations lawsuits as public nuisance lawsuits, like the present one brought as a result of the Tulsa Massacre, is an effective advocacy strategy for reparations, particularly in the wake of our racial caste system established and promoted by slavery and Jim Crow.[241]

This section starts with the premise that Black Americans, especially descendants of enslaved persons, are due reparations. Not only did their ancestors endure the brutality and savagery of slavery itself, but the institution of slavery and the racist policies it drove created a racial caste system.[242] This system was engrained

236. Stewart, *supra* note 227.

237. Resolution Supporting Community Reparations for Black Asheville (July 14, 2020) *in* Mackenzie Wicker, *Buncombe County votes for reparations for Black residents, joining Asheville*, CITIZEN TIMES (Aug. 5, 2020), www.citizen-times.com/story/news/local/2020/08/04/reparations-buncombe-joins-asheville-approves-resolution-apologizes-slavery/3290176001 [perma.cc/X3TC-VHJU].

238. Mackenzie Wicker, *Buncombe County votes for reparations for Black residents, joining Asheville*, CITIZEN TIMES (Aug. 5, 2020), www.citizen-times.com/story/news/local/2020/08/04/reparations-buncombe-joins-asheville-approves-resolution-apologizes-slavery/3290176001 [perma.cc/X3TC-VHJU].

239. *Id.*

240. *Id.*

241. ALEXANDER, *supra* note 2, at 35.

242. *Id.* at 2-19, 25-73 (providing a fully-developed explanation of how a

in post-emancipation American society through the Jim Crow era and continues to fester to this day.[243] Thus, in our society, even those Black Americans not descending from enslaved persons have been subjected to the racial caste system and are likely due reparations at some level.

This Comment will first propose that today's imperfect solutions are better than none, and immediate focus should be placed on local efforts at reparations in order to build upon recent momentum and national awareness to create a movement. Secondly, it will suggest that legal and legislative mechanisms, including public nuisance lawsuits such as the one stemming from the Tulsa Massacre in *Randle*, can be used on a broader scale to gain reparations for Black Americans. By incorporating elements from previous and other reparations movements, the right lawsuit could establish precedent. While legislative fixes are seen as preferable to the courts, the challenges are substantial.[244]

A. Focus on Local Reparations

The extra-judicial killing of George Floyd and Breonna Taylor on the heels of the street lynching of Black jogger Ahmaud Arbery by white men in Georgia sparked worldwide protests against police brutality and racial injustice in 2020.[245] There followed an urgency

racial caste system arose as slavery morphed into Jim Crow and then into mass incarceration).

243. *Id.*

244. *See generally* KENDI, *supra* note 2, at 9 (explaining that while most of us think ignorance and hate drive racist ideas which then drive discrimination and/or racist policies, it is actually the reverse, "racial discrimination led to racist ideas which led to ignorance and hate.").

245. *See* Olivia B. Waxman, *10 Experts on Where the George Floyd Protests Fit Into American History*, TIME (June 4, 2020), www.time.com/5846727/george-floyd-protests-history [perma.cc/RD53-PWL6] (comparing this moment to the Civil Rights era of the 1960s and other moments in United States history with an emphasis that this struggle is not new, nor is Black Americans' willingness to stand up for their human rights). The scale and diversity of the protests that erupted in May and June 2020 after George Floyd's death at the knee of police officer Derek Chauvin is unique in its worldwide appeal as people in as many as 50 nations took to the streets in solidarity. *See also* Michael Safi, *George Floyd Killing Triggers Wave of Activism Around the World: Protests Have Spread to UK, France, Israel, Australia, South-East Asia and Parts of Africa*, GUARDIAN (June 9, 2020), www.theguardian.com/us-news/2020/jun/09/george-floyd-killing-triggers-wave-of-activism-around-the-world [perma.cc/MV4B-CPFR] (describing some of the nations that have participated in protests of George Floyd's killing and the parallels that citizens of those nations face in their own countries). As many as 15-26 million people in the United States are estimated to have participated in marches and demonstrations. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [perma.cc/55RU-3YPZ] (noting that protests have occurred in more than forty percent of U.S. counties, and the diversity of participants is seen in the fact that ninety-five percent of

for racial progress across the country in myriad forms – criminal justice reform, health care reform, etc.[246] But while the urgency is nationwide, the power is focused locally in the states and communities that have felt this pain—and these states and localities are primed for reform.[247]

