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A Taxonomy of Silencing: The Law's 100 Year Suppression of the Tulsa Race Massacre

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Suzette M. Malveaux, *A Taxonomy of Silencing: The Law's 100 Year Suppression of the Tulsa Race Massacre*, 102 B.U. L. REV. 2173 (2022), available at <https://scholar.law.colorado.edu/faculty-articles/1587>.

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SYMPOSIUM

**16TH ANNUAL LUTIE A. LYTLE
BLACK WOMEN LAW FACULTY
WORKSHOP**

**A TAXONOMY OF SILENCING: THE LAW'S 100-YEAR
SUPPRESSION OF THE TULSA RACE MASSACRE**

SUZETTE MALVEAUX*

ABSTRACT

Over one hundred years have passed since the 1921 brutal massacre of Tulsa's African American community. This notorious attack came at the hands of a white mob and with the government's blessing. With numerous centennial commemorations behind us, what has been learned? The answer to this question is crucial to preventing similar atrocities in the future.

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One lesson is how important it is to tell the story—to honor the voices of those who lived through one of the most infamous government-sanctioned racial attacks in U.S. history. Knowledge is power.

Another lesson is how pernicious the law can be in silencing those voices. In many ways things have come full circle. The law has morphed over time to mute the stories and squash the resilience of the survivors: from the crushing use of violence and intimidation to destroy Black Tulsa; to the antiseptic use of zoning regulations, segregation mandates, urban renewal policies, and systemic discrimination to prevent rebuilding; to the cramped use of the statute of limitations to escape accountability; to the deceptive use of antidiscrimination law in public schools to quash meaningful discourse about the Tulsa Race Massacre itself. There is a through line of silencing that goes from 1921 to the present, with law leading the way.

This Article reveals how the Tulsa Race Massacre survivors continue to demonstrate tenacity in response to government obstructionism. One hundred years later, the survivors continue to demand that the legal system hear their cries for justice. Chameleon-like, the law changes to meet the times, only to be outmatched by the resilience of Black Tulsa.

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INTRODUCTION

Over one hundred years have passed since the 1921 brutal massacre of Tulsa's African American community. Numerous centennial commemorations marked this notorious attack in 2021. Now that the commemorative activities have subsided, what has been learned? The answer to this question is crucial to preventing similar atrocities in the future.

One lesson is the importance of telling the story and honoring the voices of those who lived through one of the most infamous government-sanctioned racial attacks in U.S. history. Knowledge is power.

Another lesson is the realization of the law's pernicious capacity to silence those voices. From 1921 to the present, in many ways, things have come full circle. Chameleon-like, the law has morphed over time to mute the stories and lives of the survivors.

In its most barbaric form, the government used brute force, violence, and intimidation to outright destroy the Black Tulsan community. A campaign of lynchings and lawlessness set the stage for one of the worst government-sanctioned racial massacres in U.S. history. With a government overwhelmingly dominated by the Ku Klux Klan ("KKK" or "Klan") and committed to white supremacy, it was not difficult for the state and local governments to bring all of their resources to bear to crush Black Wall Street. The City of Tulsa and the state of Oklahoma armed, empowered, and instructed a white mob to decimate one of the most successful Black communities—a feat accomplished in just twenty-four hours.

Violence as a means of control was replaced with more bloodless—but no less tenacious—attempts to squash the Greenwood community. In the face of tremendous resilience, the government turned to the antiseptic use of zoning regulations, segregation mandates, urban renewal policies, and systemic discrimination to prohibit community rebuilding. Silencing Black success required a far more sophisticated, systematic approach. Thus, the government employed laws and policies that operate as institutional barriers to recovery—an approach that has resulted in Black Tulsans faring worse on almost every economic and social indicator today.¹

Not only has the law silenced Black success, it has also silenced white brutality. Almost immediately after the Tulsa Race Massacre ("Massacre"), the government began a well-documented campaign to hide what happened. From destroying evidence, to not prosecuting whites for any crimes, to burying Black bodies in unmarked graves, to erasing the Massacre from the history books, the government engaged in a conspiracy of silence that left later generations unaware of the Massacre's existence.² Embarrassing national publicity following the Massacre catalyzed government officials to make false promises

¹ See *infra* Section II.B.

² See John Hope Franklin & Scott Ellsworth, *History Knows No Fences: An Overview*, in *TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921*, at 21, 25 (2001).

of restitution to Black Tulsans and incentivized white media to spin a counternarrative blaming Black Tulsans for starting a riot. It wasn't until almost eighty years later that the silence was broken by the publication of a bipartisan, state-commissioned report in 2001.³ After a comprehensive, four-year investigation, the record laid bare not only the gruesome attack on Greenwood, but also the government's active participation and leadership in the mayhem. The official erasure was unsuccessful, exposing the first government-sanctioned terrorist attack against American citizens on U.S. soil.

The law, however, would be wielded again to mute the voices of Massacre survivors and extinguish white accountability, this time through the federal court system. Upon learning of the government's complicity and its concomitant refusal to provide restitution, the survivors brought their first constitutional lawsuit against the City of Tulsa and the state of Oklahoma.⁴ Plaintiffs' biggest challenge was preventing Oklahoma's two-year statute of limitations from silencing their claims. The court's cramped interpretation and application of the filing deadline and its potential exemptions resulted in plaintiffs' claims being dismissed and their constitutional rights being extinguished. While an even-handed, consistent, judicial application of objective standards makes sense, equally critical is judicial discretion exercised equitably and justly. None of the goals of the limitations period—promoting efficiency, enhancing fairness to the defendant, or bolstering institutional legitimacy—were served by dismissing this case. Instead, the law shut down the claims and arguably the claimants themselves. The court's refusal to hear the Tulsa case continued the law's pattern of silencing.

Finally, the law has morphed again to quash the success of Black Tulsans and to hide white obstructionism—this time in the form of educational censorship. Just as knowledge of the Massacre was penetrating the mainstream consciousness surrounding the centennial anniversary, Oklahoma enacted a law—in the guise of an anti-discrimination statute—that threatens to quash robust, meaningful discussion of the Massacre and other racially-charged topics in the state's public schools. Teachers attempting to educate their students in a comprehensive and culturally competent manner reasonably fear that their pedagogy may cost them their jobs, or worse, their personal safety.

In sum, there is a through line of silencing that has gone from the Massacre to the present, with the law leading the way. This taxonomy of silencing reveals a painful reality about the law's centrality in subjugation.

However, there is another noteworthy through line—the resilience of Black Tulsans. The survivors of the Massacre are equally tenacious. One hundred years later, Black Wall Street's centenarians are still demanding that the legal system hear their cries and demands for justice. This Article attempts to give voice to their plight and power.

³ See TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, *supra* note 2, at 1.

⁴ See *infra* Part III.

The Article is organized as follows. Part I hears from the Massacre survivors themselves and provides a first-hand account of the Massacre's legacy and the survivors' resilience. Part II illustrates the law's silencing of Black excellence through techniques ranging from brute terrorism to sterile statutes that obstructed Black Tulsa's rebuilding. Part III describes the law's silencing of white brutality via the government's successful coverup of the Massacre, exemption from accountability under the statute of limitations, and ban on meaningful discourse about the Massacre in public schools today. The Article concludes with a tribute to the survivors for their strength, courage, and humanity and a call to heed their voices and demand for justice.

I. A CENTURY OF RESILIENCE

One hundred years after the Massacre, its targets refuse to be silenced. Just days before the 2021 centennial anniversary of the Massacre, the oldest living survivor, Viola Fletcher ("Mother Fletcher"), crossed the country and arrived at the nation's capital, for the very first time, to tell Congress her story of resilience.⁵ She squarely faced the nation's leaders and said: "I am here seeking justice. I am here asking my country to acknowledge what happened in Tulsa in 1921."⁶ She then went on to share her tragedy.

She recalls her experience as a child on that fateful night, May 31, 1921, feeling "rich—not just in terms of wealth, but in culture, community, and heritage."⁷ She describes a tranquil childhood with strong, loving family members, neighbors, and friends. She felt safe and comfortable, nestled in a "beautiful home" with her parents and five siblings in a supportive community.⁸ In one stroke, all of this was taken from her and forever seared in her memory. Even as a centenarian, she vividly recalls the childhood trauma:

I will never forget the violence of the white mob when we left our house. I still see Black men being shot, and Black bodies lying in the street. I still smell smoke and see fire. I still see Black businesses being burned. I still hear airplanes flying overhead. I hear the screams. I live through the Massacre every day.⁹

Overnight, a life of promise was snuffed out: "We lost everything that day. Our homes. Our churches. Our newspapers. Our theaters. Our lives. Greenwood represented the best of what was possible for Black people in America—and for all people."¹⁰ Instead of a bright future, she was denied educational opportunity

⁵ *Continuing Injustice: The Centennial of the Tulsa-Greenwood Race Massacre: Hearing Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary*, 117th Cong. 11 (2021) [hereinafter *Continuing Injustice*] (statement of Viola Fletcher ("Mother Fletcher"), Oldest Living Tulsa Race Massacre Survivor).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 12.

