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

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Suzette M. Malveaux*

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Over three-quarters of a century ago, one of the worst race riots in the United States took place. On May 31, 1921, up to three hundred African-Americans were killed,1 thousands were left homeless,2 and the predominantly Black Greenwood community was burnt to the ground by a white mob, deputized by the City of Tulsa and aided by the State of Oklahoma.3 Many riot victims—traumatized and homeless—could not pursue legal recourse.4 Those who did were stymied by a judicial system5 infected by the Ku Klux Klan6 and undermined by local and state government that hid evidence and promised restitution that never came.7 The truth about the government's

1 Danney Goble, Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921, in OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 1, 12–13 (2001) [hereinafter TULSA RACE RIOT]; see also OKLA. STAT. ANN. tit. 74, § 8000.1.2–1.3 (West 2002).
2 Robert L. Brooks & Alan H. Witten, The Investigation of Potential Mass Grave Locations for the Tulsa Race Riot, in TULSA RACE RIOT, supra note 1, at 123, 123 (stating that approximately 11,000 African-Americans lived in Tulsa in 1921, most of them in the Greenwood community); Goble, supra note 1, at 16 (1256 homes burned).
3 Goble, supra note 1, at 11–12; see also Scott Ellsworth, The Tulsa Race Riot, in TULSA RACE RIOT, supra note 1, at 37, 64 (stating that up to 500 white males were sworn in by the police as “Special Deputies,” one of which had been given the specific instruction to “[g]et a gun and get a nigger”); 1921 Tulsa Race Riot Commission—Creation, No. 1035, 1997 Okla. Sess. Laws 2834 (describing “wide-scale attack” on Greenwood property and on innocent Greenwood men, women, and children; including “assault, aggravated assault, arson, battery, trespass against persons and property, false imprisonment, malicious destruction of property, attempted murder, murder, and manslaughter”).
4 See Letter from Eric D. Caine, Dep’t of Psychiatry, Univ. of Rochester Med. Ctr., to Michael D. Hausfeld, Attorney, Cohen, Milstein, Hausfeld, and Toll, Washington (Aug. 25, 2003) (“[F]ew would have had the psychological resources to vigorously pursue restitution in court” shortly after the riot, and such actions would have “seemed foolhardy to most in that era.”), appended to Brief in Support of Defendant City of Tulsa’s Motion to Exclude the Report and Testimony of Dr. Eric D. Caine at 11, 14–15, Alexander v. Oklahoma, No. 03-CV-133-E(C) (N.D. Okla. Nov. 19, 2003); cf. Hardin v. Straub, 490 U.S. 536, 544 (1989) (concluding that because inmates “loathe” to bring constitutional claims against supervisors while still confined, this justifies extending time period for filing).
5 See Goble, supra note 1, at 13–14 (noting that not a single criminal act has ever been prosecuted by any level of government and, in fact, the municipal government initially tried to impede Greenwood’s rebuilding); see also tit. 74, § 8000.1.3 (“T]here were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot.”).
6 Goble, supra note 1, at 11 (concluding that “within months of the riot Tulsa’s Klan chapter had become one of the nation’s largest and most powerful” and that during the 1920’s “many of the city’s most prominent men were klansmen”); see Alfred L. Brophy, Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma, 20 HARV. BLACK LETTER L.J. 17, 40–45 (2004).
7 See Tulsa, THE NATION, June 15, 1921, at 839 (quoting former Tulsa Mayor and head of
complicity in the riot\(^8\) did not surface until roughly eighty years later, with the historic publication of the Tulsa Commission Report ("Commission Report").\(^9\) Although the government conceded moral culpability,\(^10\) it refused to provide reparations to riot victims or their descendants, prompting them to file suit in the U.S. District Court for the Northern District of Oklahoma on February 24, 2003,\(^11\) for violation of their constitutional and federal civil rights. The district court dismissed the case, concluding that the plaintiffs were barred by the expiration of the statute of limitations.\(^12\)

The Tulsa case is not unique. Unfortunately, this pattern of racial violence,\(^13\) and the concomitant denial of a legal remedy, has repeated itself in the welfare board, Loyal J. Martin, as stating, "Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny"); A Grand Jury Riot Probe: And Tulsa Business Men Will Rebuild Negroes' Homes, KAN. CITY STAR, June 3, 1921, at 1; Tulsa Is Repentant Now, KAN. CITY STAR, June 3, 1921, at 6; Citizens to Help Rebuild "Little Africa," TULSA DAILY WORLD, June 3, 1921, at 8; Tulsa Will, TULSA TRIB., June 3, 1921, at 5; Niles Blames Lawlessness for Race War, TULSA TRIB., June 2, 1921, at 4 (quoting Alva J. Niles, President of the Tulsa Chamber of Commerce) ("The sympathy of the citizenship of Tulsa, in a great wave has gone out to the unfortunate law abiding negroes who became victims of the action and bad advice of some of the lawless leaders and as quickly as possible rehabilitation will take place and reparation made.").

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

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

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

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


13 For example, similar race riots have taken place in Wilmington, North Carolina (1898); Helena, Arkansas (1919); Elaine, Arkansas (1919); Atlanta, Georgia (1906); and Sherman, Texas (1930). See Charles J. Ogletree, Jr., The Current Reparations Debate, 36 U.C. DAVIS L. REV. 1051, 1061 (2003). Race riots were not limited to the South. They also occurred in Springfield, Missouri (1906); East St. Louis, Illinois (1917); Chicago, Illinois (1919); Washington, D.C. (1919); and Rosewood, Florida (1923). See id.; Alfred L. Brophy, Reparations Talk: Reparations for Slavery and the Tort Law Analogy, 24 B.C. THIRD WORLD L.J. 81, 94–96 (2004) (comparing to Tulsa); ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 111 (2002).
communities throughout the United States. The Tulsa case is just one example of government-sanctioned collective violence going unpunished because of a procedural hurdle—the statute of limitations. Japanese Americans interned during World War II and Jewish survivors of the Holocaust have also struggled to clear this hurdle.

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

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

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

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

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


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

19 See Hylton, supra note 15, at 38.

20 Epstein, supra note 14, at 1183; see Ogletree, supra note 13, at 1054–55 ("The victims' families and communities are told to 'get over it,' even by the citizens of the towns still traumatized by their history of racial and ethnic violence as well as by black and white critics of reparations around the country."). Opponents also make numerous arguments unrelated to statutes of limitations. See David Horowitz, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS
equitable treatment.\textsuperscript{21}

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

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

\textbf{II. Policy Reasons for Statutes of Limitations}

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

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\textsuperscript{21} Epstein, supra note 14, at 1184.


\textsuperscript{23} Wolin v. Smith Barney Inc., 83 F.3d 847, 849 (7th Cir. 1996) (“Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, [and] often misunderstood issues . . . .”); \textit{Developments in the Law—Statutes of Limitations}, supra note 22, at 1185 (“So firmly have statutes of limitations become imbedded in our law in the course of centuries that legislatures seldom reconsider them in the light of the various functions that they actually perform; the delicate process of adjustment is left to rationalization and interpretation by the courts.”). For current scholarship on the purposes of statutes of limitations, see, e.g., \textit{Calvin W. Corman, Limitation of Actions} § 1.1, at 11–17 (1991); Jennifer Wiggins, \textit{Domestic Violence Torts}, 75 S. Cal. L. Rev. 121, 172–75 (2001); Tyler T. Ochoa \& Andrew J. Wistrich, \textit{The Puzzling Purposes of Statutes of Limitation}, 28 \textit{Pac. L.J.} 453, 454–55 (1997) (exploring limitations system in California). For prior scholarship on the purposes of statutes of limitations, see, e.g., Charles C. Callahan, \textit{Statutes of Limitation—Background}, 16 \textit{Ohio St. L.J.} 130, 130–39 (1955); \textit{Developments in the Law—Statutes of Limitations}, supra note
by Justice Oliver Wendell Holmes at the turn of the twentieth century, remains today. Justice Holmes's question, "what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" continues to puzzle judges, scholars, lawyers, and lay persons today.

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

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

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

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

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

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22, at 1185–86; Littell, supra note 22, at 38; John R. Mix, State Statutes of Limitation: Contrasted and Compared, 3 Rocky Mt. L. Rev. 106, 106–17 (1931).
24 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 476 (1897).
25 Id.
26 This observation has not escaped the notice of others. See Ochoa & Wistrich, supra note 23, at 454 (noting surprise at the dearth of scholarship given importance of statutes of limitations in American and other legal systems for thousands of years); Developments in the Law—Statutes of Limitations, supra note 22, at 1185.
27 Holmes, supra note 24, at 469.
29 The modern American limitations law consists of general statutes of limitations found in each state that fix time periods for various actions. Developments in the Law—Statutes of Limitations, supra note 22, at 1179. There are also special statutes that govern specific actions between specific parties. Id. Federal statutes may have their own limitations periods, but where a cause of action arises under a federal statute enacted after December 1, 1990, which is silent on limitations, a general federal four-year statute of limitations applies. Jones v. R.R. Donnelley &
serving primarily three major purposes: providing fairness to the defendant, promoting efficiency, and ensuring institutional legitimacy.

A. Fairness to the Defendant

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

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

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

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

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


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

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

Developments in the Law—Statutes of Limitation, supra note 22, at 1185.
defendant provided repose. 36 "Statutes of limitations... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber..." 37

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

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

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


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

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

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


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

43 Id. at 349 ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."); Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965).
The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to impair the accuracy of the fact-finding process . . . .

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

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

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

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

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


46 Id. at 139.


49 See Ochoa & Wistrich, supra note 23, at 484–85.
eral goals. Statutes of limitations may be designed to "stimulate to activity and punish negligence." The courts seek to promote the cultural value of diligence on the part of the plaintiff. As Justice Holmes observed, "[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example." Therefore, limitations law is punitive and normative in nature. Statutes of limitations may also be designed to ward against dilatory conduct only as a means of protecting other interests, such as repose and evidence preservation.

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

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

\[50\] See Tomanio, 446 U.S. at 488–89.

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

\[52\] Holmes, supra note 24, at 476.

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

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


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

\[57\] See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims."); Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations . . . recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim.").
Professor Ochoa and Judge Wistrich cleverly call "time shopping." That is, plaintiffs, when given the chance, will purposefully gather helpful evidence in preparation for filing suit, while unsuspecting potential defendants will discard, disregard, or fail to preserve evidence helpful to their defense.

B. Efficiency

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

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

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

Second, statutes of limitations are being used as a means of alleviating the burgeoning dockets the federal courts are laboring under today. Belea-
guered by heavy case loads, the courts\textsuperscript{67} may find reprieve in being able to
dismiss outright some cases solely on procedural grounds.\textsuperscript{68} Statutes of limita-
tions thus serve as a clearinghouse, reducing the number of filings in the
court system.

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

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

\begin{itemize}
\item of adverse possession, identifying one of the purposes of statutes of limitations as "preventing
litigation").
\item See, e.g., Rothensies v. Elec. Storage Battery Co., 329 U.S. 296, 302-03 (1946) (describ-
ing tolling as a "menace to the statute of limitations" and expressing concern that tolling statute
for taxpayers seeking tax recoupment remedy "would depend on diverting the litigation to the
district courts").
\item See Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) ("[T]he courts ought to be
relieved of the burden of trying stale claims when a plaintiff has slept on his rights."). This
phenomenon is taking place in other ways as well. The Court's preference for enforcing predis-
pute arbitration clauses and encouraging settlement, for example, also reduces the volume of
litigation on procedural grounds.
\item See Ochoa & Wistrich, \textit{supra} note 23, at 499-97.
\item Weber v. Bd. of Harbor Comm'r's, 85 U.S. (18 Wall.) 57, 70 (1873); United States v.
Wiley, 78 U.S. (11 Wall.) 508, 513-14 (1870) ("Statutes of limitations . . . are enacted upon
the presumption that one having a well-founded claim will not delay enforcing it beyond a reasona-
tuble time, if he has the power to sue."); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386,
390 (1868); see 1 Corm.an, \textit{supra} note 23, § 1.1, at 13 ("When no attempt is made in a reasonable
time to enforce a demand, it is likely that a judicial presumption will arise against the original
validity of the claim or its continued existence."); Green, \textit{supra} note 54, at 1003 n.164 ("The
assumption underlying this claim is that those with meritorious claims will be anxious to pursue
them and will therefore file suit promptly.").
\item See Ochoa & Wistrich, \textit{supra} note 23, at 499-500.
\item See, e.g., Wilson v. Garcia, 471 U.S. 261, 275 (1985) (discussing "federal interests in
uniformity, certainty, and the minimization of unnecessary litigation"); Rothensies, 329 U.S. at
\end{itemize}
A bright-line rule that prohibits claims after a certain date provides the parties and the courts with structure and clarity. Everyone is clear about the rules of engagement, and plaintiffs will not conceivably "waste" the defendant's and the court's time by pursuing a claim remote in time. In the absence of a concrete deadline, the courts would be free to decide whether a claim is too remote in time based on political or spurious rationales. Left to its own devices, the court is unchecked by the legislature, raising separation of powers concerns. There is a risk that if the bases for tolling are expanded too much, the exception will swallow the rule.

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

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

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

C. Institutional Legitimacy

An unspoken yet important rationale for limitations law is its legitimizing function. Statutes of limitations attempt to assure the public that decision making is rational. The courts permit claims to go forward on the basis of clear rules rather than prejudice or excessive discretion. "[S]trict adherence to the procedural requirements" enhances an "evenhanded administration of the law."