Local reparations initiatives have gained traction over the last several years and have shown regional influence, so that when cities like Asheville, North Carolina create local reparations and reform packages, other entities take notice.[248] In this case, Buncombe County, where Asheville is the county seat, followed suit and also voted to approve reparations.[249] While small on a nationwide scale, given the right focus, these efforts could take greater hold.[250] Imagine if Asheville and Buncombe County's inspired Durham, Greensboro, and/or Charlotte to do likewise. This could increase pressure for statewide action.

B. Public Nuisance Lawsuits

Significantly, the plaintiffs in *Randle* did not attempt the same argument as others before them. Rather, it seems that they incorporated the lessons learned from *Alexander* and other reparations cases, giving their lawsuit an opportunity to survive some of the largest legal hurdles. Political question, standing, and the statute of limitations are barriers to successful lawsuits that will have to be overcome, but earlier lawsuits have shed light on how this might be accomplished.[251]

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these counties are majority white, while seventy-five percent of these counties are at least seventy-five percent white).

246. *See* Mike Baker et al., *Three Words.70 cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html [perma.cc/FW8N-879X] (introducing the tragic history of "I Can't Breathe" in police custody killings); Jamison v. McClendon, 2020 U.S. Dist. LEXIS 139327, at *1-3, nn.1-20 (S.D. Miss. Aug. 4, 2020) (listing some of the well-known extra-judicial police killings over the past 6 years). For an interactive experience with names and pictures of police victims along with details of how they were killed and what (if any) actions were taken against the officer who killed them, *see* Alia Chughtai, *Know Their Names: Black People Killed by the Police in the U.S.*, AL JAZEERA (Sept. 20, 2020), https://interactive.aljazeera.com/aje/2020/know-their-names/index.html [perma.cc/BDB4-R6JH].

247. *See, e.g.,* Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. Times (Feb. 23, 2021), www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html [perma.cc/D3UP-864J] ("This legislation marks a substantial step toward dismantling the systemic racism that plagues our communities, our state, and our nation . . . .").

248. *See generally* Wicker, *supra* note 238.

249. *Id.*

250. *See* Brooke Simone, *Municipal Reparations: Considerations and Constitutionality*, 120 MICH. L. REV. 345 (2021) (discussing municipalities as perhaps the most effective level at which to promote and win reparations).

251. *See In re* African-American Slave Descendants Litig., 471 F.3d at 758-59 ("If one or more of the defendants violated a state law by transporting slaves

Not only do lawsuits such as *Randle* continue to have promise, but they are necessary to maintain the effort's forward momentum. It must be a strategic effort by local activists throughout the country to put the heat on the nationwide power structures.[252] For example, in Chicago, a forty-year struggle for justice culminated in reparations for a group of police torture victims.[253]

The fight for reparations for slavery and race massacres, like all fights for civil rights and equality, is an uphill battle against an entrenched foe.[254] This is no reason not to engage on the battlefield, however.[255] Like a snowball, growing as it rolls, small local protests have grown into movements.[256] At several times in American history, lawsuits have been the catalyst for massive social change. *Brown v. Board of Education* was a spark for the Civil Rights movement as *Reed v. Reed* was for the women's movement. *Randle v. City of Tulsa* can do the same in the push for reparations.[257] It will not do it alone, but it may get the ball rolling.

C. Legislative Mechanisms

A legislative solution offers the cleanest resolution to the reparations problem. Similar to the enactment of the Civil Liberties Act of 1988, Congress could create a law appropriating a certain amount for victims and descendants of slavery, race riots, and lynching.[258] Long-standing racial disparities in lifespan, health,

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in 1850, and the plaintiffs can establish standing to sue, prove the violation despite its antiquity, establish that the law was intended to provide a remedy…to lawfully enslaved persons or their descendants, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations, there would be no further obstacle to the grant of relief.").

252. *See* Simone, *supra* note 250 (discussing the strength of local movements because they can avoid the gridlock of state and federal-level legislation and they provide opportunity for community-centered reparations).