(not progressing beyond the fourth grade) and has had to scrape by as a domestic servant in white homes.¹¹ Despite her plight, Mother Fletcher's unrelenting determination is palpable: "I am asking that my country acknowledge what has happened to me. The trauma. The pain. The loss. And I ask that survivors and descendants be given a chance to seek justice."¹²

Mother Fletcher's brother, one-hundred-year-old Hughes Van Ellis, also testified before Congress at the Massacre's 2021 centennial hearing. A World War II veteran, he poignantly described the irony of being willing to fight for freedom abroad after having been a "refugee[] in [his] own country" because of the Massacre.¹³ Even after the destruction of his home and community, he believed that "in the end, America would get it right."¹⁴ Mr. Van Ellis's commitment to justice and his belief in America's potential is resolute:

We are asking for justice for a lifetime of ongoing harm. Harm that was caused by the Massacre. [The government] can give us the chance to be heard and give us a chance to be made whole after all these years and after all our struggle. I still believe in America. I still believe in the ideals that I fought overseas to defend.¹⁵

The last of three living survivors in 2021, Lessie Evelyn Benningfield Randle ("Mother Randle"), also relished the opportunity to look Congress "in the eye" and ask for justice after waiting for so long.¹⁶ Mother Randle's story is familiar. At the age of six, Mother Randle felt "very safe" living with her grandmother in a "beautiful Black community . . . filled with happy and successful Black people."¹⁷ Her childhood memories were full of toys, promise, and nothing to fear, until the Massacre.¹⁸

Mother Randle describes the scene of the Massacre as being "like a war," recalling "White men with guns [who] came and destroyed my community."¹⁹ They looted and pillaged, burned down Black homes and businesses, and murdered Black Tulsans.²⁰ Mother Randle heard that "they just dumped the dead bodies into the river."²¹ She recalls the incomprehensible racial hatred that

¹¹ *Id.* at 11.

¹² *Id.*

¹³ *Continuing Injustice*, *supra* note 5, at 16 (statement of Hughes Van Ellis, Tulsa Race Massacre Survivor and World War II Veteran).

¹⁴ *Id.*

¹⁵ *Id.* ("This is why we are still speaking up today . . .").

¹⁶ *Id.* at 20-21 (statement of Lessie Benningfield Randle ("Mother Randle"), Tulsa Race Massacre Survivor).

¹⁷ *Id.* at 20.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

motivated the attack.²² This inexplicable nightmare remains top of mind for Mother Randle:

I remember running outside of our house. I ran past dead bodies. It wasn't a pretty sight. I still see it today in my mind—100 years later. I was so scared—I didn't think we would make it out alive. I remember people were running everywhere. . . . I have survived 100 years of painful memories and losses.²³

With the opportunity to rebuild taken away from her and the Black Tulsan community, Mother Randle has “lived much of [her] life poor” in a dilapidated “ghetto.”²⁴ She believes, however, that she has lived to her age to give voice to what happened, and to hold the city of Tulsa and the state of Oklahoma accountable.²⁵ Her resilience is unflappable:

America is full of examples where people in positions of power . . . have told us to wait. Others have told us it's too late. . . . I am here today, at 106-years-old, *looking at you all in the eye*. We've waited too long, and I am tired. . . . Please give me, my family, and my community some justice.²⁶

This was not the first time centenarians had traveled to Washington, D.C., to seek justice in the courts by testifying before Congress.²⁷ As part of the only constitutional case brought in federal court against the City of Tulsa and the state of Oklahoma twenty years prior, Tulsa elders went to the halls of Congress to bear witness to Tulsa's atrocities.²⁸ In support of legislation that would have tolled the two-year statute of limitations for bringing constitutional claims against the government, Massacre survivor Dr. Olivia Hooker testified before congressional leaders.²⁹ She described the Massacre's crushing destruction and her unwavering determination to carry on.³⁰

²² *Id.* (“The white people who did this to us, were filled with so much hate. It is disgusting that they hate us for no reason except that we are Black people.”).

²³ *Id.*

²⁴ *Id.* at 21.

²⁵ *Id.* She testified: “By the grace of God, I am still here. I have survived. I have survived to tell this story. I believe that I am still here to share it with you. Hopefully *now*, you all will listen to us.” *Id.* at 20. She describes how the City and County of Tulsa, the Tulsa Chamber of Commerce, and the state of Oklahoma “are still responsible for making it right.” *Id.*

²⁶ *Id.* at 21.

²⁷ See *Tulsa-Greenwood Race Riot Claims Accountability Act of 2007: Hearing on H.R. 1995 Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary*, 110th Cong. 12-35 (2007) [hereinafter *Accountability Act Hearing*] (including testimony from experts and survivors involved in constitutional litigation).

²⁸ See *id.* at 10-11.

²⁹ *Id.* (introducing Olivia Hooker at hearing on House Bill 1995, which would have tolled statute of limitations).

³⁰ *Id.* at 31-32 (statement of Olivia Hooker, Ph.D, James B. Duke Professor Emeritus of History, Duke University School of Law).

On May 31, 1921, Dr. Hooker's parents owned a beautiful home and "one of the most prominent stores in the Greenwood District."³¹ This successful family, like many in Greenwood, faced the wrath and violence of white Tulsans that day. Without provocation, the white Tulsans stole the Hooker family's furniture and deliberately smashed or destroyed what they left behind.³² Dr. Hooker recalls: "The mobs hacked up our [family's] furniture with axes and set fire to my grandmother's bed and sewing machine."³³ The white Tulsans took the family's fine jewelry, furs, and silver.³⁴ Rather than running away, Dr. Hooker's mother stayed in defiance and poured water on their house to keep it from burning.³⁵

Ninety years after the Massacre, Dr. Hooker recalled: "I still remember the sound of gunfire raining down on my home and that the mob burned all my doll's clothes."³⁶ Dr. Hooker's parents were crestfallen over having lost so "many beautiful things they had purchased with their hard-earned money."³⁷ Dr. Hooker's father filed insurance claims for property loss, but to no avail.³⁸ Dr. Hooker described the far-reaching devastation:

[T]he damage that was done was not only the material things. A house destroyed, the entire neighborhood destroyed, the businesses destroyed, all the services destroyed, our school bombed on the day that we should have been getting our report cards to move up to the next class so that the children of Tulsa were very devastated.³⁹

While the violence itself was traumatic, the realization for six-year-old Dr. Hooker that the government was a part of it was even more devastating:

Oh, I remembered vividly. Early in the morning of the riot I heard this noise. It was hitting the house. So I said to my mother, "[h]ow can it be hailing when the sun is shining?" And my mother said . . . "[y]ou see that thing up there on top of the hill? That's a machine gun. And you see the American flag on top of it? That means that your government is shooting

³¹ EDDIE FAYE GATES, *RIOT ON GREENWOOD: THE TOTAL DESTRUCTION OF BLACK WALL STREET, 1921*, at 77 (2003).

³² *Id.*

³³ *Id.*

³⁴ *Id.* ("Jewelry valued at \$1,000, furs valued at \$1,000, and silver valued at \$500 were also stolen.").

³⁵ Suzette Malveaux, *Tulsa Race Massacre Symposium Keynote Speech (2021)*, in *Symposium, Tulsa Race Massacre*, 57 *TULSA L. REV.* 1, 19, 28 (2021) [hereinafter Malveaux, Keynote] (referencing video interview).

³⁶ *Accountability Act Hearing*, *supra* note 27, at 32 (statement of Olivia Hooker, Ph.D., James B. Duke Professor Emeritus of History, Duke University School of Law).

³⁷ GATES, *supra* note 31, at 77.

³⁸ *Id.* (recalling "the injustices [her family] suffered after the riot when insurance companies failed to pay riot victims for their losses").