To the extent that the public believes that limitations law serves important and legitimate goals (such as bolstering the reliability of evidence, preventing fraudulent claims, and curtailing judicial waste), limi-
tions law reinforces and strengthens the legal system's institutional legitimacy.77

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

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

A. Policy Rationales for Exceptions to Limitations Periods

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

77 Limitations law also discourages courts from retroactively applying current legal and moral standards on a defendant's past conduct, which may be perceived as unfair to the defendant. See Ochoa & Wistrich, supra note 23, at 493–95.
78 Chase Sec. Corp., 325 U.S. at 313.
79 Truax v. Corrigan, 257 U.S. 312, 332 (1921); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to heard."); see also Foman v. Davis, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); Laurence H. Tribe, American Constitutional Law 666 (2d ed. 1988) ("[T]here is intrinsic value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her.").
80 See Fleming James, Jr. et al., Civil Procedure § 6.7, at 311 (4th ed. 1992) ("Another characteristic American value is the right to have one's say, specifically, to have one's 'day in court.'").
81 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
The injustice of not having access to the court system because of an arbitrary cutoff is particularly acute where a claim is meritorious. Denying a claimant relief where moral culpability has been established violates the fundamental concept that "for every wrong there is a remedy."\textsuperscript{82} The notion of applying a time bar—where the plaintiff has been diligent and the defendant has not been prejudiced—seems illogical and unjust.\textsuperscript{83} Not surprisingly, the courts have considered the merits of stale claims when determining whether to exempt them from limitations periods.\textsuperscript{84} Such consideration, however, is fundamentally unfair to the defendant because he risks having to defend himself with unreliable evidence—one of the very things the limitations period is designed to avoid.\textsuperscript{85} The courts must pick their vice: unfairness to the aggrieved plaintiff or unfairness to the culpable defendant. When confronted with this choice, some courts may understandably prioritize the injured party over the wrongdoer and permit remote claims to escape the time bar.\textsuperscript{86}

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

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

\textsuperscript{82} Stringer v. Young's Lessee, 28 U.S. (3 Pet.) 320, 330 (1830).
\textsuperscript{83} See Judith N. Shklar, The Faces of Injustice 18–19 (1990) (describing injustice as "the refusal to recognize valid claims"); Ochoa & Wistrich, supra note 23, at 505 (describing injustice as "[f]ailure to provide compensation where morally it is held due") (quotation omitted); Christopher H. Schroeder, Corrective Justice and Liability for Increasing Risks, 37 UCLA L. Rev. 439, 450 (1990) (noting that "victims must be made whole" for corrective justice).
\textsuperscript{84} See Ochoa & Wistrich, supra note 23, at 509.
\textsuperscript{85} Id.
\textsuperscript{86} See Elizabeth H. Wolgast, The Grammar of Justice 162 (1987) ("It is . . . not tolerable or acceptable that the innocent should suffer and the wicked not pay for their misdeeds."); John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 4–5 (1955) ("The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.").
\textsuperscript{87} See Ochoa & Wistrich, supra note 23, at 500–01; Fleming James, Jr. et al., supra note 80, § 1.1, at 2 ("In its day-to-day application, the law of procedure implements substantive law."); Robert E. Keeton, Judging 99 (1990) ("A decisionmaker" prefers to make decisions "squarely on [the] merits.").
\textsuperscript{88} Lawrence M. Solan, The Language of Judges 27 (1993) ("No one . . . feels satisfied when a decision announced is based on what seems to be a legal technicality instead of on the real issues.").
\textsuperscript{89} See Hardin v. Straub, 490 U.S. 536, 543 (1989) ("[I]f the official knows an act is unconstitutional, the risk that he or she might be haled into court indefinitely is more likely to check misbehavior than the knowledge that he or she might escape a challenge to that conduct within a brief period of time."); Ochoa & Wistrich, supra note 23, at 506.
plaintiffs out of the legal process creates disaffection and disillusionment with the legal process:

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

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

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

90 SHKLAR, supra note 83, at 35.
91 See HERBERT JACOB, JUSTICE IN AMERICA 41 (3d ed. 1978). The judiciary plays an important role in the political process, as this commentator notes:

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

Id.

92 In an effort to address systemic problems not adequately addressed by the legislature, such as asbestos, tobacco, and other mass torts, the courts have attempted to play a greater and more creative role. See Kenneth R. Feinberg, Creative Use of ADR: The Court-Appointed Special Settlement Master, 59 ALB. L. REV. 881, 881–93 (1996) (discussing use of “new creative case management techniques aimed at the comprehensive resolution of . . . complex litigation”); Jack B. Weinstein & Karin S. Schwartz, Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements, 163 F.R.D. 369, 379–85 (1995) (discussing expanded role of judges and special masters). But see Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 COLUM. L. REV. 2010, 2012–33 (1997) (discussing whether judicial role has been expanded too far).
93 See Ochoa & Wistrich, supra note 23, at 502–03.
94 Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359, 1391 (discussing risks minorities face in alternative dispute resolution).
95 See, e.g., England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("[F]ederal judges appointed for life are more likely to enforce the constitutional
Fourth, to the extent that the judiciary plays a larger role than merely resolving disputes—and instead develops and articulates public values—limitations law deprives society of meaningful discourse and growth.\textsuperscript{96} Exemptions overcome this. Judicial opinions legitimize outcomes and convince others of their propriety, not just explain decisions.\textsuperscript{97} The courts promote, influence, and reflect cultural values and moral norms. Exemptions from limitations law appropriately promote the courts' role as educator and culture disseminator.

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

Like the defendant, the plaintiff is also scrutinized. A plaintiff's status—whether legally disabled or even dead—will have an impact on whether a limitations period is exempted.\textsuperscript{101} Legal disabilities that exempt plaintiffs rights of unpopular minorities than elected state judges.

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

\textsuperscript{97} Cf. Solan, supra note 88, at 1–3.

\textsuperscript{98} See Developments in the Law—Statutes of Limitations, supra note 22, at 1236–37.

\textsuperscript{99} Id. at 1222–24.

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

\textsuperscript{101} See Developments in the Law—Statutes of Limitations, supra note 22, at 1220, 1229–33.
from time bars include infancy, insanity, imprisonment, and coverture.\footnote{See Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 538–39 (1867) (infancy, imprisonment, coverture); United States v. Wiley, 78 U.S. (11 Wall.) 508, 508 (1870) (infancy, insanity, coverture).} The disability must exist at the time the cause of action accrues and, generally, does not stop the limitations period once it has started running.\footnote{See Developments in the Law—Statutes of Limitations, supra note 22, at 1229–30.} The underlying policy rationale for this exemption is to prevent a defendant from fortuitously benefiting from a plaintiff’s hardship.\footnote{See id. at 1233.}

A legal prohibition may also suspend the limitations period. Where a statute or injunction explicitly prohibits suit, the courts will exempt a plaintiff from the limitations period.\footnote{Id.} The underlying policy rationale for this exemption is fairness to the plaintiff: “Where the plaintiff is prevented from filing timely suit by force of law, it is manifestly unjust to penalize him by barring the suit.”\footnote{Id. at 1234.} Although rarer, “a factual, rather than legal, impossibility of bringing suit” is sometimes invoked by the courts.\footnote{Id. at 1234.} For example, where the courts are closed to citizens of an enemy state during war, the courts will suspend the limitations period.\footnote{Black’s Law Dictionary 21 (6th ed. 1990).}

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

B. Mechanisms for Exempting Claims from Limitations Periods

1. Accrual

A court’s determination of when a cause of action accrues impacts whether a plaintiff may successfully bring a claim remote in time. Accrual is the moment when a plaintiff may bring a cause of action. In other words, a “cause of action ‘accrues’ when a suit may be maintained thereon, and the law in this regard differs from state-to-state and by nature of action.”\footnote{Black’s Law Dictionary 21 (6th ed. 1990).} It is at this point that the proverbial clock begins to run.

a. The Discovery Rule

In general, the clock begins to run not on the date an injury has occurred\footnote{Justice Scalia, in a concurrence in Klehr v. A.O. Smith Corp., identifies the possibility of an “injury occurrence” rule in which discovery of the injury would be irrelevant. Klehr v. A.O. Smith Corp., 521 U.S. 179, 198 (1997) (Scalia, J., concurring). The Supreme Court has left this question open. Rotella v. Wood, 528 U.S. 549, 554 n.2 (2000).}, but on the date that the plaintiff discovers or should have reasonably discovered the injury.\footnote{Federal courts generally apply the discovery accrual rule where a federal statute is silent on the issue. Rotella, 528 U.S. at 555; Klehr, 521 U.S. at 191; 1 Corman, supra note 23, § 6.5.5.1, at 449.} In most jurisdictions, this discovery rule has replaced the more restrictive rule that a tort claim accrues at the time of...
plaintiff’s injury.\textsuperscript{112} There are, however, various approaches to accrual which are even more liberal than the general discovery rule—e.g., a cause of action may not be triggered until something other than the initial injury is discovered.\textsuperscript{113}

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

There is no uniform application of the discovery rule; it varies according to the type of claim and circumstances. The propriety of the discovery rule is governed by the Court’s own subjective determination of which claims “cry out” for its application.\textsuperscript{115}

\begin{footnotes}
\footnotetext[112]{United States v. Kubrick, 444 U.S. 111, 120, 121 n.8 (1979); see also Green, supra note 54, at 977 (noting that “[v]irtually all commentators and the vast majority of courts” have adopted a discovery accrual approach because of its fairness).}
\footnotetext[113]{The Supreme Court has recently had occasion to evaluate such liberal discovery rules and rejected them on the grounds that they violate the underlying purposes of limitations periods. See, e.g., Rotella, 528 U.S. at 553–55, 558 (rejecting the “injury and pattern discovery rule” in the context of civil action brought under the Racketeer Influenced Corrupt Organizations Act (“RICO”); Court anticipated the rule would lead to claims very remote in time, and concluded that the policies of limitations law—“repose, elimination of stale claims, and certainty”—would be undermined); Klehr, 521 U.S. at 187–90 (rejecting the most liberal accrual discovery rule, the “last predicate act rule,” in the context of a civil RICO claim); Kubrick, 444 U.S. at 117–18, 122–24 (rejecting a more lenient accrual rule in the context of a medical malpractice case, despite plaintiff’s contention that tolling was justified due to the technical complexity of the case, because the primary purpose of the limitations period—encouraging plaintiff diligence—would be undermined).

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

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

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

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

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117 See id.
120 See Toussie v. United States, 397 U.S. 112, 134–35 (1970) (White, J., dissenting) ("The 'continuing offense' is hardly a stranger to American jurisprudence. The concept has been extended to embrace such crimes as embezzlement, conspiracy, bigamy, nuisance, failure to provide support, repeated failure to file reports, failure to register under the Alien Registration Act, [and] failure to notify the local board of a change in address ... "); see also Nat'l R.R. Passenger Corp., 536 U.S. at 115 (continuing violation within employment discrimination context).
121 In the employment discrimination area, the Supreme Court recognizes a hostile-environment claim as one that by its nature involves repeated conduct and therefore lends itself to accrual under the continuing violations doctrine. Nat'l R.R. Passenger Corp., 536 U.S. at 114–15. The unlawful employment practice takes place over a lengthy period of time and does not become actionable until the cumulative effect of various individual acts has taken place. Id. at 115. In contrast, a discrete act of discrimination—such as a termination, promotion denial, or refusal to hire or transfer—constitutes its own individual actionable unlawful practice and is subject to immediate accrual. Id. at 114. The Court has been reluctant to extend the continuing violations doctrine to ongoing antitrust violations or a pattern of racketeering activity. Id. at 127 (O'Connor, J., concurring in part and dissenting in part).
122 The Supreme Court had occasion to address this issue in Delaware State College v. Ricks, where it held that the timeliness of an employee's Title VII and § 1981 claims were measured from the date the employee was terminated on the basis of national origin, not later. Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980). In Ricks, the plaintiff accepted a one-year "terminal" contract following his denial of tenure. Id. at 253–54. He argued that this date prolonged the limitations period. Id. at 257. The Court, however, was unpersuaded, holding that continuity of employment alone did not prolong the life of his employment discrimination action. Id. Neither did the plaintiff's pending grievance toll the statute of limitations. Id. at 261. The Court concluded that the moment the employer made the tenure decision and communicated it to the employee was the moment the discriminatory act occurred and the limitations period started. Id. at 258. Even though the employee did not experience the impact of the discriminatory act until later, this did not push back accrual. Id.
123 Id. at 262 n.16 ("We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."); see also Mills v. Habluetzel, 456 U.S. 91, 101 (1982).
2. Equitable Estoppel

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

3. Equitable Tolling

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

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

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

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

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

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

\(^{129}\) Cada, 920 F.2d at 451–52 ("Holmberg makes clear that equitable tolling does not require any conduct by the defendant.” (citing Holmberg, 327 U.S. at 397)). But see Wolin, 83 F.3d at 852 (“[W]hen the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay . . . , so the plaintiff must use due diligence to be allowed to toll the statute of limitations . . . .”).
is immaterial whether the defendant is responsible for depriving the plaintiff of information vital to the existence of his claim. Equitable tolling means that "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." \[131\]

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

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

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

\[131\] Id. at 451.

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

\[133\] Holmberg, 327 U.S. at 396.

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

\[135\] Young, 535 U.S. at 49-50.