253. G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J.L. & SOC. POL'Y 330 (2016).

254. *See*, *e.g.*, KENDI, *supra* note 2, at 427 ("The leading proponents of race-conscious policies to maintain the status quo of racial disparities in the late 1950s had refashioned themselves as the leading opponents of race-conscious policies in the late 1970s to maintain the status quo of racial disparities.").

255. "'It's when you know you're licked before you begin but you begin anyway and you see it through no matter what.' Atticus said." HARPER LEE, TO KILL A MOCKINGBIRD 112 (1960).

256. *See Michael Safi, George Floyd Killing Triggers Wave of Activism Around the World: Protests Have Spread to UK, France, Israel, Australia, South-East Asia and Parts of Africa*, GUARDIAN (June 9, 2020), www.theguardian.com/us-news/2020/jun/09/george-floyd-killing-triggers-wave-of-activism-around-the-world [perma.cc/MVQ7-JMVG] (describing the way protests spread worldwide after the murder of George Floyd by a Minneapolis police officer).

257. *See generally* Brown v. Board of Ed. of Topeka, 347 U.S. 483, 495 (1954) (holding "separate but equal" in public education as unconstitutional); Reed v. Reed, 404 U.S. 71, 77 (1971) (recognizing sex discrimination as unconstitutional).

258. Civil Liberties Act of 1988, 50 U.S.C.S. Appx. §§1989b – 1989b-8

education, home ownership, and household wealth could be tackled. Mechanisms could include expanded medical services in majority-Black neighborhoods and free or reduced medical care or health insurance. Additionally, reinvestment in Black schools and targeted job creation programs, reduced interest-rate home loans, and trust fund creation for Black youth could help eliminate the racial wealth gap.[259] These initiatives have gained traction at the local level in the aforementioned Asheville and California cases, but despite annual attempts to initiate such actions nationally, nothing has been advanced on Capitol Hill.[260]

Today's hyper-partisan political climate presents additional challenges; control of the Supreme Court is in the hands of those who actively work to uphold the status quo in vague terms of "historical tradition," "colorblindness," and "strict scrutiny."[261] In the words of Chief Justice John Roberts, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[262] In short, today's Supreme Court takes the view that any use of racial criteria must meet strict scrutiny and treats those policies designed to ameliorate the harms from racial discrimination as equally objectionable as those designed to promote discriminatory harm.[263] The effect of the Supreme Court's decisions is to defend white supremacist policies in direct contradiction with the history and intent of the Fourteenth Amendment.[264]

(amended 1989, 1992).

259. *See*, *e.g.*, Wicker supra note 238 (providing an overview of the Buncombe County reparations initiative and including a link to the actual resolution).

260. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019).

261. *See generally* Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 157 (2016) (detailing the multitude of ways that the rigidity of the legal framework serves injustice rather than justice).

262. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (rejecting a school district's proposal to combat segregation in its schools).

263. *But see id.* at 832-33 (Breyer, J., dissenting) (citing Adarand Constructors v. Pena, 515 U.S. 200, 228 (1995) (internal quotation marks omitted) ("[I]n its more recent opinions, the Court recognized that the fundamental purpose of strict scrutiny review is to take relevant differences between fundamentally different situations . . . into account . . . and "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable."). Additionally, the Court has held that where the government "treats [a person] unequally because of his or her race…says nothing about the ultimate validity of any particular law." *Adarand Constructors*, 515 U.S. at 229-230. Finally, the Court…sought to "dispel the notion that strict scrutiny" is as likely to condemn inclusive uses of "race-conscious" criteria as it is to invalidate exclusionary uses. *Id.* at 237.