³⁹ *Accountability Act Hearing*, *supra* note 27, at 32 (statement of Olivia Hooker, Ph.D., James B. Duke Professor Emeritus of History, Duke University School of Law).

at you.” This was a terribly distressing thing to a six year old, that my government was shooting at me.⁴⁰

As a child, I had believed every word of the Constitution, but after the riots happened, I realized that the Constitution did not include me.⁴¹

Dr. Hooker is an example of tremendous resilience. The Hooker family ultimately moved to Columbus, Ohio where Dr. Hooker and her sisters graduated from Ohio State University.⁴² Dr. Hooker became a third grade teacher for seven years.⁴³ She went on to make history as the first African American woman to enlist in the U.S. Coast Guard and to serve active duty as part of the U.S. Navy during World War II.⁴⁴ Following her military service, she pursued higher education with support from the GI bill.⁴⁵ She earned a Master’s degree from Columbia University Teachers College and a Ph.D. from the University of Rochester, as one of only two Black female students.⁴⁶ She became an Associate Professor in the Graduate School of Arts and Sciences at Fordham University in New York until her retirement in 1985.⁴⁷

Dr. Hooker’s success is tempered by the Massacre’s enduring impact and what could have been:

We did go on with our lives after the riot but the memories of what happened to us then will never go away. The injustices we suffered the two days of the riot and the injustices we suffered after the riot when insurance companies failed to pay riot victims for their losses and when court officials summarily threw out our riot victims’ cases are a blot on Tulsa’s image that have not been erased to today.⁴⁸

As a ninety-six year old, Dr. Hooker continued to educate, this time about the Massacre and its aftermath as a plaintiff in the 2003 constitutional case against the city of Tulsa and state of Oklahoma. As mentioned above, she testified before Congress in 2007 in an effort to toll the statute of limitations so that the federal courts would hear their case. Even after the lawsuit was dismissed, she continued to teach mainstream America about the Massacre. For example, at a conference held at Temple University, spearheaded by the lawsuit’s lead

⁴⁰ Malveaux, Keynote, *supra* note 35, at 28 (alterations in original) (quoting video interview). Please note that throughout this Article, the author uses the more accurate term “Massacre” to describe the 1921 racial attack on Greenwood. The term commonly used in the past was “riot.” The term riot has been preserved throughout this Article when it is a direct quotation.

⁴¹ *Accountability Act Hearing*, *supra* note 27, at 32 (statement of Olivia Hooker, Ph.D., James B. Duke Professor Emeritus of History, Duke University School of Law).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 32.

⁴⁷ *Id.*

⁴⁸ *Id.*

counsel, Professor Charles Ogletree, Dr. Hooker summarized: [W]e have a chance to wake up America's soul and hopefully can stir up enough indignation that something will be done. It's not money that we were looking for. We were looking to have America[] acknowledge that . . . this war had been waged against American citizens.⁴⁹

Also present at that conference was Massacre-survivor Otis Grandville Clark. Mr. Clark similarly traveled around the country sharing his tragedy. He would recall how, at the age of eighteen, he was caught in the middle of gunfire indiscriminately being fired at Black Tulsans in the predawn attack of Greenwood on June 1, 1921.⁵⁰ Mr. Clark recalled how "white snipers" were perched on top of white-owned industrial buildings to "kill blacks who were defending Greenwood."⁵¹ Mr. Clark was on the front line: "I got caught right in the middle of a gun battle. . . . [T]hey were just gunning down black people, just picking them off like they were swatting flies."⁵² Black men, with guns but no ammunition, desperately fought back against white men shooting at them on the street.⁵³ Mr. Clark and a driver attempted to find an ambulance to pick up their neighbors who were "close to the dividing lines of Blacks and Whites" downtown, but the driver was shot in the hand during the attempt.⁵⁴ The injured driver dropped the ambulance keys and fled inside a funeral home.⁵⁵ Sprayed with blood, Mr. Clark ran down an alley and beyond, not stopping until he reached his aunt's and cousin's home.⁵⁶ Terrified, Mr. Clark and his aunt Vinnie, uncle Buck, cousin Bertha, and Bertha's husband packed into their car and fled for their lives.⁵⁷ Before they had reached safety, a group of five armed white

⁴⁹ Malveaux, Keynote, *supra* note 35, at 36 (quoting ART FENNELL AFRICAN ADVENTURES, TERROR IN TULSA, YOUTUBE (Jan. 31, 2017), <https://www.youtube.com/watch?v=jzzT611h2Fc>). On a personal side note, Dr. Hooker spoke at the conference despite having forgotten her teeth that day! When we realized this, we tried to run and get them, but it was too late. Dr. Hooker did the presentation regardless, and did an excellent job. That day, we had a good laugh at the circumstances and her unwavering determination to speak her truth regardless.

⁵⁰ See GWEN WILLIAMS & STAR WILLIAMS, HIS STORY, HISTORY AND HIS SECRET: LIFE THROUGH THE EYES OF 105 YEAR OLD OTIS GRANDVILLE CLARK 33-35 (2008); GATES, *supra* note 31, at 63-64.

⁵¹ GATES, *supra* note 31, at 64.

⁵² *Id.*

⁵³ WILLIAMS & WILLIAMS, *supra* note 50, at 35.

⁵⁴ *Id.* at 33-35; GATES, *supra* note 31, at 64.

⁵⁵ WILLIAMS & WILLIAMS, *supra* note 50, at 35; GATES, *supra* note 31, at 64.

⁵⁶ WILLIAMS & WILLIAMS, *supra* note 50, at 35; GATES, *supra* note 31, at 64. Mr. Clark had tried to run to his cousin Bertha Black's cafe/choc joint, but discovered that the white mob had burned it to the ground when he arrived there. GATES, *supra* note 31, at 64.

⁵⁷ WILLIAMS & WILLIAMS, *supra* note 50, at 36.

men stopped the car and confiscated the Black men's guns.⁵⁸ From there, they took refuge and hid until the Massacre ended.⁵⁹

When they returned to Tulsa the next day, Mr. Clark learned that his mother and grandmother's house, where they all lived, had been burned down with his beloved bulldog Bob inside.⁶⁰ Mr. Clark's stepfather was gone forever, last seen being chased from his home by an angry white mob.⁶¹ According to Mr. Clark's daughter: "My dad was devastated. He did not understand why anyone would want to kill his step-dad and his dog and burn down his home. He was in shock."⁶² Mr. Clark described the devastating return to his home:

[W]e had a little pet bulldog named Bob that everybody just loved. Bob was so protective of our house. He was never seen again. I just know that Bob fought bravely to protect our house. I do believe he was a victim of that mob, too. When things cooled down in Tulsa and it was safe to return, I went to our home site. There was nothing there but ashes. I raked through the ashes trying to find something to cherish from the past. But I couldn't find nothing. Absolutely nothing. I believe Bob's remains were in those ashes.⁶³

The Red Cross built a one-room shanty for the family, where all five family members stayed.⁶⁴ Mr. Clark would leave and return to Tulsa a number of times, trying to find his way in life.⁶⁵ Mr. Clark went on to make corn whiskey and chock beer during Prohibition, and briefly served time in a Los Angeles county jail for bootlegging.⁶⁶ Mr. Clark later worked as a shoe shiner, driver, butler for

⁵⁸ *Id.*

⁵⁹ *Id.* ("[Mr. Clark] recalls, 'When we got to Claremore, we went to a colored hotel for one night.'"); GATES, *supra* note 31, at 64.

⁶⁰ WILLIAMS & WILLIAMS, *supra* note 50, at 38.

⁶¹ *See id.* at 39. Historian Eddie Faye Gates notes: "Tom Bryant, stepfather of riot survivor OTIS GRANVILLE CLARK, was last seen running from his home on Archer Street as white mobsters were pursuing fleeing blacks. He was never seen or heard from again." GATES, *supra* note 31, at 44, 64. In addition to Mr. Clark's forty-five year-old stepfather, an elderly Black couple who lived close by "were also never seen or heard from again." *Id.* at 64.

⁶² WILLIAMS & WILLIAMS, *supra* note 50, at 39.

⁶³ GATES, *supra* note 31, at 64. Gates noted that when Mr. Clark would share the loss of his stepfather, neighbors, and dog, he would be reduced to tears and unable to speak. *Id.*

⁶⁴ WILLIAMS & WILLIAMS, *supra* note 50, at 47.

⁶⁵ *See id.* at 47-48, 86, 103 (providing instances when Mr. Clark moved to Wisconsin, California, and Illinois doing various jobs before moving back to Oklahoma).