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

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

\[138\] Young, 535 U.S. at 50 (citing Baldwin County Welcome Ctr., 466 U.S. at 151 (listing grounds for tolling)). Courts are less generous in providing equitable tolling where the dispute is over land title. For example, in interpreting the propriety of equitable tolling under the Quiet Title Act, the Supreme Court acknowledged the significance of land ownership in concluding that the extension of additional time for tolling was unwarranted: "This is particularly true given that the [Quiet Title Act] deals with ownership of land. It is of special importance that landown-
bly tolled limitations periods for various reasons. For example, the Supreme Court has expressed approval of equitable tolling where a plaintiff did not have sufficient notice of her right to sue;\textsuperscript{139} where a motion for appointment of counsel was pending and equity required the motion to be ruled upon prior to suit;\textsuperscript{140} and where the court led a plaintiff to believe she had done everything necessary to bring suit.\textsuperscript{141} Equitable tolling has been permitted where, despite due diligence, a plaintiff is unable to collect critical information related to the existence of his claim,\textsuperscript{142} or where a plaintiff is rendered unable to protect his claim during the statutory filing period.\textsuperscript{143} For example, if the courts are unavailable—as they often are during wartime—the courts have equitably tolled the limitations period.\textsuperscript{144} The doctrine is appropriate under extraordinary circumstances\textsuperscript{145} and when the underlying purposes of the statute of limitations have nonetheless been served.\textsuperscript{146}

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

\textsuperscript{140} Id. (citing Harris v. Walgreen’s Distrib. Ctr., 456 F.2d 588 (6th Cir. 1972)).

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

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

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

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


\textsuperscript{146} Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974) (“Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute.”). In American Pipe & Construction Co. v. Utah, the Supreme Court held that the filing of a class action lawsuit tolled the statute of limitations for putative class members who timely moved to intervene once class certification was denied on numerosity grounds. Id. at 539. The Supreme Court concluded that this ruling was consistent
In sum, there are as many reasons for carving out exceptions to limitations periods as there are for enforcing them. The courts have the power to exercise discretion and flexibility in enforcing limitations periods, and the legislature has the power to eradicate them altogether. The shelter of statutes of limitations is not guaranteed and has come into law by legislative grace, not as a natural right.\textsuperscript{147}

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

\textbf{IV. The Court's Misapplication of Limitations Exceptions in the Tulsa Reparations Litigation}

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

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


\textsuperscript{148} A similar critique can be done of litigation where plaintiffs seek reparations for slavery from private corporations. \textit{See In re African-American Slave Descendants Litig.}, 304 F. Supp. 2d 1027, 1038–44 (N.D. Ill. 2004) (seeking to hold eighteen present-day companies liable for the commercial activities of their alleged predecessors before, during, and after the Civil War for claims that arose out of the institution of human chattel slavery). Claims for reparations for slavery and its vestiges are admittedly even more complex because of their greater remoteness in time and the additional complications related to identification of the parties, causation, and injury. This critique is beyond the scope of this Article and will be explored in a subsequent article.
A. The Story of Tulsa

On May 31, 1921, up to three hundred African-Americans were killed and thousands left homeless after they were attacked by a white mob. Deputized by the City of Tulsa, and aided by the State of Oklahoma, the mob burned the entire African-American community to the ground—destroying schools, churches, businesses, a hospital, and a library in a prosperous community and business district affectionately called the "Negro's Wall Street." Civic leaders at the time promised reparations for one of the worst race riots in United States history, condemned nationwide, but none came.

Many riot victims—homeless, destitute, and terrorized—were in no position to pursue a judicial remedy at the time. Other riot victims who sought relief in the courts soon realized its futility because law enforcement and the political process were infected by extremist organizations, such as the Ku Klux Klan. Moreover, city and state officials buried evidence and discouraged litigation, impeding riot victims from preparing the record needed to prevail. Victims were buried in unmarked graves and the government failed to investigate or prosecute perpetrators for arson and murder. Indeed, the African-American community of Greenwood was initially blamed for the

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149 See supra note 1.
150 See Goble, supra note 1, at 12 (approximately 1256 homes burned or destroyed).
151 See supra note 3.
152 Goble, supra note 1, at 12; see also Larry O'Dell, Riot Property Loss, in TULSA RACE RIOT, supra note 1, at 145, 149 (almost $2 million in 1921 dollars estimated in property damage from the riot).
153 SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921, at 22 (1982); see also Goble, supra note 1, at 12 (“Little Africa”).
154 See supra note 7 and accompanying text.
155 See Caine, supra note 4, at 5 (“Thus it is difficult (unto implausible) to imagine the residents of Greenwood banding together and having the necessary individual or collective psychological strengths to sue for restitution in the courts of Oklahoma at that time, given what had happened to them, as well as the social and legal environment of that era.”); see also Brophy, supra note 6, at 41-45.
156 Approximately 150 lawsuits were filed after the riot. Goble, supra note 1, at 7; see, e.g., Redfearn v. Am. Cent. Ins. Co., 243 P. 929, 931 (Okla. 1926) (denying recovery under insurance policy for owner of theater and hotel burned to ground during riot). “[T]here were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot.” OKLA. STAT. ANN. tit. 74, § 8000.1.3 (West 2002). Instead, the government attempted to block rebuilding efforts in Greenwood. Id.
157 See supra note 6.
158 1921 Tulsa Race Riot Commission—Creation, No. 1035, 1997 Okla. Sess. Laws 2835 (creating the Tulsa Riot Commission and stating “black persons of that era were practically denied equal access to the civil or criminal justice system in order to obtain damages or other relief for the tortious and criminal conduct which had been committed”); see, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984) (“Though [riot victim] Dolphus Bell filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress . . . .”).
159 See Brooks & Witten, supra note 2, at 124-32 (exploring evidence of potential mass graves based on geophysical study and eyewitness testimony).
160 See Goble, supra note 1, at 13–14 (noting that not a single criminal act has ever been
riot.\textsuperscript{161} Evidence was hidden or destroyed and talk of the riot's occurrence squelched.\textsuperscript{162} The suppression was so complete that the current and former mayors of Tulsa had never heard of it.\textsuperscript{163} Oklahoma history textbooks and historical accounts of Tulsa excluded it.\textsuperscript{164} In such an environment, no litigants could successfully vindicate their claims.

Almost eighty years later, in an effort to address the conspiracy of silence\textsuperscript{165} that surrounded the riot and its aftermath, the State of Oklahoma commissioned a study of the riot.\textsuperscript{166} Based on over ten thousand pages of materials,\textsuperscript{167} some of which implicated the government in the riot and its aftermath, the Tulsa Commission ("Commission") issued a report, recommending reparations to riot victims.\textsuperscript{168} Again, none came.

Armed with critical evidence never made available before,\textsuperscript{169} over 130 survivors of the riot\textsuperscript{170} sought relief in federal court, claiming that the governments of Tulsa and Oklahoma violated the Federal Constitution and various federal statutes.\textsuperscript{171} Specifically, the plaintiffs claimed that the government

\begin{footnotes}
\footnote{161} Ellsworth, supra note 3, at 69 (riot called "Negro uprising"); see also Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated, TULSA DAILY WORLD, June 26, 1921, at 1 (blaming group of African-American men for riot); Negroes Blamed for Race Riots, TULSA DAILY WORLD, June 14, 1921, at 2 (describing a resolution passed by the Tulsa Silver Plume Lodge Knights of Pythias, which stated that the riot was an "awful tragedy... [and] a premeditated, unlawful uprising of a large number of armed negroes who... without cause or justification fired upon white men, women and children"); TULSA TRIB., June 14, 1921, at 2 (Mayor blaming negroes for "Negro uprising" and exonerating whites "in no uncertain language"); TULSA TRIB., June 4, 1921, at 88 ("[T]he bad niggers started it.").
\footnote{162} See tit. 74, § 8000.1.4--1.5 (riot was "virtually forgotten" for seventy-five years, which changed after publication of the Commission Report). "Before there was this commission, much was known about the Tulsa race riot. More was unknown. It was buried somewhere, lost somewhere, or somewhere undiscovered. No longer. Old records have been reopened, missing files have been recovered, new sources have been found." Goble, supra note 1, at 8.
\footnote{164} Franklin & Ellsworth, supra note 163, at 26.
\footnote{165} Id. at 25 (noting that important missing documents and reluctance to talk of the riot has led some to conclude that nothing short of a "conspiracy of silence" existed regarding the riot).
\footnote{166} Tit. 74, § 8000.1.5 (stating that work of Tulsa Commission has "forever ended the 'conspiracy of silence'.").
\footnote{167} Goble, supra note 1, at 8 (stating that amount of material "passed ten thousand pages some time ago and well may reach twenty thousand by the time everything is done").
\footnote{168} Id. at 15.
\footnote{169} See id. at 6--8. The Commission concluded:
\begin{quote}
Until recently, the Tulsa race riot has been the most important least known event in the state's entire history. Even the most resourceful of scholars stumbled as they neared it for it was dimly lit by evidence and the evidentiary record stumped more with every passing year. That is not now and never will be true again.
\end{quote}
\footnote{168} Id. at 6.
\footnote{170} As of February 28, 2001, there were 118 persons registered as living survivors of the riot and 176 persons registered as descendants of riot victims. Id. at 6.
\footnote{171} See Second Amended Complaint ¶ 1, Alexander v. Oklahoma, No. 03-CV-133-E(C) (N.D. Okla. Apr. 29, 2003).
\end{footnotes}
deprived them of their due process and equal protection rights in violation of
the Fourteenth Amendment and engaged in a policy of intentional race dis-

**B. Accrual**

The district court gave short shrift to the main bases for exempting the
Tulsa plaintiffs' claims from the statute of limitations: accrual, equitable es-
toppel, and equitable tolling. Although the court applied the discovery rule
of accrual, like other courts in similar reparations litigation, it took an un-
necessarily narrow and cramped interpretation of what constitutes the requi-
site injury and causation.

Where the plaintiffs sought reparations against state and municipal gov-
ernment for their alleged complicity in the Tulsa race riot of 1921, the court
concluded that the plaintiffs had sufficient knowledge of their injuries such
that their various claims arising out of the riot accrued over eighty years ago.
The court rejected the plaintiffs' contention that they were insufficiently
aware of the City's complicity in the riot until the publication of the Commis-

Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *35--36 (N.D.

Id. at *37.

Id. at *36.

See In re African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1070--71
(N.D. Ill. 2004). But see Cato v. United States, 70 F.3d 1103, 1108--09 (9th Cir. 1995) (discussing,
in dicta, some tolling doctrines in the context of the slave reparations case, but not addressing
accrual).


Id. at *26.
tiffs alleged that the City of Tulsa organized, armed, and deputized white citizens who then committed gross atrocities against the residents of Greenwood under color of law.\textsuperscript{179} In the middle of perhaps one of the most brutal race riots in American history, Greenwood residents would hardly have been in the position to know that many of those who terrorized them were cloaked under color of law. Many deputized whites who killed, looted, and burned Greenwood to the ground did not wear badges or uniforms; their names were not even recorded.\textsuperscript{180} It is unreasonable to believe that riot victims would be able to accurately ascertain the government’s role in such mayhem—especially where the conduct plaintiffs challenge is not aberrant behavior by individual government officials, but an orchestrated plan by the government to deprive plaintiffs of their civil rights.\textsuperscript{181}

The court further misunderstood various allegations in the complaint to mean that the plaintiffs were aware of the defendants’ misconduct. For example, the court concluded that riot victims “would have had to” observe the improper conduct of the Oklahoma National Guardsmen and those citizens deputized by the government.\textsuperscript{182} But with only roughly 2% of the mob—comprising between 15,000 to 25,000 men—having been deputized,\textsuperscript{183} it is not at all clear that riot victims would have been able to identify the government’s role. The court also concluded that the plaintiffs were aware of the government’s role in the riot on the basis of newspaper accounts shortly after the riot, stating that Blacks condemned the actions of the Tulsa Police and Oklahoma National Guard.\textsuperscript{184} The plaintiffs’ condemnation of the government for its laxity in policing, however, is not the same as the plaintiffs’ recognizing the government’s affirmative participation in the riot.\textsuperscript{185} The court seems to have mistakenly imputed knowledge the plaintiffs currently have about the government’s complicity—obtained from the Commission Report—to their knowledge within the limitations period. The Commission Report itself acknowledges the degree to which crucial information about the government’s role in the riot had never before been known or knowable.\textsuperscript{186} Despite this concession, the court was unconvinced that accrual took place on the date of the Commission Report’s publication.\textsuperscript{187}

\textsuperscript{180} See Ellsworth, supra note 3, at 64.
\textsuperscript{181} See Goble, supra note 1, at 16–19 (concluding attack was on a community and riot was designed to “keep one race ‘in its place’”).
\textsuperscript{182} Alexander, 2004 U.S. Dist. LEXIS 5131, at *27.
\textsuperscript{185} See Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated, supra note 161 (noting “laxity of law enforcement on the part of the officers of the city and county”); It Must Not Be Again, Tulsa Trib., June 12, 1921 (“Why were these niggers not made to feel the force of the law and made to respect the law?”); Niles, supra note 7, at 4; Aide to Police Answers Critics, Tulsa Daily World, June 6, 1921.
\textsuperscript{186} See Goble, supra note 1, at 6–8 (“Commissioners were surprised to receive so much new evidence and pleased to see that it contributed so much . . . . This commission’s work changes the game forever.”).
The court's interpretation of what the plaintiffs should have known about their injury and its source is devoid of context and reason. Holding that the plaintiffs' actions accrued at the moment the riot unfolded fails to account for the profoundly serious nature of the injuries and complexity of their causes.