264. *See generally* Simone, *supra* note 250 (discussing the Supreme Court's reliance on anticlassification theory regarding race and the Fourteenth Amendment). *But see* Fisher v. University of Texas, 570 U.S. 297, 317 (2013)

Given the active opposition of much governmental leadership, in order for either a lawsuit or a challenge to legislation awarding reparations to succeed, the following conditions will need to be met: (1) the race-based eligibility guidelines must be "narrowly tailored measures that further compelling government interests,"[265] (2) there must be a "need and basis for a racial classification [that] also tailors the classification to its justification,"[266] and (3) "the program [must be] appropriately limited so that it will not last longer than the discriminatory effects it is designed to eliminate."[267] Similar to the Civil Liberties Act of 1988, any legislation must be "aimed at specific governmental actions as opposed to discrimination in general."[268]

Despite this, the Civil Liberties Act of 1988 and the Tuskegee Syphilis Study demonstrate that where there is congressional will, reparations can be made for citizens who have suffered great harm, including harm based solely on discriminatory animus.[269] Anti-racist constituents nationwide must demand that their congressional representatives either pass H.R.40 – Commission to Study and Develop Reparation Proposals for African-Americans Act or alternatively propose and pass legislation for a Truth and Reconciliation Commission.[270] In either case, success hinges on the

("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." (quoting *Adarand Constructors*, 515 U. S. at 240 (THOMAS, J., concurring in part and concurring in judgment)). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (THOMAS, J., concurring in part and dissenting in part).

265. Obadele v. United States, 52 Fed. Cl. 432, 443 (2002) (quoting *Adarand Constructors*, 515 U.S. at 227).

266. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980).

267. *Id.* (quoting *Adarand Constructors*, 515 U.S. at 237-38).

268. *Id.* (citing Kaneko v. United States, 122 F.3d 1048, 1053 (Fed. Cir. 1997) ("Persons of Japanese descent who suffered hardship because of governmental action were denied redress payments if their injuries were not related to any evacuation, internment or relocation program as required for redress under the Civil Liberties Act." (internal quotation marks omitted)).

269. Civil Liberties Act of 1988, 50 U.S.C.S. Appx. §§1989b – 1989b-8 (amended 1989, 1992); *Pollard*, 69 F.R.D. 646.

270. Olufemi Taiwo, *The Best Way to Respond to our history of racism? A Truth and Reconciliation Commission*, WASH. POST (June 30, 2020), www.washingtonpost.com/opinions/2020/06/30/best-way-respond-our-history-racism-truth-reconciliation-commission [perma.cc/KX7T-JXFM] (suggesting that we should adopt a Truth and Reconciliation Commission model such as used in South Africa at the end of apartheid); *see also* Mary Kay Magistad, *South Africa's imperfect progress, 20 years after the Truth & Reconciliation Commission The World* (Apr. 6, 2017), www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission [perma.cc/LT6T-SJ55] (discussing the effects of South Africa's Truth & Reconciliation Commission 20 years later in terms of what it has improved and where it has failed).

commission's recommendations being acted upon.[271]

V. CONCLUSION

"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Fourteenth Amendment perpetuate racial supremacy."[272] These words from Justice Blackmun, written forty-two years ago in the dissenting opinion of a case where the Supreme Court was already dismantling the states' ability to use affirmative action programs, are as applicable today as when they were written.[273]

There is no clear cut or easy path for the United States to fully atone for its past sins. The wrongs of generations—past and present—still significantly impact the daily lives of millions of Black Americans keeping them from equal employment, equal healthcare, equal education, and equal justice. Although the past cannot be rewritten, measures can be enacted so even footing can eventually be achieved. Public nuisance lawsuits provide a localized to state-level avenue to provide reparations for past harm. These, combined with the changing public sentiment following the public violence against Black Americans in 2020, may be enough to prompt a true national legislative effort at reparations. It is true that "power concedes nothing without a demand,"[274] so we must demand it. Now.

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271. *See* Bassett, *supra* note 13 *and* Fla. HB 591 (1994) (demonstrating the importance of civic action to correct historical injustices). *But see* TULSA RACE RIOT REPORT, *supra* note 13, at 20 (demonstrating the example of continued neglect and inaction by a city after completing a truth and fact-finding commission).

272. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

273. *Id.*

274. *(1857) Frederick Douglass, "If There is No Struggle, There is No Progress"*, BLACK PAST (Jan. 25, 2007), www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress/ [perma.cc/GD4U-SPLD] (providing a full transcription of Frederick Douglass' "West India Emancipation" speech delivered in Canandaigua, New York, on August 3, 1857—the event's twenty-third anniversary).