⁶⁶ *Id.* at 76-79.

actress Joan Crawford,⁶⁷ and aircraft factory worker.⁶⁸ He married three times and became a father.⁶⁹ He eventually became an evangelical preacher, and traveled the world (including to Africa at 103-years-old) to spread the gospel.⁷⁰ Mr. Clark's preaching did not stop there. At 104-years-old, he joined the constitutional lawsuit as a plaintiff,⁷¹ and traveled the country telling the story of the Tulsa Massacre.⁷²

Massacre survivor, ninety-six-year-old Wess Young—one of the younger plaintiffs in the constitutional lawsuit—also told a story of incredible resilience. Mr. Young recalled how on the first day of the Massacre, “black men, women and children” were fleeing for their lives, trying to escape “white mobsters.”⁷³ The Oklahoma national guardsmen took Black Tulsans into custody, separating the women and children from the men.⁷⁴ The former were taken to a high school, while the latter were “marched to the fairgrounds.”⁷⁵ The “captured blacks,” like Mr. Young, remained in custody anywhere from a few days to three weeks, “until some white person came and claimed them.”⁷⁶ Mr. Young recalled how homeless Black people lived in tents and how “[a]ll the wonderful buildings, commercial and residential, on Greenwood had been burned to the ground during the riot.”⁷⁷ Mr. Young observed how “it was a terrible time for black people after that riot.”⁷⁸

Mr. Young's narrative, however, diverges somewhat from that of some of the other Massacre survivors. He recounted how, against all odds, some Black

⁶⁷ Mr. Clark knew a number of celebrities at the time, including Clark Gable, Charlie Chaplain, and Stepin Fetchit. Matt Schudel, *Otis G. Clark, Survivor of 1921 Tulsa Race Riot, Dies at 109*, WASH. POST (May 26, 2012), https://www.washingtonpost.com/national/otis-g-clark-survivor-of-1921-tulsa-race-riot-dies-at-109/2012/05/26/gJQA2UW6sU_story.html.

⁶⁸ WILLIAMS & WILLIAMS, *supra* note 50, at 87-106 (detailing how Mr. Clark lived in Joan Crawford's house as a butler and later moved back to Oklahoma to work in the Douglas Aircraft Plant).

⁶⁹ *Id.* at 87, 105.

⁷⁰ *Id.* at 107-14, 118-23.

⁷¹ Gates recounts in her book how Mr. Clark was not only one of the “[d]arlings of the [m]edia,” but also “one of the most avid survivor supporters of reparations.” GATES, *supra* note 31, at 50, 64.

⁷² Malveaux, Keynote, *supra* note 35, at 37. On one occasion, our legal team gave a panel presentation at Abyssinian Baptist Church in Harlem about the Tulsa Race Massacre and the litigation. Mr. Clark was asleep on the dais as I gave my presentation on the statute of limitations. *Id.* When it was his time to speak, I softly nudged him with my elbow and he immediately came to life, telling his account of the Massacre. *Id.* We would often laugh together about his cat naps on stage! *Id.*

⁷³ GATES, *supra* note 31, at 111.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; see First Amended Petition at 11, *Randle v. City of Tulsa*, No. CV-2020-1179 (Okla. Dist. Ct. Tulsa Cnty. Feb. 2, 2021) (including Mr. Young's granddaughter as a plaintiff).

⁷⁷ GATES, *supra* note 31, at 111-12.

⁷⁸ *Id.*

Tulsans rebounded after the Massacre, achieving a “new prosperity in the Greenwood area.”⁷⁹ This rebound even resulted in the National Negro Business League Convention being held in Tulsa in 1926.⁸⁰ Mr. Young attributed this success to a fierce determination on the part of Black Tulsans and their strategic outreach outside the state to get funding and building supplies.⁸¹ Mr. Young noted how “White Tulsans didn’t want black Tulsans to rebuild” and instead wanted Greenwood for themselves.⁸² But as Mr. Young noted: “There was such a determination in those black Tulsa businessmen in those days. They just could not be kept down.”⁸³

Mr. Young, himself an unwavering entrepreneur since the age of nineteen, acquired real estate throughout Tulsa.⁸⁴ He eventually settled into a manor house formerly built by a white oil baron and designated as a historic site in north Tulsa’s Brady Heights Historic District.⁸⁵ Later in life, Mr. Young would garden and enjoy his beautiful, well-appointed land and home, not far from the Tate Brady Mansion.⁸⁶ By contrast, Tate Brady, a wealthy white civic leader and oil mogul at the time of the Massacre, would later commit suicide after evidence surfaced suggesting his potential involvement in the Massacre.⁸⁷

In sum, the stories of the Massacre victims range greatly, from some relegated to a life of abject poverty and despair to others who financially and socially thrived.⁸⁸ Regardless of how they landed, the victims share the experience of surviving one of the worst government-sanctioned racial massacres in U.S. history. Their lives were forever changed and their resilience is extraordinary. Collectively, they refuse to be silenced despite legal obstacles at every turn.

II. THE LAW’S SILENCING OF BLACK EXCELLENCE

The 1921 Massacre was a brutal attempt to silence Black excellence, aided and abetted by state and local governments and their legal machinery. When outright state-sanctioned terrorism became unviable, the government prevented Greenwood from thriving through more bloodless, but lawful, means. A legacy of oppression continues to this day.

A. *The Massacre Itself*

While attempts to squash Greenwood have been carried out in a myriad of ways, the most barbaric one was the Massacre itself. At its core, the Massacre

⁷⁹ *Id.* at 112.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 47, 112.

⁸⁶ *Id.* at 112.

⁸⁷ *Id.*

⁸⁸ *Id.* at 51 (noting variation among “political, economic, and social status of survivors”).

was a government-sanctioned terrorist attack on Black American citizens, born out of simple reasons, such as personal resentment and greed, and more complex ones involving the institutional maintenance of white supremacy.

1. Success Out Loud

In the 1920s, Greenwood—Tulsa’s Black, segregated community—was an unabashed example of Black success lived out loud. The community was comprised of numerous businesses, two schools, thirteen churches, two newspapers, three fraternal lodges, two theaters, one hospital, one library, and numerous well-appointed homes.⁸⁹ The businesses—predominantly lining Greenwood Avenue—included restaurants, grocery stores, billiard halls, hotels, dance halls, and choc joints.⁹⁰

This relatively prosperous community and business district arose amid exclusion from white Tulsa’s commerce.⁹¹ While Black Tulsans worked as servants, domestic workers, and common laborers in the white sections of Tulsa, they were excluded from patronizing white businesses and living in the oil “boom” town, called “magic city.”⁹² Thus, Black Tulsans created their own thriving city, affectionately called “Negro’s Wall Street.”⁹³ Indeed, upon visiting the city in 1913, a representative of the National Negro Business League called it “a regular Monte Carlo.”⁹⁴ An exceptional number of professionals—including lawyers, doctors, and entrepreneurs—built significant wealth in Greenwood, with some purportedly owning assets worth over \$100,000 in 1921 dollars.⁹⁵

Greenwood was not just relatively prosperous in terms of material wealth—the city was also rich in culture, relative freedom, and independence.⁹⁶ Black veterans had returned from World War I with expectations of equal treatment and democracy they had observed abroad. This esprit de corps coursed through

⁸⁹ See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921*, at 14-15 (1982) [hereinafter ELLSWORTH, *PROMISED LAND*] (outlining growth and success of Greenwood throughout 1900s).

⁹⁰ *Id.*

⁹¹ See *id.* at 14.

⁹² *Id.* at 8, 10 (noting that population of Oklahoma exploded between 1890 and 1920, growing over sevenfold to over two million people).

⁹³ *Id.* at 15.

⁹⁴ *Id.*

⁹⁵ *Id.* at 16. Of course, Greenwood also had its share of poor Black Tulsans, like many Black communities across America. *Id.* (noting that many of Tulsa’s poor Black residents lived in servants’ quarters in white homes).

⁹⁶ This is not to overstate the point. As historian Scott Ellsworth reminds, while Greenwood “was assuredly one of the finest black commercial districts in the entire Southwest, it was scarcely free from white influence and control.” *Id.* The economic success of Greenwood also depended on the income from white employers in larger Tulsa. *Id.*

Greenwood's veins, making it a special place among Black cities and an especially vulnerable target for white ire.⁹⁷

2. A State-Sponsored Terrorist Attack

Over a century ago, the United States experienced one of the worst racial massacres in its history. The Massacre started as many did, based on a rumor that a Black male assaulted a white woman.⁹⁸ This time it was young Dick Roland who was accused of attacking Sarah Page in an elevator.⁹⁹ As it turns out, there was no evidence of wrongdoing and the charges were ultimately dropped.¹⁰⁰ There is still no agreement on what actually happened in the elevator that fateful day. Theories range from Roland tripping and trying to brace himself from falling, to his hugging his girlfriend.¹⁰¹ No matter. To white Tulsans in the early 1920s, it was sufficient kindling for fire.¹⁰² Upon learning of the potential transgression, a white mob gathered outside the jail in which Roland resided.¹⁰³ A rumor that he would be lynched quickly spread throughout Greenwood, leading Black veterans—recently back from defending democracy abroad—to come to his aid.¹⁰⁴ The veterans would now prepare to defend themselves from their own fellow Americans and, as it turns out, their government too.

A gunshot was fired, setting off mayhem. In less than twenty-four hours, from May 31 to June 1, 1921, a white mob decimated Greenwood.¹⁰⁵ Enraged white Tulsans shot, stabbed, and killed innocent men, women, and children; looted and destroyed their homes; and burned down their entire community.¹⁰⁶ An estimated 100 to 300¹⁰⁷ Black Tulsans lost their lives, thousands were

⁹⁷ See ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 26-35 (2003) [hereinafter BROPHY, DREAMLAND].