Other courts have appropriately recognized that plaintiffs often fail to properly identify the parties responsible for misconduct or the precise causation because of inhospitable circumstances at the time. For example, in actions dealing with FBI involvement in civil rights murders, the courts have held that accrual did not take place until the victims' families discovered—as many as twenty or thirty years later—the Bureau's complicity. Similarly, courts have concluded that plaintiffs' claims did not accrue until plaintiffs learned of defendants' malfeasance in cases involving the government's role in Cold War drug testing and syphilis experiments on nonconsenting victims. Likewise, the notice requirement for plaintiffs in reparations cases should be expanded because of the nature of the claim. As Mari Matsuda aptly observed: "[T]he need for reparations arises precisely because it takes a nation so long to recognize historical wrongs against those on the bottom. Something other than a rigid conception of timeliness is required." The Tulsa case also highlights the judiciary's limited view of what constitutes due diligence—the cornerstone of accrual and one of the fundamental policy rationales for statutes of limitations. The Tulsa court, like others, was unpersuaded that plaintiffs who bring claims today for Jim Crow vio-

188 See, e.g., Anderson v. Cornejo, 199 F.R.D. 228, 251 (N.D. Ill. 2000) ("A person may be well aware that she was directly harmed by a specific person without having any knowledge that it was part of a conspiracy, let alone knowing that a third party was aware of the conspiratorial plans and could have prevented the injury."); Allred v. Chynoweth, 990 F.2d 527, 531 (10th Cir. 1993); Bergman v. United States, 551 F. Supp. 407, 419–22 (W.D. Mich. 1982); Peck v. United States, 470 F. Supp. 1003, 1017–20 (S.D.N.Y. 1979).

189 See, e.g., Liuzzo v. United States, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980) (holding that where plaintiffs were in the unique position of not knowing about the government's complicity in their mother's murder until long after they knew of the injury, accrual did not begin until an "investigation [was] both warranted and realistically possible"). Judge Posner reasoned in a different context that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." Drazan v. United States, 762 F.2d 56, 59 (7th Cir. 1985). Where a plaintiff knows of his injury but not the source, the cause of action does not accrue. Id.


191 Matsuda, supra note 14, at 381.


193 Similarly, in recent consolidated litigation for slave reparations, the Northern District of Illinois found it relevant to the question of whether plaintiffs had exercised due diligence that "other former slaves were aware of their injuries and previously have attempted to recover for them well before this action was filed." See In re African-American Slave Descendants Litig., 304 F. Supp. 2d 1027, 1071 (N.D. Ill. 2004) (citing Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916) (claim for slavery-based reparations brought nearly a century prior), aff'd, 244 U.S. 643 (1917)).
lence exercised sufficient diligence when other riot victims filed suit much earlier.194

What should the relevance of such prior filings be? How much weight should the court give to the fact that others were able to timely bring suit? Although prior lawsuits do not as a matter of law put plaintiffs on notice of their own claims,195 such lawsuits suggest that plaintiffs may have been able to bring suit earlier if they had made greater effort. This standard is unfair. For no other types of claims do we hold plaintiffs to a superhero standard of diligence. There are always those few exceptional people who are able to overcome tremendous adversity and rise above no matter what the circumstances. The legal system, however, is designed not for the extraordinary, but for the norm. Disturbingly, in the context of reparations, the objective reasonableness standard has been replaced with one far more rigorous. The fact that some riot victims were able to bring suit within the limitations period should not be determinative.196

And where the parties are equally blameworthy (or blameless) it is unclear why plaintiffs should be the only ones to suffer. This question was considered in the context of whether statutes of limitations are fair to plaintiffs who have art stolen from them but do not make claims for it until after the limitations period has expired. Courts seem to be moving in a direction that is more sympathetic to the original owners who bring untimely claims to recover stolen art rather than the bona fide purchasers of such art.197 This has led some scholars to propose a wholesale retreat from statutes of limitations, arguing that the discovery rule places an unfair burden on a diligent owner to justify deferring the limitations period because he was unable to locate his stolen chattel earlier.198 Scholars analogize a plaintiff’s blameless ignorance of his claim to those disabilities that toll the limitations period, suggesting


195 See Texas v. Allan Constr. Co., 851 F.2d 1526, 1533 (5th Cir. 1988) (holding that existence of similar lawsuits does not put plaintiffs on notice of their own claims because lawsuit could be “frivolous or baseless,” and “defendants would have had to prove that the plaintiffs had access to information that would independently verify the allegations” (quotation omitted)); Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 504 (9th Cir. 1988) (same); see also Bibeau v. Pac. Nw. Research Found., 188 F.3d 1105, 1110 (9th Cir. 1999) (holding that public records did not put plaintiffs on notice as a matter of law).

196 Many of the prior lawsuits were unsuccessful, which deterred others from filing. Realizing the futility of such litigation, those who did not file within the limitations period may have done so out of rationality, not slothfulness. For example, most of the lawsuits filed shortly after the Tulsa race riot were against insurance companies who refused to honor their claims on the ground that individuals, not the government, were responsible for the riot damage. Moreover, the two cases actually litigated against the City of Tulsa were dismissed. Black riot victims were further dissuaded from filing suit against the government by grand jury indictments against Blacks only. See supra note 156.

197 Bibas, supra note 192, at 2448, 2460 (“We have almost come full circle. In the nineteenth century, courts abandoned the common law’s absolute protection of owners by adopting adverse possession of chattels. That rule has eroded ever since, as courts have become increasingly concerned with fairness to theft victims and discouraging theft.”); see also id. at 2449–50.

198 Id. at 2447, 2450–51. Bibas also criticizes the discovery rule as vague and inefficient. Id. at 2450–51.
that they should be treated the same.\textsuperscript{199} This makes sense in the context of reparations too.

\textbf{C. Equitable Estoppel}

The Tulsa case illustrates the judiciary’s overly narrow vision of what circumstances justify equitable estoppel.\textsuperscript{200} Despite the Commission Report’s own admission that there existed a “conspiracy of silence” that kept the plaintiffs ignorant of the facts surrounding the riot and its aftermath—including the defendants’ culpability—the court did not estop the defendants from raising the limitations defense on the grounds of fraudulent concealment. The court also held the plaintiffs to an exacting standard on the question of whether the plaintiffs reasonably relied on the defendants’ promise to provide restitution—the alternative basis for equitable estoppel. The court’s limited analysis of equitable estoppel is unwarranted and inconsistent with the underlying purposes of limitations law and its exemptions.

\textit{1. Fraudulent Concealment}

The Tulsa plaintiffs contended that the government fraudulently concealed its role in the race riot of 1921, thereby precluding them from timely filing.\textsuperscript{201} According to the Commission Report, which ultimately unearthed the government’s complicity in the riot,\textsuperscript{202} the concealment was so thorough, “[i]t was as if the greatest catastrophe in the city’s history simply had not happened at all.”\textsuperscript{203}

Designed to uncover hidden or suppressed information that could not have been revealed otherwise,\textsuperscript{204} the Commission Report is the culmination of a four-year intensive study by a team of experts—including historians, legal scholars, archeologists, anthropologists, forensic specialists, geophysicists, and others—who combed archival depositories and research libraries all over the country; searched court and municipal records; extensively reviewed magazines and newspaper outlets; and interviewed hundreds of survivors and witnesses.\textsuperscript{205} The Commission Report had a tremendous impact on the un-

\textsuperscript{199} \textit{Id.} at 2455.

\textit{O}ne can draw an analogy between an innocent owner’s ignorance and disabilities such as infancy, insanity, and imprisonment, all of which toll the running of adverse possession of land. In these cases, the law subordinates a possessor’s repose to an owner’s fair chance to bring an action. Likewise, where an owner cannot bring suit out of blameless ignorance of who has her chattel, the law should treat her ignorance as a disability and so toll the limitation period.

\textit{Id.; see also id.} at 2456; \textit{Matsuda, supra} note 14, at 381–82 (comparing injuries resulting from slavery and its vestiges to legal disabilities that justify delayed accrual).

\textsuperscript{200} \textit{See also In re African-American Slave Descendants Litig.}, 304 F. Supp. 2d 1027, 1072-73 (N.D. Ill. 2004) (rejecting equitable estoppel in slave reparations case).


\textsuperscript{202} \textit{See Goble, supra} note 1, at 11–14; \textit{see also Okla. Stat. Ann. tit. 74, § 8000.1.2–1.3} (West 2002).

\textsuperscript{203} \textit{See Franklin & Ellsworth, supra} note 164, at 26.

\textsuperscript{204} \textit{See Goble, supra} note 1, at 6–8; \textit{see also tit. 74, § 8000.1.5}.

\textsuperscript{205} \textit{See Goble, supra} note 1, at 1–4.
derstanding of the riot and its aftermath: “Commissioners were surprised to receive so much new evidence and pleased to see that it contributed so much.”

After decades of concealment, the Commission Report revealed the extent to which the defendants were complicit in the horror of the race riot and its aftermath. Rather than calm or contain the riot, city officials deputized and armed members of the white mob who deliberately burned, looted, and killed. Units of the Oklahoma National Guard arrested the Black residents of Greenwood and held them captive in holding centers, thereby enabling their homes, churches, schools, and businesses to be looted and burned to the ground. No government official offered resistance or protection for Greenwood; no criminal acts were prosecuted or punished; and Greenwood residents were left to rebuild the community without assistance.

The Commission’s findings were incorporated by statute by the State of Oklahoma, which conceded that a “conspiracy of silence” had effectively concealed information about the riot and its aftermath. The record was set straight. The State concluded that “[o]fficial reports and accounts of the time that viewed the Tulsa Race Riot as a ‘Negro uprising’ were incorrect,” and, in fact, government officials had participated in the violence and destruction. With the truth no longer “swept well beneath history’s carpet,” the plaintiffs sought restitution from the government. Although acknowledging the plaintiffs’ allegations of fraudulent concealment—including the findings of the Commission and the Oklahoma state legislature—the district court ignored this doctrine as a basis for equitable estoppel. Refusal to permit equitable estoppel under such circumstances is shortsighted. Other courts understand this.

For example, in 1997, Jewish victims and survivors of the Nazi Holocaust, with their families and heirs, filed class action lawsuits against banking institutions that operated in France during World War II, and their predecessors and successors, for violations that occurred over fifty years earlier. The plaintiffs claimed that the banks “aided and abetted and conspired with

206 Id. at 7.
207 Id. at 11-12.
208 Id. at 12.
209 Id. at 12-14.
211 Id. § 8000.1.2.
212 Id. § 8000.1.4.
213 See Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *8-15, *23-24 (N.D. Okla. Mar. 19, 2004), aff’d, 382 F.3d 1206 (10th Cir. 2004), cert. denied, 125 S. Ct. 2257 (2005). Specifically, Plaintiffs argue that the City concealed its role in the Riot through the convening of a Grand Jury that blamed the Riot on the victims, the failure to investigate the riot or prosecute persons who committed murder or arson, and the disappearance of official files from the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department. Plaintiffs further support this argument with the language from [title 74 of the Oklahoma Statutes], § 8000.1.4 referring to a “conspiracy of silence” that “served the dominant interests of the state.”

Id. at *24.

the Vichy and Nazi regimes” to loot the plaintiffs’ assets, which promoted discrimination against Jewish citizens and disabled them from being able to finance their escape from Nazi persecution and avoid being sent to concentration camps where they were killed.\textsuperscript{215} The plaintiffs alleged that, after the war, the “defendants unjustly refused to return the looted assets, enriched themselves with the derivative profits, and concealed information, value, and derivative profits of the looted assets from the plaintiffs.”\textsuperscript{216} The plaintiffs also accused the defendants of “misrepresenting to plaintiffs and the general public [the defendants’] role during the Vichy government and their continued retention of assets; and failing to provide an accounting and restitution to plaintiffs.”\textsuperscript{217}

Various commissions were formed to provide relief to victims of the Holocaust-related atrocities, to supervise banking institutions’ compliance, and to conciliate amongst the parties. The primary commission was an independent one organized by the French government, “comprised of historians, diplomats, lawyers, and magistrates to ‘study the conditions in which goods may have been illicitly acquired . . . and to publish proposals’ regarding redress of Holocaust-era atrocities in France.”\textsuperscript{218} This commission generated a report that provided substantial relevant evidence to the plaintiffs’ case.\textsuperscript{219} Consequently, the plaintiffs argued that “defendants should be equitably estopped from raising a statute of limitations defense because plaintiffs have been kept in ignorance of vital information necessary to pursue their claims without any fault or lack of due diligence on the part of the plaintiffs.”\textsuperscript{220} The plaintiffs contended that the defendants engaged in a “policy of systematic and historical denial and misrepresentation” and that such deception misled and deprived the plaintiffs from knowing or successfully proving their claims.\textsuperscript{221} The court unequivocally accepted the plaintiffs’ equitable argument, concluding that the defendants’ deception should not permit them to hide behind the statute of limitations:

Should the alleged facts be supported by evidence in discovery, there is certainly a strong undercurrent to the issues at bar suggesting the [sic] a deceptive and unscrupulous deprivation of both assets and of information substantiating plaintiffs’ and their ancestors’ rights to these assets. There is no reason that plaintiffs should be denied a forum for addressing their claims as a result of deceitful practices by the defendants which have kept them from knowing or proving the extent of these claims, if that proves to be the case. Defendants are not entitled to benefit from whatever ignorance

\textsuperscript{215} Id. at 121–22.
\textsuperscript{216} Id. at 122.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 123 (citation omitted).
\textsuperscript{219} Id. at 123, 132.
\textsuperscript{220} Id. at 135.
\textsuperscript{221} Id.
they have perpetuated in the plaintiffs. Thus, plaintiffs are entitled to the benefit of equitable tolling.\textsuperscript{222}

Despite the passage of fifty years, the plaintiffs were able to receive some recompense for their misery. There is no reason why the same should not be true for plaintiffs seeking relief for the atrocities of Jim Crow violence in Tulsa.\textsuperscript{223}

When confronted with the question of whether there has been fraudulent concealment sufficient to equitably estop a defendant from relying on the statute of limitations defense, the court must first ask what was concealed. What types of information fall under the fraudulent concealment rubric such that equitable estoppel will result? The courts have relied on various types of information, including the identity of the defendant and other facts vital to the plaintiffs' case.\textsuperscript{224} Despite the wide net cast by equity, the Tulsa court reduced the inquiry to whether victims of the riot would have observed the city's misconduct during the riot.\textsuperscript{225} Not surprisingly, the court answered this question in the affirmative, concluding that the injury was "obvious" to riot victims at the time that it was inflicted.\textsuperscript{226}

The district court missed the point. The injury for which plaintiffs sought relief was far greater and more sophisticated than a single tort—it involved interrelationships that were not "obvious" until the publication of the Commission Report. Equitable estoppel was therefore warranted.