⁹⁸ Malveaux, Keynote, *supra* note 35, at 26 (explaining origins of conflict and noting that it “started like so many other conflicts post-Reconstruction”).

⁹⁹ *Id.*; Alexander v. Oklahoma, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *7 (N.D. Okla.), *aff'd*, 382 F.3d 1206 (10th Cir. 2004).

¹⁰⁰ Malveaux, Keynote, *supra* note 35, at 26.

¹⁰¹ *Id.*

¹⁰² Of course, there were some white Tulsans who took a different approach. Gates describes a number of “Good White Samaritans” who sought to protect Black Tulsans. Some seemed to have had knowledge in advance of the Massacre and took steps to protect their Black employees with shelter, supplies, and notice before the Massacre took place. During the Massacre, other “Good White Samaritans” hid their employees, stopped mob members from taking their employees, or even risked their own lives by going to Greenwood to intercede. See GATES, *supra* note 31, at 49.

¹⁰³ Malveaux, Keynote, *supra* note 35, at 26.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 28; Alexander v. Oklahoma, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *7 (N.D. Okla.), *aff'd*, 382 F.3d 1206 (10th Cir. 2004).

¹⁰⁶ Malveaux, Keynote, *supra* note 35, at 28; see also Eric J. Miller, *Republican, Rebellious Reparations*, 63 HOW. L.J. 363, 369-70 (2020) [hereinafter Miller, *Reparations*].

¹⁰⁷ Danney Goble, *Final Report of the Oklahoma Commission To Study the Tulsa Race Riot of 1921*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE

displaced,¹⁰⁸ and millions of dollars of property damage was incurred.¹⁰⁹ Machine guns were mounted on a hill, where white assailants picked off Black Tulsans fleeing for safety.¹¹⁰ If that was not enough, explosives from airplanes were dropped on Black Tulsans who could not run for cover.¹¹¹ With a twenty-to-one ratio of white to Black Tulsans involved, the mob of twenty thousand white Tulsans completely destroyed Greenwood.¹¹² Police brought the Massacre survivors to internment camps, where they were tagged and released upon a white person's voucher and retrieval.¹¹³

As it turned out, this extraordinary display of brutality was accomplished with the assistance and leadership of the City of Tulsa and the state of Oklahoma—a fact not officially established until Oklahoma commissioned an investigation and report three quarters of a century later.¹¹⁴ The resulting report (the “Commission Report”) revealed that the City and state armed and deputized members of the crazed white mob, enabling them to unleash unspeakable violence on their innocent Black neighbors.¹¹⁵ The police swore in approximately 500 white men as “Special Deputies,” cloaking them with state authority and giving them the power to terrorize fellow American citizens; some were even instructed to “get a gun and get a [N]!”¹¹⁶

The government's orchestration and participation in the racial Massacre—while not fully grasped and supported with evidence until the 2001 Commission

TULSA RACE RIOT OF 1921, *supra* note 2, at 1, 12-13; *see also* OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2022); Malveaux, Keynote, *supra* note 35, at 28 (noting that true number could be in the thousands).

¹⁰⁸ Robert L. Brooks & Alan H. Witten, *The Investigation of Potential Mass Grave Locations for the Tulsa Race Riot*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, *supra* note 2, at 123 (noting “[o]ver 1,000 residences were burned,” and more than 4,000 Black people were displaced, mostly in Greenwood).

¹⁰⁹ Larry O'Dell, *Riot Property Loss*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, *supra* note 2, at 143, 145, 149 (noting that “an estimate of just under \$2 million of property damage in 1921 dollars can be made”).

¹¹⁰ *See* Malveaux, Keynote, *supra* note 35, at 28.

¹¹¹ *Id.*

¹¹² *Id.*; Scott Ellsworth, *The Tulsa Race Riot*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, *supra* note 2, at 37, 63 [hereinafter Ellsworth, *Tulsa Race Riot*].

¹¹³ Malveaux, Keynote, *supra* note 35, at 28.

¹¹⁴ Goble, *supra* note 107, at 1, 6-8, 19 (describing government assistance to Massacre and process of preparing Commission Report).

¹¹⁵ Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 96 (2005) [hereinafter Malveaux, *Statutes of Limitations*]; *see also* Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 657 (2011) (describing government involvement in Massacre).

¹¹⁶ Malveaux, Keynote, *supra* note 35, at 28 (quoting Ellsworth, *Tulsa Race Riot*, *supra* note 112, at 64).

Report¹¹⁷—is unsurprising given the government’s Klan membership. Hundreds of members of the Klan worked for the City of Tulsa during the 1920s.¹¹⁸ During the period of the Massacre and beyond, Klan members included Tulsa city employees, two mayors (1922, 1930), a police chief, police officers, an assistant fire chief, firefighters, city and county judges, court clerks, and insurance agents.¹¹⁹ Just one year after the Massacre, a KKK member was elected as Tulsa’s mayor.¹²⁰ Indeed, Klan members could not lose office in the November 1922 elections for county attorney and sheriff, as both the Republican and Democrat candidates were Klansmen.¹²¹ That year, the Oklahoma governor contended that 90% of the officers in the Oklahoma National Guard and about 25% of the enlisted men were KKK members.¹²² The governor’s efforts to oust KKK members from the National Guard resulted in the Klan-dominated state legislature summarily dismissing him.¹²³ An original copy of the KKK roster during this era documents over 1,000 Klan members holding a range of municipal government positions.¹²⁴ Professor Jared A. Goldstein has documented a second wave of KKK growth prior to the Massacre, in which white supremacy and dominance were core tenets of the organization’s claimed approach to defending the U.S. Constitution.¹²⁵ Indeed, KKK membership in Tulsa tripled during this time period.¹²⁶ The Klan was particularly active in Tulsa in the 1920s.¹²⁷ Not only was the general membership robust, but the Women of the Klan’s separate order was “thriving.”¹²⁸ Tulsa even had its own “Junior” KKK for white boys ages twelve to eighteen, a distinction even among the Klan.¹²⁹ In sum, the Klan and similar hate groups were ubiquitous at the time.

¹¹⁷ Goble, *supra* note 107, at 6-8, 19 (discussing report’s methodology and stating that government participated in atrocities).

¹¹⁸ *The City of Tulsa Was the Klan and Mob in the 1921 Race Massacre*, BLACK WALL ST. TIMES (Apr. 29, 2022), <https://theblackwallstimes.com/2022/04/29/the-city-of-tulsa-was-the-klan-and-mob-in-the-1921-race-massacre/> [<https://perma.cc/8CDT-G4HJ>] [hereinafter, *Tulsa Was Klan and Mob*] (“The Black Wall Street Times discovered that hundreds of Klan members worked for the City of Tulsa during the 1920s, the same decade as the [M]assacre.”).

¹¹⁹ *Id.*

¹²⁰ *Id.* (“[I]n 1922, a year after the Massacre, the Klan installed Herman Newblock, a Klan member, as mayor.”).

¹²¹ ELLSWORTH, PROMISED LAND, *supra* note 89, at 22.

¹²² *Tulsa Was Klan and Mob*, *supra* note 118 (incorporating contemporary newspaper report clipping).

¹²³ *Id.* (“[T]he Klan-filled Oklahoma legislature successfully ousted then-Governor Jack Walton who vowed to rid the Oklahoma National Guard of the Klan.”).

¹²⁴ *Id.*

¹²⁵ Jared A. Goldstein, *The Klan’s Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 320-42 (2018).

¹²⁶ *Tulsa Was Klan and Mob*, *supra* note 118.

¹²⁷ See ELLSWORTH, PROMISED LAND, *supra* note 89, at 20-22 (noting nationwide resurgence in white supremacy).

¹²⁸ *Id.* at 22.

¹²⁹ *Id.*

Their dominance ensured that the law and its machinery were used to silence Black Americans who dared to fight back.

3. Violence as a Means of Control

The Massacre, while one of the worst racial massacres in the history of the United States, was by no means an anomaly.¹³⁰ The late nineteenth century and early twentieth century were replete with unspeakable crimes committed against Black Americans trying to make a life post-Reconstruction.¹³¹ A particularly brutal string of massacres began in 1917 and spread throughout the country, culminating in the Red Summer of 1919, and ending with the Tulsa Massacre of 1921.¹³² The year 1919 was “one of the most violent in [U.S.] history, as white Americans inflicted appalling cruelties on their black neighbors.”¹³³ Between April and October of that year, twenty-six of these massacres occurred,¹³⁴ leading historian John Hope Franklin to describe it as “the greatest period of inter-racial strife the nation ever witnessed”¹³⁵ and author James Weldon Johnson to dub it the “Red Summer”¹³⁶ because of the Black American blood spilled. The carnage occurred not only in the South, but across the country in Minnesota, Nebraska, Illinois, Pennsylvania, and Washington, D.C.¹³⁷ Racial massacres continued in Harlem in 1935 and in Detroit in 1943.¹³⁸ Historian Ann Collins documented at least fifty racial massacres in the United States from 1898 to 1945, with at least half of them in 1919 alone.¹³⁹

¹³⁰ See ANN V. COLLINS, *ALL HELL BROKE LOOSE: AMERICAN RACE RIOTS FROM THE PROGRESSIVE ERA THROUGH WORLD WAR II*, at 1 (2012) [hereinafter COLLINS, *ALL HELL BROKE LOOSE*] (outlining long history of racial violence in United States).

¹³¹ See *Massacres in U.S. History*, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/collection/massacres-us/> [<https://perma.cc/P8XT-Z7UG>] (last visited Dec. 7, 2022) (describing how racial massacres promote white supremacy); see also *May 31, 1921: Tulsa Massacre*, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/news/tdih/tulsa-race-riot/> [<https://perma.cc/JT2F-4E75>] (last visited Dec. 7, 2022).

¹³² Ann V. Collins, *Red Summer and Early 20th-Century Race Massacres*, OXFORD RSCH. ENCYCS.: AM. HIST. (Nov. 29, 2021) [hereinafter Collins, *Red Summer*], <https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-842;jsessionid=8A5A9449603E76F49DD9547FF70A1B0B> (describing rising violence and Red Summer).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ ELLSWORTH, *PROMISED LAND*, *supra* note 89, at 17.

¹³⁶ Collins, *Red Summer*, *supra* note 132.

¹³⁷ ELLSWORTH, *PROMISED LAND*, *supra* note 89, at 17 (noting violence “across America” including in Minnesota, Nebraska, Illinois, Pennsylvania, and the South); Collins, *Red Summer*, *supra* note 132 (noting that three of the Red Summer’s largest massacres occurred in Washington, D.C., Chicago, and Arkansas).

¹³⁸ ELLSWORTH, *PROMISED LAND*, *supra* note 89, at 17.

¹³⁹ COLLINS, *ALL HELL BROKE LOOSE*, *supra* note 130, at xv.

During this time period, lynchings were another common form of terror inflicted on Black Americans to enforce white dominance.¹⁴⁰ While used immediately following Reconstruction,¹⁴¹ lynching peaked in 1919. In that year, “White throngs lynched seventy-eight black Americans, several of them veterans, burning eleven of their victims alive.”¹⁴² Lynchings—whether for white sport and family entertainment or to terrorize Black communities deemed too successful and uppity¹⁴³—grew not only in number but also in ferocity.¹⁴⁴ Black Americans suffered beatings, rape, castration, and torture through lynchings. For example, on May 25, 1911, Laura Nelson and her young son, L.W., were victims of this terror in Okemah, Oklahoma.¹⁴⁵ Accused of an alleged crime, they sat in a local jail, but not for long.¹⁴⁶ A white mob dragged them out, raped her, and gagged and hung them both off of a bridge for gawkers to enjoy.¹⁴⁷ A photo of the mother-son tragedy was made into a popular and profitable postcard at the time.¹⁴⁸

Lynching was the weapon of choice for silencing Black success and enforcing white dominance in Oklahoma. From 1877 to 1950, there were seventy-five reported lynchings in the state.¹⁴⁹ Of those lynchings, thirty-five were in Tulsa County alone.¹⁵⁰ From 1911 to 1921, twenty-three Black Americans in

¹⁴⁰ See *Racial Terror Lynchings*, EQUAL JUST. INITIATIVE: LYNCHING IN AM., <https://lynchinginamerica.eji.org/explore> [<https://perma.cc/9GKC-4XYB>] (last visited Dec. 7, 2022) (documenting lynchings from 1877-1950 by county).

¹⁴¹ EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876, at 7 (2020), <https://ejournal.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf> [<https://perma.cc/LZV6-RTMW>] (documenting lynchings during Reconstruction Era).

¹⁴² Collins, *Red Summer*, *supra* note 132.

¹⁴³ See EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 68 (3d ed. 2017) [hereinafter EQUAL JUST. INITIATIVE, CONFRONTING THE LEGACY], <https://ejournal.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> [<https://perma.cc/TN7D-DENM>] (providing, as historian Leon F. Litwack explains, that “[t]he story of a lynching [] is more than the simple fact of a Black man or woman hanged by the neck. It is the story of slow, methodical, sadistic, often highly inventive forms of torture and mutilation.” (quoting LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 286 (1998))).

¹⁴⁴ ELLSWORTH, PROMISED LAND, *supra* note 89, at 18-19 (stating that in first decades of 20th century “the degree of barbarity in these lynchings had generally increased” compared to 1890s, and noting that “[t]he burning of live victims was not uncommon”).

¹⁴⁵ EQUAL JUST. INITIATIVE, CONFRONTING THE LEGACY, *supra* note 143, at 46.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; Malveaux, Keynote, *supra* note 35, at 26-27.

¹⁴⁸ Malveaux, Keynote, *supra* note 35, at 26-27.

¹⁴⁹ *Oklahoma*, EQUAL JUST. INITIATIVE: LYNCHING IN AM., <https://lynchinginamerica.eji.org/explore/oklahoma> [<https://perma.cc/G8TC-DXHM>] (last visited Dec. 7, 2022).

¹⁵⁰ *Id.* (displaying number of reported lynchings by county through interactive map whereby data becomes visible when viewer selects individual county). By contrast, the other major metropolitan area, Oklahoma County, had three. *Id.*

Oklahoma were lynched, a precursor of the terror to come.¹⁵¹ Notably, these lynchings, like the Massacre, were carried out with government support.¹⁵²

In sum, naked brutality—unchecked by police protection or a credible criminal justice system—was used against Black Tulsans to intimidate them into submission and keep them there.¹⁵³

B. *Law as Reinforcer*

Violence is a barbaric and blunt tool. While effective, alone it failed to quash the Greenwood community. The law and its enforcement apparatus, instead, has been deployed to muffle Black success from the Massacre to the present. From crippling zoning regulations immediately following the Massacre; to segregation laws lasting into the 1960s;¹⁵⁴ to ravaging urban renewal policies;¹⁵⁵ to pervasive and ongoing discrimination in employment,¹⁵⁶ housing,¹⁵⁷ and criminal justice,¹⁵⁸ the government has continued to obstruct efforts by the Greenwood community to rebuild.

¹⁵¹ Natalie Chang, *The Massacre of Black Wall Street*, ATL. RE:THINK, <https://www.theatlantic.com/sponsored/hbo-2019/the-massacre-of-black-wall-street/3217/> [https://perma.cc/Z86X-KWP9] (last visited Dec. 7, 2022).

¹⁵² See Eric J. Miller, *Representing the Race: Standing To Sue in Reparations Lawsuits*, 20 HARV. BLACK LETTER L.J. 91, 106 n.75 (2004) [hereinafter Miller, *Representing the Race*] (“[T]he Oklahoma Commission to Study the Race Riot of 1921 and the State of Oklahoma itself have documented the State’s complicity in a variety of lynchings leading up to the Tulsa Race Riot of 1921.”); see also Miller, *Reparations*, *supra* note 106, at 368 (“In the decade preceding the Massacre, the State of Oklahoma encouraged and empowered white supremacy.”).

¹⁵³ See BROPHY, DREAMLAND, *supra* note 97, at 39-40 (describing lynchings, “negro drives,” and other violence against Black Americans); see also Miller, *Representing the Race*, *supra* note 152, at 107 (describing “‘sun down’ laws” and other methods of terrorizing Black Tulsans, culminating in 1921 Massacre).

¹⁵⁴ First Amended Petition, *supra* note 76, at 31, 43-44 (describing Tulsa’s zoning policies and extensive segregation from 1920s to 1960s).

¹⁵⁵ For example, the decision to locate a highway such that it went through the heart of the Greenwood business district further divided the primarily Black north part of Tulsa from the city’s more lucrative downtown area. *Id.* at 47-48.

¹⁵⁶ *Id.* at 44 (describing myriad examples of employment discrimination policies in Tulsa that targeted African American businesses and individuals).

¹⁵⁷ *Id.* at 51 (stating that Black Tulsans were denied bank loans because of redlining).