2. Promise to Provide Restitution

The alternative ground for granting equitable estoppel\textsuperscript{227} is where a defendant has made some assurance reasonably calculated to lull plaintiff into

\begin{itemize}
\item \textsuperscript{222} Id. at 135–36. The court seems to have permitted the plaintiffs to go forward under both the equitable estoppel and equitable tolling doctrines, which often overlap.
\item \textsuperscript{223} Similarly, in \textit{Hohri v. United States}, 782 F.2d 227 (D.C. Cir.), \textit{reh'g denied}, 793 F.2d 304 (D.C. Cir. 1986) (en banc), \textit{vacated on other grounds}, 482 U.S. 64 (1987), the U.S. Court of Appeals for the District of Columbia Circuit held that where the government had fraudulently "concealed the fact that there was no military necessity justifying the exclusion, evacuation, and internment program" of Japanese Americans, plaintiffs' claims were considered timely because of the concealment. \textit{Id.} at 246, 250. \textit{But see} \textit{Iwanowa v. Ford Motor Co.}, 67 F. Supp. 2d 424, 467–68 (D.N.J. 1999) (concluding that alleged misrepresentations by Ford Motor Company about its involvement in German slave labor during World War II did not toll the statutes of limitations when the misstatements were made long after the end of the War). \textit{See also} \textit{Klehr v. A.O. Smith Corp.}, 521 U.S. 179, 194–96 (1997) (fraudulent concealment).
\item \textsuperscript{224} \textit{See} \textit{Wolin v. Smith Barney Inc.}, 83 F.3d 847, 850 (7th Cir. 1996) (identity of defendant and other facts necessary for suit).
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} Although the plaintiffs in the Tulsa case did not argue that the defendants waived the statutes of limitations, this is another available exemption. Defendants have waived statutes of limitations in a variety of other reparations-type cases. The federal government did so in its enactment of the Civil Liberties Act of 1988 that compensated Japanese Americans for their unlawful internment. \textit{See} \textit{Civil Liberties Act of 1988}, 50 U.S.C. app. § 1989 (2000). The federal government also waived the statutes of limitations in response to \textit{Pigford v. Glickman}, a class action brought against the Department of Agriculture on behalf of African-American farmers and ranchers for lending discrimination. \textit{Pigford v. Glickman}, 185 F.R.D. 82, 86 (D.D.C. 1999), \textit{aff'd}, 206 F.3d 1212 (D.C. Cir. 2000). Where the Department's own study (the CRAT Report)
not timely filing. In the Tulsa case, the plaintiffs argued that that assurance was a promise by the City of Tulsa to provide restitution to the riot victims. Shortly after the riot, the City promised it would “make good the damage, so far as can be done, to the last penny.” The State of Oklahoma, in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001, also acknowledged “its moral responsibility” for the riot. The court concluded that the plaintiffs’ reliance on the City’s promise could not be supported because the defendants ultimately failed to provide restitution and instead tried to undermine the plaintiffs’ recovery and community rebuilding. Consequently, equitable estoppel was not granted.

But why should the defendants be able to benefit from their own deception, in contravention of the policies underlying the statute of limitations? It does not follow that because the defendants eventually reneged on their promise to provide restitution that the plaintiffs’ initial reliance on that promise was unreasonable. As the plaintiffs argued, the fact that the defendants gave conflicting messages does not mean that the plaintiffs did not reasonably rely on the defendants’ assurances.

What is reasonable, of course, depends largely on the circumstances and the actors. Here, where the court itself concluded that “[t]he political and social climate after the riot simply was not one wherein the [p]laintiffs had a true opportunity to pursue their legal rights,” it would be reasonable—although certainly not ideal—to rely on the government or private entities to provide some sort of restitution. Given the state of chaos, destruction, and devastation during and immediately following the riot, the plaintiffs were certainly in no condition to accurately access the government’s credibility—one way or the other. The government’s own culpability in the riot was not yet established, and the government purported not only to the riot victims, but to the rest of the world, that it was going to redress the plaintiffs’ grievances.

revealed that African-American farmers and ranchers had been improperly denied loans and that their complaints of such mistreatment had been routinely ignored or destroyed, the government waived the two-year statute of limitations. Invoking the promise General Sherman made to provide recently freed slaves “forty acres and a mule” and the Freedmen’s Bureau’s relinquishment of that promise, the court endorsed the consent decree permitting Black farmers relief long after the two-year statute of limitations had expired. At 85–86.


229 Tulsa, supra note 7, at 839.

230 Goble, supra note 1, at 15, 19 (acknowledging moral responsibility and recommending reparations); see also Okla. Stat. Ann. tit. 74, § 8000.1.6 (West 2002):

The 48th Oklahoma Legislature ... recognizes that there were moral responsibilities at the time of the riot which were ignored and has [sic] been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to “put down” another race. Therefore, it is the intention of the Oklahoma Legislature ... to freely acknowledge its moral responsibility on behalf of the State of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

Id.


232 Id. at *29.

233 Id. at *31.
In the context of reparations litigation, the courts should grant wide latitude to the plaintiffs' claims of reasonable reliance on the defendants' promises of restitution for wrongdoing. To do otherwise rewards the morally bankrupt and undermines the credibility of limitations law.

D. Equitable Tolling

Given the tremendous breadth of the application of the equitable tolling doctrine, the court's constricted use of it in the Tulsa litigation is unjustified. Ironically, the court recognized the unavailability of the courts and the plaintiffs' inability to access necessary information about their claims, bases normally sufficient to equitably toll the limitations period, but the court did not toll the statute of limitations to the point of resurrecting the plaintiffs' claims.

The difficult issue is determining at what point it becomes reasonable to expect plaintiffs to bring reparations claims for a race riot that occurred over three-quarters of a century ago. The court's opinion is instructive, but it poses more questions than it answers.

Although the court recognized the propriety of equitable tolling where plaintiffs could not, despite due diligence, obtain vital information bearing on the existence of their claims, the court did not accept this as a basis for equitable tolling. The court rejected the plaintiffs' contention that they were unaware of the role the City played in the riot and its aftermath until the publication of the Commission Report and that therefore equitable tolling was appropriate. Relying on allegations in the complaint, the court concluded that because some riot victims sought relief before and some were supposedly aware of specific city officials' violent acts, the plaintiffs were not sufficiently diligent. This conclusion fails to take seriously the impact of the defendants' campaign of misinformation and fraudulent concealment that extended post-Jim Crow. With many adult survivors now dead and the riot "swept well beneath history's carpet"—as recognized by the Oklahoma legislature itself—the Commission Report made a challenge to the City and State for restitution possible for the first time. Riot survivors today were mere children when the riot occurred and could not realistically have been expected to have had sufficient knowledge to file suit.

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234 Id. at *31-32.

235 See id. at *24-28.

236 Id. at *25-26. The court concluded:

Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the City's involvement any sooner. While it is certain that the Commission Report has helped to gather more facts about the Riot, the Court has considerable trouble with the Plaintiffs' assertion that until the Commission issued its report, they were unaware of the City's responsibility for their injury.

Id.

237 See id. at *26-28.

238 OKLA. STAT. ANN. tit. 74, § 8000.1.4 (West 2002).

239 Cf. Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984) (noting that a plaintiff must have "an awareness of sufficient facts to identify a particular cause of action," not "hints, suspicions, hunches or rumors," to be required to file suit).
brought by African-Americans shortly after the riot was substantially undercut by dismissals and a grand jury that exonerated only whites for their participation in the riot.\textsuperscript{240} These circumstances understandably discouraged plaintiffs from filing suit.\textsuperscript{241} Finally, despite the groundbreaking work of the Tulsa Commission and the significant contribution it has made to understanding the complicity of the City and State in the riot and its aftermath, the court rejected the notion that the Commission Report's publication was a requisite precursor to filing.\textsuperscript{242} Instead, the court held the plaintiffs to a standard far beyond the reasonable person standard normally expected of plaintiffs.

The court's conception of what constitutes diligence sufficient to toll the limitations period is unreasonable and out of sync with decisional law. For

\textsuperscript{240} The State of Oklahoma blamed African-American residents of Greenwood for the riot, returning criminal indictments against several of them. \textit{See Grand Jury Blames Negroes for Inciting Race Rioting; Whites Clearly Exonerated, supra note 161.}

\textsuperscript{241} In a similar case, the U.S. Court of Appeals for the Tenth Circuit rightly held that the statute of limitations for a wrongful death action had been tolled, even where the plaintiffs believed the defendant had committed the murder. \textit{See Allred v. Chynoweth, 990 F.2d 527, 531-32 (10th Cir. 1993).} There, the circuit court equitably tolled the limitations period until the publication of the defendant's book, which admitted her guilt many years after her acquittal. \textit{Id.} at 532. The court rejected the defendant's argument that the plaintiffs were sufficiently on notice of their cause of action where the state found sufficient evidence to arrest and try the defendant and the plaintiffs knew the victim had been murdered and suspected the defendant. \textit{Id.} at 531-32. The Tenth Circuit concluded that the plaintiffs would not have had the incentive to bring suit because the "jury's acquittal logically would have substantially undercut that suspicion, if not eliminated it altogether." \textit{Id.}


Dr. Ellsworth, author of the preeminent work on the riot, \textit{Death in a Promised Land}, conceded that "[w]hat little information about the riot that was available was inadequate and incomplete" prior to the Commission's Report. Declaration of Dr. Scott Ellsworth, \textit{appended to Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment, Exhibit 1 at 3-4, Alexander v. Oklahoma, No. 03-CV-133-E (N.D. Okla. Feb. 23, 2004)}. Specifically:

\textit{[T]he Tulsa Race Riot Commission—and here I am speaking primarily of the scholars who were attached to it—began to produce a much larger body of information about the riot than anyone, myself included, had anticipated. . . .

All told, the overall effect of this new information was to help transform our historical understanding of the riot . . . [b]y using the newly uncovered historical evidence in conjunction with previously available sources, one could now discern, for the first time, not only the overall dynamics of the riot, but also how actions taken by government authorities directly affected the fate of the African American community.}

\textit{Id.} at 4-5; \textit{see also} Goble, \textit{supra} note 1, at 8 (noting that to write his accompanying report to the final Commission Report, "Scott Ellsworth used evidence he did not have—no one had it—as recently as 1982"). Moreover, resources such as the Internet, television documentaries, and others were not available to Dr. Ellsworth when he published his book.
example, in *Rosner v. United States*, Hungarian Jews and their descendants sought property expropriated by the pro-Nazi Hungarian government during World War II and seized by the United States Army from the "Hungarian Gold Train." They sought information about the identification of their property to no avail. The plaintiffs contended that many of the facts in their complaint did not come to light until the publication of the Presidential Advisory Commission on Holocaust Assets Report on the Gold Train. Consequently, the district court tolled the limitations period on the ground that the plaintiffs "could not have known about the facts giving rise to this lawsuit." Similarly, in *Bodner v. Banque Paribas*, Jewish descendants sought damages from financial institutions who allegedly looted assets during the Nazi occupation in France. The plaintiffs argued that the defendants engaged in a system of denial and misrepresentation about the custody of the assets that made it "impossible for them to learn critical facts underlying their claim." The court equitably tolled the limitations period on the ground that a reasonably prudent person could not have possibly learned or discovered facts critical to the underlying claims. Victims of the Tulsa race riot, by contrast, were not afforded the same benefit of the reasonably prudent standard, and instead were expected to bring suit in the absence of information critical to their case.

The Tulsa case demonstrates how vulnerable the due diligence standard is to discretionary abuse and caprice, but also demonstrates the federal judiciary's greater understanding of the historical reality and impact of the Jim Crow era. Even assuming—contrary to the allegations in the complaint—that the plaintiffs had actual or presumed knowledge of the role of the government in the riot, the court recognized that the riot and its aftermath presented extraordinary circumstances that warranted tolling the statute of limitations until the end of the Jim Crow era in the 1960s. Although the case was ultimately dismissed, the plaintiffs enjoyed a Pyrrhic victory—that is, a tolling of the limitations period for over forty years. The enormity of this achievement should not be undervalued. For the first time in a case seeking restitution for damages incurred from a race riot, a court applied and accepted the notion that the racial violence beset upon a community and the ongoing institutionalized brutality in the decades that followed was sufficiently extraordinary to toll the limitations period. While recognizing the ex-

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244 *Id.* at 1203–04.
245 *Id.* at 1205.
246 *Id.*
247 *Id.* at 1205–06, 1209.
250 *Bodner*, 114 F. Supp. 2d at 135–36.
251 *Id.*
treme complexity of applying the equitable doctrines of estoppel and tolling, the court’s adoption of this scheme was unequivocal:

Plaintiffs assert extraordinary circumstances in a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow. There is no question that there are exceptional circumstances here. Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights. The question is not a factual question of whether exceptional circumstances existed. They did.

Where the record was replete with evidence of “intimidation, fear of a repeat of the riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow,” the court concluded that the environment was unconducive to timely filing. The court thus tolled the limitations period for four decades—up to the dismantling of Jim Crow.

Application of the equitable tolling doctrine where such extraordinary circumstances exist is consistent with similar decisional law. For example, in the context of reparations claims for Holocaust-related violations, district courts have equitably tolled the limitations period in part because of the exceptional nature of the circumstances. In Rosner, Hungarian Jews and their descendants sued the government to recover property stolen by the pro-Nazi government during World War II and seized by the United States Army. The plaintiffs did not file until 1999, forty-six years after the limitations period expired. The district court conceded that what partially tipped the balance in favor of equitable tolling was the fact that “for the majority of Plaintiffs, the years following World War II were particularly difficult.” The court was persuaded by the plaintiffs’ contentions that the “brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure” were important pieces of its equitable tolling analysis.

Similarly, in Bodner, ancestors of Jewish customers brought suit against French financial institutions for stealing the assets of customers during the Nazi occupation and for failing to return the looted property. The plaintiffs did not file until 1997, seeking damages for claims over fifty years old.

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253 Id. at *35–36.
254 Id. at *30–31 (emphasis added).
255 Id. at *32.
256 Id. at *31–32.
258 Id. at 1209.
259 See id. at 1208.
261 See id. at 124.
The district court permitted equitable tolling for various reasons, including the extraordinary conditions under which the plaintiffs would have had to function: "[P]laintiffs could hardly have been expected to bring these claims at the end of World War II."262

Additionally, in *Hoang Van Tu v. Koster*,263 residents of a Vietnam village sued American soldiers on behalf of the survivors and descendants of a Vietnam War massacre.264 Although the plaintiffs were not able to persuade the appellate court to toll the statute of limitations for up to twenty-eight years, the U.S. Court of Appeals for the Tenth Circuit recognized the potential legitimacy of "some degree of equitable tolling [as] appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel."265

The Tulsa case suggests that the courts have come further in recognizing the impact the confluence of racial violence, government corruption, and de jure segregation has had on African-Americans' ability to timely file suit for reparations, but this case also highlights the ever-dangerous slippery slope on which everyone is purportedly terrified to fall down. Where do we draw the line? At what point do the extraordinary circumstances cease to exist, thereby forcing plaintiffs to file? In order to answer these questions, we must identify what those circumstances were, whether they were in fact truly extraordinary, and what the implications of the answers to such questions are for those seeking to procure restitution for past injury.

First, what is extraordinary? The court identified specific conditions that impeded the plaintiffs from seeking legal recourse,266 but there is no telling whether any one of these factors alone or the confluence of them constituted the "extraordinary." Certainly, had any one of them alone sufficed to exonerate the plaintiffs from timely suing, equitable tolling would arguably be justified in a large number of cases. The court's identification of the circumstances that barred the plaintiffs from timely filing is clearly fact-driven and case-specific,267 but its findings may have broader appeal. Certainly, accounts of African-Americans being targeted for brutal racial violence and then being prevented from pursuing meaningful legal recourse because of "intimidation, misrepresentation and denial" resonate throughout American

262 *Id.* at 135.


264 *Id.* at 1197.

265 *Id.* at 1199–1200.

266 The court identified "a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow." *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *30 (N.D. Okla. Mar. 19, 2004), *aff'd*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (2005).

267 That is, it was a race riot (perhaps the worst in this country); there was a full investigation conducted that unearthed voluminous evidence, including that of government complicity; there are specific live victims who personally experienced the violence who are seeking compensation today.
history. The Tulsa case is, all at once, both extraordinary and completely commonplace for Blacks living in America.268

Second, what are the implications of deeming something extraordinary? If the level of government complicity, racial violence, Klan domination, and de jure segregation in Tulsa were tragically not so unique or extraordinary as the plaintiffs contend, this may impact application of the equitable tolling doctrine. If we accept that the confluence of factors in the Tulsa case was the normal experience for many, if not most, African-Americans up to the end of the Jim Crow era, this may mean that the statute of limitations should be equitably tolled as a general matter for African-Americans seeking reparations for this time period. Or, it may mean that because African-Americans share this common experience, it ceases to be extraordinary, and therefore, does not warrant tolling. If we conclude that the Tulsa case was really an aberration, this may mean that tolling is appropriate in this case but not elsewhere. Certainly, the more unique the Tulsa case, the more credible the argument that tolling is appropriate. However, such a finding—although helpful for the plaintiffs in the Tulsa case—could harm similar race restitution cases in particular and the reparations movement in general. To the extent that the Tulsa case, or any other reparations case for that matter, is distinguishable, it stands a chance at successfully tolling the limitations period. If it fails to set itself apart, however, it may trigger the slippery slope contention.

Third, when do the extraordinary circumstances end? At what point did the extraordinary circumstances in the Tulsa case cease to exist, thereby warranting the statute’s running to resume? While acknowledging the devastating impact of the Tulsa race riot and its aftermath on the plaintiffs’ ability to timely bring a claim against the defendants, the court fell short of tolling the limitations period beyond the dismantling of the Jim Crow laws. Relying on the testimony of an expert witness, Dr. Leon Litwack, that the Jim Crow era ended in the 1960s,269 the court used this arbitrary date as the cutoff date for extraordinary conditions.

As the plaintiffs argued, this line is much more blurry. The plaintiffs contended that the brutality, fear, and denial that characterized the period from 1921 to the 1960s in Tulsa did not immediately cease upon the dismantling of the de jure Jim Crow system. To the contrary, the plaintiffs argued that these unfortunate circumstances—generally and in Tulsa specifically—continued, thereby leaving the victims of the race riot with the reasonable expectation that the judicial system would not be receptive to their claims and that pressing such claims would be futile and possibly dangerous.270 The

268 See Goble, supra note 1, at 19 ("The 1921 riot is, at once, a representative historical example and a unique historical event.").
270 Tulsa blamed African-American community leaders such as A.J. Smitherman, J.B. Stradford, and Charles T. Smithie for inciting the riot and unsuccessfully sought to extradite them from other cities to which they fled for their lives; thousands of other Greenwood residents fled. See, e.g., All Trains out of City Jammed with Refugees; Hundreds of Negroes Buy One-Way Tickets out of Tulsa Agents Say, TULSA TRIB., June 5, 1921.
plaintiffs’ arguments notwithstanding, the court did not accept the ongoing nature of such extraordinary circumstances.

The Tulsa case highlights the arbitrary and artificial nature of the extraordinary-conditions determination. Although the limitations period normally resumes once the filing obstacle has been removed—e.g., peace after wartime or the end of a brutal government regime—the model does not fit in the context of reparations cases. What happens when the line of demarcation is not that stark—when there is no moment when “peace” is declared or an oppressive regime is ousted from office? What if the oppressive conditions continue to exist on a more limited scale or the plaintiffs still suffer from fear and intimidation long after the initial injury has occurred? In reparations cases, a more nuanced approach is warranted. There have clearly been great strides made in the area of race relations and the justice system, but this does not resolve the question of whether conditions are extraordinary enough to justify tolling. In the Tulsa case, for example, the plaintiffs argued that the conditions that made it impossible for them to file pre–Jim Crow bled over into the roughly thirty years that followed.

Finally, who gets to decide what constitutes extraordinary circumstances? Who should determine whether and when it is reasonable to seek legal redress for racial violence? Whose voice, perspective, and experience counts when determining whether conditions are so excessive that it is impossible for victims to vindicate their civil rights? Courts enjoy tremendous discretion to make such determinations, but perhaps they should borrow the conceptual framework of the “eggshell skull defense” used in torts or the related “reasonable woman” standard used in the sexual harassment context and judge the propriety of equitable tolling from the vantage point of the victim. The plaintiffs’ arguments seem to hint at the adoption of such a framework. The plaintiffs posit that even assuming that the level of intimidation, fear of racial violence, inequities in the justice system, Klan domination in the courts, and Jim Crow discrimination diminished to the point of making it more plausible that African-Americans would bring suit for past wrongs.

271 See, e.g., Levy v. Stewart, 78 U.S. (11 Wall.) 244, 250, 255 (1870) (“[T]he right to sue revives when peace is restored . . . .”); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 537, 539–41 (1867) (“[R]estoration of peace removes the disability, and opens the doors of the courts.”).
272 See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (“Given these extraordinary conditions, any claims against Marcos for injury from torture, ‘disappearance’, [sic] or summary execution were tolled until he left office in February 1986.”).
273 See, e.g., Primm v. U.S. Fid. & Guar. Ins. Corp., 922 S.W.2d 319, 321 (Ark. 1996) (“[The eggshell plaintiff] rule embraces the principles that a tortfeasor must accept a plaintiff as he finds him and may not escape or reduce damages by highlighting the injured party's susceptibility to injury.”).
274 See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) (“[T]he reasonable person perspective fails to account for the wide divergence between most women’s views of appropriate sexual conduct and those of men . . . [U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.”).
post–Jim Crow, these plaintiffs in particular continued to labor under extraordinary conditions.

Given that it was impossible for plaintiffs to successfully bring suit until the publication of the Commission Report, equity demands that they be allowed to bring suit now. Shortly after the Civil War, the Supreme Court recognized this connection between the limitations period and legal disability: "The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other." Here, logic dictates that the court suspend the statute of limitations for that period of time where the courts were unavailable and plaintiffs could not access information vital to bringing their claims. Until just recently, there has been no legal theory under which the plaintiffs could seek reparations from the government.

V. The Underlying Policy Rationales for Statutes of Limitations Are Not Served by Time-Barring Reparations Cases

Regardless of whether the recent Tulsa reparations case fits within the exemptions commonly used by the courts to permit the litigation of stale claims, the case warrants consideration based on public policy. Even if the court had not misapplied the statute of limitations exemptions, the court could have entertained the litigation on the grounds that it is consistent with the relevant underlying policy rationales of limitations law. The primary

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275 See Caine, supra note 4, at 3 (noting the "profound and lasting effect" of the riot on some of its victims today). The preeminent scholar on the Tulsa race riot, Dr. Ellsworth, has concluded:

A half century after the riot, there were still plenty of black survivors who were fearful even to merely discuss the riot. (And, indeed, as recently as 2001, a riot survivor informed me that he was afraid that both he and his family would be punished for taking part in the lawsuit.).

Declaration of Dr. Scott Ellsworth, supra note 242, at 2–3; see also Franklin & Ellsworth, supra note 163, at 25 ("Of course, any one who lived through the riot could never forget what had taken place. And in Tulsa's African American neighborhoods, the physical, psychological, and spiritual damage caused by the riot remained highly apparent for years. Indeed, even today there are places in the city where the scars of the riot can still be observed.").

Similarly, in Hilao v. Estate of Marcos, the U.S. Court of Appeals for the Ninth Circuit tolled the limitations period until the President of the Philippines, Ferdinand Marcos, left office, for persons bringing claims against him for injuries due to "torture, disappearance, [sic] or summary execution." Hilao, 103 F.3d at 773. The Ninth Circuit credited plaintiffs' explanation of fear and intimidation as appropriate grounds for tolling:

Another expert witness testified that many victims of torture in the Philippines did not report the human-rights abuses they suffered out of intimidation and fear of reprisals; this fear seems particularly understandable in light of testimony on the suspension of habeas corpus between 1972 and 1981, and on the effective dependence of the judiciary on Marcos.

Id.

276 The problem, of course, is more complex when the concept is applied to those persons who continue to labor under the extraordinary conditions of slavery and its aftermath.


278 See, e.g., Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 473–76 (1975) (Marshall, J., concurring in part and dissenting in part) (arguing that where underlying policies of statute of limitations are not frustrated and settlement and reconciliation are enhanced, tolling should be permitted).
goals of ensuring fairness to the defendant, promoting efficiency, and bolstering institutional legitimacy are not undermined by permitting such claims.

A. Fairness to the Defendant

Rather than ensuring fairness for the defendant, foreclosing reparations claims because of untimeliness devalues fairness for the plaintiff.

1. Exposing Repose

The court's refusal to hear the Tulsa case as a means of providing repose for defendants and society at large is unjustified. Providing peace of mind and protecting a defendant's well-established expectations have been a hallmark of the Anglo-American legal system, but very few have sought to explain why. Examining repose as a preeminent rationale for limitations periods in reparations cases reveals its many shortcomings.

First, it is not at all clear why society should care more about satisfying a defendant's settled expectations that he escape liability than a plaintiff's settled expectations that the legal system will hold wrongdoers accountable for their misdeeds. Justice Holmes, in *The Path of the Law*, suggested that the pull towards repose is human nature. Relying on the law of adverse possession, Justice Holmes suggested that from a defense point of view, the defendant has gained a right that transcends, if not supplants, that of the plaintiff. The defendant's right stems from the intrinsic human act of self-preservation and entitlement:

> It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Certainly, claims for reparations have provoked deep resentment, defensiveness, and outright hostility. Mere discussion and research of the topic and its impact engender rage and intolerance. A corporation unjustly enriched by generations of cheap slave labor, a governmental system built on

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279 See Ochoa & Wistrich, *supra* note 23, at 460–61, 464 n.42 ("One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not be defeated." (quotation omitted)); 1 Wood, *supra* note 51, at 8–9 ("The underlying purpose of statutes of limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution."); see, e.g., A'Court v. Cross, 130 Eng. Rep. 540, 541 (K.B. 1825) ("Long dormant claims have often more of cruelty than of justice in them.").

280 As Justice Holmes posed, "[W]hy is peace more desirable after twenty years than before?" Holmes, *supra* note 24, at 476.

281 Id. at 477.

282 Id. ("Has the defendant gained a right or not? ... But if I were the defendant's counsel, I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser.").