¹⁵⁸ *Id.* at 46 n.46 (quoting Former City Police Chief of Tulsa, Drew Diamond, who stated that “policing is carried out ‘differently’ in North Tulsa than in the rest of the city”). Tulsa police did not take action to protect Black residents of Tulsa during the Massacre, and the Tulsa City Commission later blamed the Massacre on Black residents. JOHN RAPHLING, HUM. RTS. WATCH, “GET ON THE GROUND!”: POLICING, POVERTY, AND RACIAL INEQUALITY IN TULSA, OKLAHOMA 28, 85 (2019) https://www.hrw.org/sites/default/files/report_pdf/us0919_tulsa_web.pdf [https://perma.cc/5YLR-W4CE] (“Former Police Chief Diamond said that policing is carried out ‘differently’ in North Tulsa than in the rest of the city, and that officers in North Tulsa regularly conduct unnecessary stops of black people.”).

While the ashes of Greenwood were still smoldering, attempts to mute the Black community through law had already started. During the internment of Black Tulsans, the city, county, and Chamber of Commerce quickly altered fire regulations and zoning laws, which hampered Greenwood's rebuilding.¹⁵⁹ In the immediate aftermath of the Massacre, when Tulsa was under martial law, the Chamber of Commerce's Public Welfare Board was responsible for reconstruction.¹⁶⁰ Rather than helping to compensate Greenwood, however, the Public Welfare Board turned away monetary donations that had been offered from across the nation in response to the horrific publicity of the Massacre.¹⁶¹ The Public Welfare Board also appointed the Tulsa Real Estate Exchange (the "Exchange") to appraise Black Tulsans' properties.¹⁶² The Exchange's leadership, ironically, included a well-known Klan leader who, armed and deputized, had participated in the Massacre himself.¹⁶³ Through illegal zoning ordinances, the Exchange forced Black Tulsans to rebuild further north—into what is now North Tulsa—in an effort to prevent "inter-mingling of the lower elements of the two races."¹⁶⁴

From 1923 through the 1950s, zoning ordinances kept Black Tulsans trapped in Greenwood and North Tulsa, which fell into disrepair as a result of Tulsa's systemic neglect in providing basic public services and utilities.¹⁶⁵ Black Tulsans found themselves living in overcrowded, dilapidated conditions without "paved streets, running water, sewers, and regular trash pickup, or a comparable number of parks and playgrounds."¹⁶⁶ Indeed, the Tulsa Urban League's 1958 report found a "critical shortage" of suitable housing "almost to the point of non-existence," since the Massacre.¹⁶⁷ The report noted how "Negroes who desired better housing" were priced out and forced "to remain in shacks or in blighted old houses," resulting in "at least 65% of the Tulsa Negroes still" living in "slums."¹⁶⁸ More than a third of Greenwood businesses never reopened in the

¹⁵⁹ First Amended Petition, *supra* note 76, at 33 (stating that changed fire regulations and zoning laws ultimately moved Black residents further north and away from the white populated areas of Tulsa).

¹⁶⁰ *Id.* at 29, 31 (stating that Public Welfare Board imposed policies that inhibited ability of Black residents to recover from Massacre).

¹⁶¹ *See id.* at 33 (citing City and Chamber of Commerce returning \$1,000 donation to *Chicago Tribune*).

¹⁶² *Id.* at 34.

¹⁶³ *Id.* (noting that W. Tate Brody, member of organization that appraised Massacre damage, was also known member of Klan and participated in Massacre).

¹⁶⁴ *Id.* (quoting *Plan To Move Negroes into New District*, TULSA TRIB., June 3, 1921, at 1).

¹⁶⁵ *Id.* at 38-39.

¹⁶⁶ *Id.*

¹⁶⁷ TULSA URB. LEAGUE, A CONCISE REVIEW OF HOUSING PROBLEMS AFFECTING NEGROES IN TULSA 3 (1958), <http://digitalcollections.tulsalibrary.org/digital/collection/p16063coll1/id/5361>.

¹⁶⁸ *Id.*

years following the Massacre, and none exist today.¹⁶⁹ Where Black and white homeownership was relatively equal in 1921 Tulsa, post-Massacre, Black homeownership decreased by 20% and the gap has since widened.¹⁷⁰

By 1993, the Department of Justice concluded that predominantly Black “North Tulsa had long been regarded as a depressed, low-income area, with virtually no social services or industrial activity.”¹⁷¹ A decade later, North Tulsa was “the most underdeveloped section of the city” according to a 2002 article in *The Nation*.¹⁷² And a decade after that, the 2011 Business Editor of *The Tulsa World* documented the continued neglect in food access, healthcare, education, skills training, income, and infrastructure in North Tulsa.¹⁷³ Studies by the City of Tulsa in 2013,¹⁷⁴ 2016,¹⁷⁵ and 2019¹⁷⁶ document significant economic disparities for Black Tulsans on various metrics, including household income, poverty, unemployment, and home values.¹⁷⁷ A May 2020 Report completed by Human Rights Watch documented how, under the auspices of urban renewal, the government’s “policies had claimed and demolished so many businesses and

¹⁶⁹ First Amended Petition, *supra* note 76, at 41.

¹⁷⁰ *Id.* at 42.

¹⁷¹ BUREAU OF JUST. ASSISTANCE, NCJ 143710, PROBLEM-ORIENTED DRUG ENFORCEMENT: A COMMUNITY-BASED APPROACH FOR EFFECTIVE POLICING 45 (1993), <https://www.ojp.gov/pdffiles/problem.pdf> [<https://perma.cc/NA9F-J35M>]; *see also* First Amended Petition, *supra* note 76, at 53.

¹⁷² Adrian Brune, *Tulsa’s Shame: Race Riot Victims Still Wait for Promised Reparations*, NATION (Feb. 28, 2002), <https://www.thenation.com/article/archive/tulsas-shame/> [<https://perma.cc/K3BV-T2P4>]; *see* First Amended Petition, *supra* note 76, at 54.

¹⁷³ John Stancavage, *John Stancavage: Partnerships Needed To Ensure North Tulsa’s Recovery*, TULSA WORLD (May 21, 2020), https://tulsaworld.com/business/john-stancavage-partnerships-needed-to-ensure-north-tulsas-recovery/article_049514f9-f773-5f69-a204-d1a7792393d5.html; *see* First Amended Petition, *supra* note 76, at 54-55 (noting food access issues in North Tulsa and increase in poor health indicators for Black Tulsans since Massacre, including life expectancy, chronic disease, and infant mortality).

¹⁷⁴ *See* CITY OF TULSA PLAN. DIV., 36TH STREET NORTH CORRIDOR SMALL AREA PLAN 16 (2013), <https://www.cityoftulsa.org/media/1560/36snc.pdf> [<https://perma.cc/RXJ7-GTYA>] (finding that community’s median household income was \$22,000 lower, poverty rate was over two times greater, and education level was lower than rest of Tulsa); *see also* First Amended Petition, *supra* note 76, at 152 (emphasizing that community was 75% African American in 2013).

¹⁷⁵ *See* CITY OF TULSA & TULSA DEV. AUTH., UNITY HERITAGE NEIGHBORHOODS PLAN 10-11 (2016), <http://tulsaplanning.org/plans/Unity-Heritage-Neighborhoods-Plan.pdf> [<https://perma.cc/KG56-WBY4>]; *see* First Amended Petition, *supra* note 76, at 56 (noting that North Tulsa community, which was 81.8% African American in 2016, experienced higher poverty and lower income compared to rest of Tulsa).

¹⁷⁶ CMTY. SERV. COUNCIL & CITY OF TULSA, ANNUAL REPORT 2019: TULSA EQUALITY INDICATORS 20-21 (2019) [hereinafter 2019 ANNUAL REPORT], https://www.csctulsa.org/wp-content/uploads/2020/10/Tulsa-Equality-Indicators-Report_2019.pdf [<https://perma.cc/5MNN-ACST>] (finding Black Tulsans have over twice the unemployment rate compared to white Tulsans, and \$20,000 less in median household income); *see* First Amended Petition, *supra* note 76, at 59-60.

¹⁷⁷ First Amended Petition, *supra* note 76, at 55-56, 59-60.

homes in Tulsa, more than 1,000, many of them in Greenwood,” keeping many African Americans on the north (the proverbial wrong) side of the tracks.¹⁷⁸

Since the Massacre, African Americans in Tulsa have fallen precipitously in nearly every economic and social measure. A century later, Black Tulsans “are more likely to live in poverty and less likely to own a business.”¹⁷⁹ They “live on 40% less than white Tulsan households.”¹⁸⁰ Black Tulsans fare worse on indicators such as education,¹⁸¹ housing,¹⁸² justice,¹⁸³ and health.¹⁸⁴ Connecting

¹⁷⁸ DREISEN HEATH, HUM. RTS. WATCH, THE CASE FOR REPARATIONS IN TULSA, OKLAHOMA: A HUMAN RIGHTS ARGUMENT 16 (2020), https://www.hrw.org/sites/default/files/media_2020/11/tulsa-reparations0520_web.pdf [<https://perma.cc/VC4V-HERT>] (describing effects of urban renewal policies on Greenwood residents, which Black Tulsans call “urban removal”); see First Amended Petition, *supra* note 76, at 48 n.47.