283 Id.

284 For example, U.S. Representative John Conyers has tried unsuccessfully for years to get Congress to enact legislation that would merely study the issue of slavery and its impact and
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legally sanctioned discrimination, and many individuals unfairly privileged by generations of racial favoritism each hold onto their unmerited privilege as an entitlement. Is this response simply the product of the “deepest instincts of man” for which we cannot ask for more? Or is it possible to expect something greater? Even assuming that this sense of entitlement is intrinsically human, this does not countenance designing legal principles to accommodate a quality so base. Law is designed to establish rules that transcend instinctual human behavior so that justice and order prevail.

As an initial matter, there is no reasonable expectation of repose by the defendants in the Tulsa reparations litigation. In 1997, the defendants themselves commissioned the most comprehensive investigation of the Tulsa race riot to identify its victims, determine culpability, and ascertain the propriety of reparations, and then issued a report whose findings were adopted by the Oklahoma legislature. The Commission Report clearly established the moral responsibility of the City of Tulsa and the State of Oklahoma for their wrongdoing. What should follow is some measure of compensation for that wrongdoing. Upon failing to provide restitution voluntarily, the defendants cannot credibly argue that they were caught by surprise or that their settled expectations were altered when the plaintiffs shortly thereafter filed a lawsuit to force the defendants to take legal responsibility for their moral wrongdoing. Defendants should not be able to invoke repose as a defense where their culpability has been established—using repose as a shield from liability. Permitting such defense makes a mockery of the principle of repose. Had there been any expectation of repose, it was shattered by the defendants themselves.

Second, the erosion of repose in the context of criminal prosecutions for civil rights violence suggests that the same may be appropriate in the civil context. Prosecutors have recently seen it fit to reopen numerous criminal


These are not the only persons and entities that oppose reparations litigation. Some African-Americans, for example, also oppose reparations for a variety of reasons, including: fear that it will create a negative stigma, concern that it demonstrates dependence on the majority, a preference for other means for redressing slavery and past discrimination, and concern over how such a scheme would practically work. See, e.g., Jordan, supra note 14, at 558 (arguing that the “exclusive focus on slavery [by reparations litigators] is misguided” and proposing alternative of focusing on lynchings and race riots of more recent past).

In 1997, Oklahoma House Joint Resolution 1035 initiated the creation of The 1921 Tulsa Race Riot Commission. Goble, supra note 1, at 1. The Act was amended twice and enacted into law on April 6, 2000. Id. The Commission’s authority was extended to February 28, 2001. Id. The Commission issued its report on February 28, 2001. Id. The Act was amended twice and enacted into law on April 6, 2000. Id. The Commission’s authority was extended to February 28, 2001. Id. The Commission issued its report on February 28, 2001. Id.


See supra note 10.

The victims’ rights movement also suggests that many in society—at least in the criminal context—have grown weary of defendants’ interests predominating the legal system. See Ogletree, supra note 13, at 1058. The notion of providing repose for the defendant as justification for depriving plaintiffs the opportunity to seek restitution may be waning. Ochoa and Wistrich conclude:

In assessing the validity and weight of this purpose . . . it is necessary to ask how much value should be placed on the desire of wrongdoers, or of persons who are uncertain whether they are wrongdoers, for freedom from worry about being called
cases involving civil rights violence perpetrated decades ago.\endnote{290} If in criminal law, where the stakes for finding a defendant guilty are much greater—i.e., a defendant could lose his freedom or even his life\endnote{291}—society has thought it appropriate to entertain stale claims, why shouldn’t the same be true in the civil context? Finally, prioritizing repose wrongly protects and deflects American society from the critical and difficult job of coming to terms with the historical and current oppression of African-Americans. Recognition and reconciliation have not and will not take place until they replace repose as a preeminent value. Not even masked in language of restoration or healing for plaintiffs, some argue that plaintiffs seeking restitution for past acts of racial violence need to just “get over it.”\endnote{292} The opposition contends that the topic is too divisive and painful to deal with; however, such avoidance encourages not repose for defendants, but amnesia.\endnote{293}

2. Putting Evidentiary Problems into Perspective

Reparations cases present significant evidentiary problems, but it is important to put these problems into perspective. The difficulty and complexity of identifying plaintiffs, defendants, causation, and damages so remote in time is unquestionably daunting.\endnote{294} Yet, it is important to ask ourselves to account for past misdeeds. Currently, society appears to place relatively little value on such considerations.

Ochoa & Wistrich, supra note 23, at 461 (emphasis added); see Russell, supra note 17, at 1227–47; see also Bibas, supra note 192, at 2466 (“Thieves deserve no repose from the rightful owner’s claim.”).

\endnote{290} See Anthony V. Alfieri, Retrying Race, 101 MICH. L. REV. 1141, 1141 (2003); Todd Taylor, Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith, 16 B.C. THIRD WORLD L.J. 359, 359 (1996). Disrupting repose also works to help defendants. The Innocence Project is a case in point. In an effort to protect the innocent, there has been a groundswell of support for reopening cases where DNA or other evidence suggests that a defendant was wrongly convicted.

\endnote{291} See In re Winship, 397 U.S. 358, 371–72 (1970) (Harlan, I., concurring). The Court recognized this critical distinction between the criminal and civil context:

In a civil suit between two private parties for money damages . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor . . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

Id.

\endnote{292} See John McWhorter, supra note 14, at 36–37; Epstein, supra note 14, at 1192; Ogletree, supra note 13, at 1054–55 (“The victims’ families and communities are told to ‘get over it,’ even by the citizens of the towns still traumatized by their history of racial and ethnic violence as well as by black and white critics of reparations around the country.”); Horowitz, supra note 20, at 14; Horowitz, supra note 20; see also Brophy, supra note 20, at 1201–02 (categorizing the arguments opposing reparations).

\endnote{293} See Leon F. Litwack, Black Southerners in the Age of Jim Crow, appended to Plaintiffs’ Response to Defendant City of Tulsa’s Motion to Dismiss, Alternative Motion for Summary Judgment and Brief in Support, at Exhibit 15, Alexander v. Oklahoma, No. 03-CV-133-E (N.D. Okla. Jan. 6, 2004) (“It has been far easier to take refuge in historical amnesia, as Americans chose to do for much of the twentieth century, and not view these experiences as part of our heritage.”).

\endnote{294} That the evidentiary issues in reparations cases are difficult to surmount does not mean that such cases should be abandoned altogether. Other types of massive litigation, such as those involving asbestos and tobacco, have also posed daunting evidentiary challenges. Where the
whether the Supreme Court was correct when it stated more than a century ago: "[T]ime is constantly destroying the evidence of rights." 295 Although experience and logic suggest that the answer is yes, 296 the answer within the context of reparations claims is more nuanced.

First, the presumption that evidence is less reliable over time in the context of reparations cases is not necessarily true. This is because statutes of limitations are overinclusive: they ban not only those claims that are based on inaccurate factual findings, but those claims based on accurate ones as well. *Wood v. Carpenter* concludes that the "bane and antidote go together." 297 But does a statute of limitations remedy the problem of deteriorating evidence? Do prohibiting a lawsuit from going forward and preventing inaccurate fact finding "go together"? Not necessarily. 298 Some meritorious claims thus are barred by what is inevitably an arbitrary cutoff. The limitations bar does not neatly divide claims into those based on accuracies and inaccuracies. Its efficacy as a means of protecting evidence is crude at best.

Critical to the inquiry is the type of evidence under consideration. For example, testimonial evidence—although subjected to the ravages of time 299 —may be more forthcoming today than it would have been in the past. The passage of time itself may heal wounds that enable victims to overcome suppressed memories and their fear of coming forward. Additionally, the greater the distance from the events themselves, the easier it may be for defendants to disclose their involvement without having to take personal and direct responsibility for the wrongdoing. The passage of time may be healing and cathartic, allowing the parties to articulate the unspeakable.

The passage of time has resulted in circumstances that make it much more likely that reliable evidence will surface. The creation of impartial, bipartisan investigative commissions has unearthed long-buried evidence and jogged collective memories. The very existence of investigative commissions and a legal system committed to eradicating at least the most egregious forms of de jure civil rights violations may resurrect testimonial evidence. Certainly, within the criminal context, aggressive and reinvigorated investiga-


296 See *Ochoa & Wistrich*, supra note 23, at 474–75; see also *Epstein*, supra note 62, at 1181 ("With the passage of time, the evidence available regarding a given legal issue necessarily becomes stale."); *Letsou*, supra note 62, at 227 ("The passage of time magnifies uncertainty and evidentiary problems."); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 446 (1973) ("Court delay increases error costs . . . because evidence decays over time, increasing the probability of an erroneous decision.").

297 *Wood*, 101 U.S. at 139.

298 See *Ochoa & Wistrich*, supra note 23, at 477 ("Limitation of actions is a rather blunt instrument for ensuring accuracy."); *Callahan*, supra note 23, at 134 (concluding that given that statutes of limitations bar "good" claims based on accurate facts as well as "bad" ones, the preservation of evidence is not a justification for such statutes).

299 Despite the passage of time, "hundreds and hundreds . . . tell us that what happened in 1921 in Tulsa is as alive today as it was back then. What happened in Tulsa stays as important and remains as unresolved today as in 1921." *Goble*, supra note 1, at 4.
tions of civil rights murders have led to new convictions or confirmation of prior ones.300

Other evidence—although not contemporaneous to Jim Crow violence—may be reliable despite the passage of time. With major advances in modern technology, communications, and science—such as the computer, Internet, and DNA testing—it is easier to collect, record, and preserve evidence than ever before. Witnesses, whose general longevity has increased, may be found through computer search engines and contacted by cellular phone, facsimile, or e-mail. Persons can be identified positively through DNA testing and genealogy records. Such advances have enabled prosecutors today to successfully pursue those responsible for some of the most notorious and well-known acts of civil rights violence. It is thus important to recognize that there are times when evidence, like a fine wine, improves over time.301

Second, even assuming that issues such as the identification of plaintiffs, defendants, causation, and damages in reparations cases cannot be determined with absolute certainty, it is important to recognize that the legal system often provides at best “rough justice.” On the one hand, it seems obvious that the more accurate the fact finding the better.302 Accurate fact finding in the legal system accomplishes important objectives: the guilty are punished and the innocent exonerated; accurate adjudication deters misconduct; and the legal system is legitimized.303 On the other hand, although accuracy is a laudable goal,304 it is often neither attained nor attainable.305 Decision making based on perfect information is admittedly aspirational.306

The Anglo-American legal system is arguably designed to play the limited role of resolving disputes, as opposed to determining truth.307 This reality is reflected in the “preponderance of the evidence” standard in civil cases. Plaintiffs are charged with convincing the fact finder that it is more likely than not that their version of the facts is true, not that their version is abso-

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300 See supra note 290 and accompanying text.
301 See also Ochoa & Wistrich, supra note 23, at 475 (noting that claims based primarily on documentary evidence may survive the passage of time); Green, supra note 54, at 989–1003 (arguing that in toxic tort cases, statutes of limitations diminish the accuracy of fact finding because they require claims to be filed prematurely—before adequate scientific data showing causation is developed, before the plaintiff has suffered significant loss, and before it is possible to assess the course of the plaintiff’s condition).
302 See Ochoa & Wistrich, supra note 23, at 472 n.80 (“The degree of accuracy is a central concern of adjudication.” (quotation omitted)); Daniel R. Ortiz, Neoactuarialism: Comment on Kaplow (1), 23 J. LEGAL STUD. 403, 403 (1994) (“Accuracy is a central, if not the central, value of adjudication.”); Stephen McG. Bundy, Valuing Accuracy—Filling Out the Framework: Comment on Kaplow (2), 23 J. LEGAL STUD. 411, 433 (1994) (“Accuracy is a central aspiration of any procedural system, but it cannot be the only aspiration.”).
303 See Ochoa & Wistrich, supra note 23, at 472–73.
304 Some argue that accuracy is more important in certain types of civil cases than others. See, e.g., Bundy, supra note 302, at 431 (identifying civil rights, torts, and employment cases as those where accuracy is paramount because of a defendant’s “hazy sense of how much harm they are doing”).
305 See Ochoa & Wistrich, supra note 23, at 473.
306 See id.
307 See id. at 473 n.87 (“Of course, the principal purpose of the legal process is not to obtain correct answers; it is to resolve disputes.” (quotation omitted)).
lutely true. In cases where plaintiffs seek a group remedy, such as class actions and other aggregate litigation, our legal system regularly provides “rough justice.” The argument for a group remedy in reparations cases has been made persuasively by others.\(^{308}\) Certainly, the judiciary’s overwhelming encouragement of settlements of mass litigation—which are by definition massive compromises—illustrates the legal system’s tolerance, if not endorsement, of “rough justice” outcomes. To the extent that the legal system is already limited in its capacity to determine the truth, maximizing the accuracy of fact finding is critical.\(^{309}\) But once that maximization has occurred, it behooves the court at that point to provide some measure of relief.

Over a century ago, the Supreme Court concluded that where evidence is destroyed by the ravages of time, a presumption in favor of the defendant should result.\(^ {310}\) Wood concluded that mere delay should result in a conclusive bar.\(^ {311}\) In the context of reparations claims, however, the potential inability to obtain the most accurate evidence should not foreclose a cause of action altogether. Rather than providing fairness to the defendant, such an outcome would only result in unfairness to the plaintiff. It is better for the judiciary to provide “rough justice” than no justice at all.

3. Curtailing Plaintiff Misconduct

Although a statute of limitations purports to provide fairness to the defendant by curtailing plaintiff misconduct, it is not obvious that in reparations cases such a statute prevents plaintiff fraud, promotes diligence, or ensures an equal playing field between the parties. First, those opposing tolling fear that plaintiffs will inflate their injuries and fraudulently identify themselves as victims and, therefore, beneficiaries of reparations litigation. It is not clear, however, that a plaintiff’s incentive and ability to commit fraud is deterred by limitations law. Some scholars have suggested that other mechanisms may more effectively curtail plaintiff misconduct and prevent the admission of unreliable evidence.\(^ {312}\) It is also unclear whether the defendant would not be equally tempted to commit fraud in the absence of a limitations period. There is nothing to suggest that, upon being sued, a defendant would not also resort to fabricating evidence. A defendant might fraudulently deny itself as a party, diminish its involvement in the plaintiff’s injury, or devalue the injury itself. There is no reason to believe that a defendant’s evidence would escape the ravages of time any more than a plaintiff’s.\(^ {313}\) Limitations law may thus fail to curtail fraudulent behavior by either party. In any event, in the Tulsa case, where the plaintiffs are live victims of the race riot or their

\(^{308}\) See generally Russell, supra note 17.

\(^{309}\) See Ochoa & Wistrich, supra note 23, at 473.


\(^{311}\) Id.

\(^{312}\) See Ochoa & Wistrich, supra note 23, at 480; Developments in the Law—Statutes of Limitations, supra note 22, at 1186. For example, some scholars contend that measures such as the parol evidence rule, statute of frauds, and strict evidence rules may better address concerns about fraud. See Ochoa & Wistrich, supra note 23, at 480; Developments in the Law—Statutes of Limitations, supra note 22, at 1186.

\(^{313}\) See Ochoa & Wistrich, supra note 23, at 480.
direct descendants, and the defendants have conceded culpability in the riot, concerns about fraudulent identity are greatly diminished.

Second, those opposing tolling statutes of limitations fear that in the absence of such temporal restrictions, plaintiffs will be dilatory in bringing their claims. It is unclear whether barring a plaintiff from seeking recovery is a sensible punishment for dilatory conduct. Professor Ochoa and Judge Wistrich suggest that it is not, because denying an innocent plaintiff the right to vindicate his rights would unfairly give the guilty defendant a windfall.\(^{314}\) This is hardly good policy. Instead, they propose other types of punishment for the plaintiff, such as making him forfeit his damages to charity.\(^{315}\)

Statutes of limitations are also a poor deterrent of plaintiff misconduct where the plaintiff is unaware of her potential claim.\(^{316}\) Under such circumstances, a punitive approach does nothing to encourage diligence. For example, in the Tulsa case, the plaintiffs had no way of knowing or fully understanding their claims until the release of the Commission Report. The court makes much ado over the fact that a small minority of plaintiffs actually brought claims contemporaneous with the Tulsa riot. The judiciary may want to encourage plaintiffs to overcome their adverse circumstances and pursue their rights in a timely manner, but it should not expect them to overcome such extraordinary circumstances in order to enjoy the protection of the law.

Finally, the notion that limitations law is necessary to ensure that plaintiffs do not have an unfair advantage over defendants in the preservation of evidence is inapplicable here. Where a plaintiff is unaware of a potential claim, there is no risk that the plaintiff will deprive defendants of notice of the lawsuit. If both parties are ignorant of the potential claim, they may be equally vulnerable to the risk of evidence deterioration over time.\(^{317}\) Under these circumstances, the plaintiff may suffer more because he bears the primary burden of proof.\(^{318}\) More important, if the plaintiff is ignorant of his potential claim, and the defendant is knowledgeable, the defendant is in a superior position.\(^{319}\) In this situation, the defendant has the opportunity to preserve helpful evidence (or worse, destroy unhelpful evidence) for his defense, thereby allowing the plaintiff’s evidence to deteriorate and her concomitant claim to die.

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\(^{314}\) Id. at 491.

\(^{315}\) See id. at 492.

\(^{316}\) Id.

\(^{317}\) Id. at 486. Where both parties are aware of a potential claim, they can both take measures to preserve evidence. Id.

\(^{318}\) See Hardin v. Straub, 490 U.S. 536, 543 n.12 (1989) (noting that an open-ended tolling provision would not result in plaintiffs frequently filing claims based on antiquated events because plaintiff bears burden of proof).

\(^{319}\) See Ochoa & Wistrich, supra note 23, at 486–87. Rather than the plaintiff being perceived as the knowledgeable party, hoarding evidence and lying in wait to sue the unsuspecting and ill-prepared defendant, just the opposite may be true. In the cases of a corporate or institutional defendant, it may be accustomed to being sued. As a “repeat player,” the defendant may hoard evidence for its benefit and lie in wait for ill-informed plaintiffs to let the statute of limitations expire. The advantages repeat players have in the context of alternative dispute resolution and settling cases are well known.
Whether society should condone, if not promote, such defendant misconduct has been the subject of concern. Where a principal goal of limitations law—equalizing the playing field between the parties—is not served because the defendant has notice of a potential claim, some courts have contended that the statute of limitations should be liberally construed.

Application of this principle to the Tulsa case favors the plaintiffs being able to pursue claims remote in time. For example, the defendants were admittedly aware of the plaintiffs' potential claims and worked hard to conceal them. The defendants' efforts were in large measure successful. To the extent that the plaintiffs were unaware of their potential claims—an argument the plaintiffs persuasively make—and the defendants were aware of those claims, the playing field tipped in favor of the defendants. Under this scenario, "the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied."

B. Promoting Efficiency

Although statutes of limitations generally promote efficiency in our legal system, this is not necessarily so for reparations cases. First, the presumption that transaction costs are greater the more remote in time a cause of action is does not necessarily hold true for reparations litigation. The costs of tracking down documents, witnesses, and other reliable evidence in such cases are indeed high, as evidenced by the amount of money the Tulsa Commission spent on its investigation and report, but there is no telling what they would have been in 1921. Given the lengths to which evidence was covered up and the extent to which the legal system was corrupted and co-opted by the Ku Klux Klan and others, contemporaneous litigation would have encountered its own significant evidentiary challenges. Controlling for inflation, it is not obvious that the costs associated with these evidentiary concerns would have been significantly less than those incurred today.

Second, although limitations law is a procedural mechanism that may curtail courts' burgeoning dockets, this modern justification for its application is weak, especially in the context of reparations cases. Smaller dockets—although a beneficial byproduct of limitations periods—should not drive courts to deprive plaintiffs of their substantive rights. Given the tiny fraction of cases involving reparations claims, barring such cases because of limitations periods would have a nominal effect on the federal judiciary's caseload.

Third, the notion that limitations law reduces undesirable claims because stale claims are more likely to be meritless is suspect. The premise for this belief—that a plaintiff is more likely to timely file a claim if she believes it is strong and important—is unfounded in the reparations context. There are

320 See, e.g., id. at 486–87.
322 Id.
323 See, e.g., Bowen v. City of New York, 476 U.S. 467, 481 (1986) (noting that the statute of limitations is also designed "to move cases to speedy resolution in a bureaucracy").
324 See Ochoa & Wistrich, supra note 23, at 498.
325 It is also unfounded in other cases where people have been seriously victimized. For example, the propriety of limitations periods is being examined in the context of rape and child
numerous reasons why a plaintiff seeking relief for damages resulting from a race riot might delay litigation, or eschew it altogether. As discussed above, certainly the physical, material, and psychological devastation of being assaulted, having your home burned to the ground, or watching a parent get shot and killed—at the hands of not only individuals but the government itself—would potentially disable anyone from timely filing a lawsuit. This "disability"—although not recognized as a legal one—operates as effectively as a formally recognized incapacity.\footnote{See, e.g., Alexander v. Oklahoma, 382 F.3d 1206, 1217 (10th Cir. 2004) (disabilities include competency and age), cert. denied, 125 S. Ct. 2257 (2005).} Tremendous fear and intimidation shortly thereafter would also explain why victims would delay filing suit; indeed, some victims of the Tulsa race riot remain fearful of the possible repercussions for giving deposition testimony and speaking out.\footnote{See Caine, supra note 4, at 3–4 (noting the "profound and lasting effect" of the riot on some of its victims today).} Ignorance of the requisite facts for bringing a cause of action and false assurances by the responsible parties that relief will be provided also may delay timely filing. Victims of the Tulsa race riot allege that they did not have sufficient knowledge of their cause of action until publication of the Commission Report and that the government had lulled them into not filing earlier by promising it would voluntarily provide restitution.\footnote{See supra Part IV.C.} These conditions—alone or considered separately—explain why the courts should not use timeliness as a proxy for merit when determining whether reparations claims should be time-barred.

Finally, statutes of limitations are efficient because they provide a cutoff date for barring claims, but the courts exercise sufficient discretion to undermine the certainty that such a cutoff might provide. The nature of reparations litigation requires the courts to carefully and seriously scrutinize the applicability of equity principles and the exemptions doctrines. In the Tulsa case alone, litigation over the limitations issue has been going on for years—replete with discovery, hearings, and full briefings. Both the federal district court and the Tenth Circuit Court of Appeals have issued opinions on this crucial topic.\footnote{See Alexander, 382 F.3d at 1206 (affirming district court's dismissal on statute of limitations grounds); Alexander v. Oklahoma, 391 F.3d 1155, 1159 (10th Cir. 2004) (denying en banc review), cert. denied, 125 S. Ct. 2257 (2005).}

In sum, an efficiency rationale fails to adequately justify barring reparations claims that are brought after the statute of limitations has expired.

C. Bolstering Institutional Legitimacy

One of the most important, yet unspoken, rationales for statutes of limitations is legitimization of the legal system. Courts are not permitted to exercise unfettered discretion, but instead are checked by clear boundaries embodied in limitations law. Dismissal of reparations cases thus may simply demonstrate a reasonable application of the time bars established by the leg-
islature. The problem with this reasoning is that it fails to properly contextualize the plaintiffs' claims. The purported absurdity of seeking relief for claims so old is dissipated when one considers why it is that such claims are being brought now. The reasons the plaintiffs have chosen to file suit recently (like all plaintiffs) are varied and complicated, but they all stem from the fact that the prior timely attempts of the plaintiffs' predecessors were unsuccessful, through no fault of their own. There would be no need for the plaintiffs to seek redress now, had restitution been initially provided. Some African-Americans immediately sought relief in the aftermath of the Tulsa race riot to no avail. It is no wonder that such efforts were unsuccessful, as the courts were unavailable to the plaintiffs at that time—a reality the court conceded. Taken within context, it is reasonable that the plaintiffs would only seek reparations now.

The validity of the legal system is also undermined by the court's recent dismissal of the case because it grants guilty defendants a windfall to the detriment of blameless plaintiffs. The Tulsa government conceded its failure to protect its citizens from mob violence and even admitted to participating in it—leaving up to three hundred dead, thousands homeless, and many businesses destroyed. The victims of the Tulsa race riot were assured restitution by the government in the aftermath of the riot. The district court and Tenth Circuit concluded respectively that, following the riot, the courts were unavailable to the riot victims and the circumstances so extraordinary that the plaintiffs could not have possibly brought suit until at least the 1960s, with the dismantling of Jim Crow, or as late as 1982, with the publication of *Death in a Promised Land*. The most comprehensive and exhaustive study of the Tulsa race riot, which for the first time disclosed to riot victims the full nature and scope of their legal claims, was not published until 2001. Consequently, the plaintiffs timely filed for restitution two years after the publication of the Commission's Report. The injustice of the Tulsa circumstances is unsettling.

The legitimacy of the legal system is also undermined by the court's ahistorical and unrealistic expectations of the plaintiffs—as victims of government-sanctioned extreme racial violence and discrimination—to pursue litigation shortly after the "injury" occurred. The court diminishes the nature and scope of the injury by parsing out individual tort-related injuries, as opposed to recognizing the systemic nature of the violation. The extraordinary nature of the Jim Crow era and its troubling legacy today warrant a different approach to traditional litigation. The legitimacy of a legal system that pur-

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330 They may range from strategic, to political, to psychological, to practical, to circumstantial, or a combination of them all.
332 See Goble, supra note 1, at 11–13, 16; see also O'Dell, supra note 152, at 144.
334 The Commission Report conceded that Scott Ellsworth's book in 1982, *Death in a Promised Land*, was only a quarter the size of his accompanying report to the Commission Report and contained far less evidence than what is available today. Goble, supra note 1, at 8.
335 It is undisputed that Oklahoma's two-year statute of limitations applies. See Alexander, 382 F.3d at 1215.
ports to value every citizen's right to be heard and the equal protection of the laws, but fails to adhere to such values when the implications are most profound, must be called into question. Foreclosing reparations claims because of untimeliness inappropriately elevates procedural norms over the pursuit of just outcomes.336

Although limitations law is designed to curb judicial discretion and inoculate decisions from bias, such law does not forbid courts from applying (or failing to apply) equitable doctrine in a biased manner. There exists a collective blind spot when it comes to understanding the residual and ongoing effects of the legacy of Jim Crow violence on society as a whole. It is fundamentally unfair that the courts regretfully eschew reparations claims as beyond the scope of their mandate and pass it on to the legislature,337 and the legislature responds with an equal unwillingness to consider the issue.338 Consequently, there is no relief for the victims and their descendents for some of the most profound human rights violations in this country's history.

VI. Conclusion

In the context of reparations claims, it is time for the courts to take a different approach to the equitable tolling doctrines of statutes of limitations. Reparations claims push the concepts of statutes of limitations and equitable tolling doctrine to their outer edge. Where the claims are so horrendous they cry out for equitable relief and yet so remote in time they seem insurmountable, the legal system must reexamine the underlying policies of statutes of limitations and recognize when they are not being served.

336 See Russell, supra note 17, at 1225–27, 1258–59. Although there has not been any legislative alteration of the applicable statute of limitations, a few congressional representatives have been receptive to hearing the plaintiffs' argument for tolling in this case.


338 See supra note 284.