¹⁷⁹ *Tulsa Was Klan and Mob*, *supra* note 118 (citing CMTY. SERV. COUNCIL & CITY OF TULSA, ANNUAL REPORT 2021: TULSA EQUALITY INDICATORS 15, 19 (2021), https://csctulsa.org/wp-content/uploads/2022/03/Tulsa-EI-Report_2021-compressed.pdf [<https://perma.cc/UHT7-B253>]).

¹⁸⁰ First Amended Petition, *supra* note 76, at 60.

¹⁸¹ 2019 ANNUAL REPORT, *supra* note 176, at 23 (reporting data on racial and economic disparities in education indicators); see First Amended Petition, *supra* note 76, at 59 (“Black students are nine times more likely than White students to be suspended from school.”).

¹⁸² 2019 ANNUAL REPORT, *supra* note 176, at 27 (finding that 58.2% of white Tulsans are homeowners compared to 34.8% of Black Tulsans).

¹⁸³ In the City of Tulsa, Black citizens “are five times more likely to experience police use of force than” their Latinx counterparts. *Tulsa Was Klan and Mob*, *supra* note 118. Black youth, in particular, are over “five times as likely to” be arrested than their white counterparts. *Id.* Further, Black Tulsans, regardless of age, are also “more likely to experience police use of force” than other groups. *Id.* Data from the *Tulsa Equality Indicators 2019 Annual Report* demonstrates that:

The arrest rate of Black youth is nearly three-and-a-half times that of White youth. Likewise, the arrest rate of Black adults is over twice that of White adults. Black Tulsans are one-and-a-half times more likely to be victims of police use-of-force than White Tulsans and are five times more likely to be victims of officer use-of-force than all other racial and ethnic groups.

First Amended Petition, *supra* note 76, at 59-60 (citing 2019 ANNUAL REPORT, *supra* note 176, at 31-33). Relations between police and Black Tulsans are strained. See Cliff Brunt, *Black Fear of Tulsa Police Lingers 100 Years After Massacre*, AP NEWS (May 29, 2021), <https://apnews.com/article/tulsa-race-and-ethnicity-fdc950a679a5aa27715ccdce0ab4642> [<https://perma.cc/B2RG-JF2Y>] (stating that 2018 poll indicates “only 18% of Black residents said they trust police ‘a lot,’ compared to 49% of white residents, and 46% of Black Tulsans said they trust the Police Department ‘not at all’ or ‘not much,’ compared to 16% of whites”). For some, the 2016 killing of unarmed Black man Terence Crutcher by white police officer Betty Shelby harkens back to the trauma of the 1921 Massacre and distrust of the police. *Id.*; see also Tiffany Crutcher, *‘We’re Still Not Free.’ A Descendant of the 1921 Tulsa Massacre on the Pain of Trump’s Juneteenth Weekend Rally*, TIME (June 19, 2020, 11:47 AM), <https://time.com/5856248/tiffany-crutcher-juneteenth-trump-rally> (describing how author’s great-grandmother fled from Massacre in 1921 and associating this with police killing of her twin brother Terence Crutcher).

¹⁸⁴ The infant mortality rate for Black Tulsans, for example, is substantially greater than

the dots from the Massacre to today's disparities is straightforward—something even the City of Tulsa itself has done.¹⁸⁵

The gauntlet of structural obstacles placed before the survivors and their descendants has resulted in the loss of not only generational wealth, but also psychological health. As renowned historian and son of Massacre survivor B.C. Franklin, John Hope Franklin, explained:

People did not just lose their homes and businesses, they seemed eventually to lose part of their dreams and their will, at least as a group. Thus, while I believe there was a period of approximately ten years in which people made their best effort to rebuild, and revitalize their community educationally and socially, eventually, given the economic devastation, and the persistent and complete separation and indifference of the white community, a pall of discouragement set in among the black community. And because the city has never honestly confronted what happened, that pall persists to this day.¹⁸⁶

The last three living Massacre survivors,¹⁸⁷ Massacre descendants, and others recently brought a lawsuit in Oklahoma state court seeking abatement for state law public nuisance and unjust enrichment claims, which to date the City of Tulsa has attempted to dismiss three times.¹⁸⁸ Central to their case is the through line from the Massacre itself to the blight that many Black Tulsans toil under today. Time will tell if the law, chameleon-like, will morph again to guard the status quo.

that for their white counterparts. 2019 ANNUAL REPORT, *supra* note 176, at 38.

¹⁸⁵ See First Amended Petition, *supra* note 76, at 57 (quoting current Chamber of Commerce President and Chief Executive Officer, Mike Neal, who stated: “The racism that enabled the [M]assacre also shaped the economic disparities in our community.”); CMTY. SERV. COUNCIL & CITY OF TULSA, ANNUAL REPORT 2018: TULSA EQUALITY INDICATORS 5 (2018), https://www.cityoftulsa.org/media/18551/tulsa_equality_indicators_report_2018.pdf [<https://perma.cc/25XX-R5Y7>] (indicating Tulsa’s demographics stem from zoning regulations that mandated segregation following Massacre).

¹⁸⁶ John Hope Franklin, *Foreword* to MARY E. JONES PARRISH, *THE NATION MUST AWAKE: MY WITNESS TO THE TULSA RACE MASSACRE OF 1921*, at xii (2021) (excerpting John Hope Franklin’s testimony April 24, 2007, before the House Judiciary Committee).

¹⁸⁷ The survivors are 107-year-old Viola Fletcher (“Mother Fletcher”), 107-year-old Lessie Benningfield Randle (“Mother Randle”), and 100-year-old Hughes Van Ellis, Sr. See First Amended Petition, *supra* note 76, at 5, 8-10.

¹⁸⁸ See *id.*; see also Order on Defendant’s Motion To Dismiss at 6, 7, Randle v. City of Tulsa, No. CV-2020-1179 (Okla. Dist. Ct. Tulsa Cnty. Aug. 3, 2022) (finding that plaintiffs “can prove no set of facts which would entitle Plaintiffs to relief on their public nuisance claims” but granting “leave to amend the petition”); Omar Jimenez & Brandon Tensley, *Tulsa Judge Allows 1921 Race Massacre Lawsuit To Move Forward*, CNN (Aug. 4, 2022, 4:43 PM), <https://www.cnn.com/2022/08/04/us/tulsa-1921-race-massacre-lawsuit/index.html> [<https://perma.cc/MYV8-8PUF>]; Brentin Mock, *Survivors of Black Wall Street Massacre Challenge Tulsa’s Atonement Strategy*, BLOOMBERG (Nov. 17, 2022, 11:52 AM), <https://www.bloomberg.com/news/articles/2022-11-17/black-wall-street-survivors-challenge-tulsa-reparations-strategy>.

III. THE LAW'S SILENCING OF WHITE BRUTALITY

Not only has the law been used to squash Black success, but, equally important, it has also been wielded to hide white brutality. This was successfully done by the government in the aftermath of the Massacre and later by the courts, when Massacre victims challenged the government's own participation in, and even orchestration of, the Massacre.¹⁸⁹ In the constitutional case challenging the government's misconduct, the courts used the statute of limitations to silence Massacre survivors' legal outcries.¹⁹⁰ Two decades later, the Oklahoma legislature is using educational censorship to silence their moral outcries by shutting down robust discussion of the Massacre in public schools.¹⁹¹

A. *The Government's "Conspiracy of Silence"*

The cover up by the City of Tulsa and the state of Oklahoma of their participation, and even leadership, in the 1921 Massacre is well documented. The historic Tulsa Commission Report, published on February 28, 2001, unearthed significant evidence of a "conspiracy of silence" that kept plaintiffs unaware of the government's culpability and violation of their constitutional and federal civil rights.¹⁹² Local and state governments hid and destroyed evidence¹⁹³ and failed to investigate or prosecute wrongdoers for civil and criminal offenses.¹⁹⁴ Black Tulsans themselves were wrongly blamed for the Massacre.¹⁹⁵ Bodies were buried in unmarked graves.¹⁹⁶ The Massacre was excluded from Oklahoma history textbooks and historical accounts.¹⁹⁷ This "conspiracy of silence"¹⁹⁸ was so effective that even Tulsa County District

¹⁸⁹ See *supra* Section II.A.2.

¹⁹⁰ The district court dismissed the case as untimely under a two-year statute of limitations. See *Alexander v. Oklahoma*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *37 (N.D. Okla.), *aff'd*, 382 F.3d 1206 (10th Cir. 2004).

¹⁹¹ See *supra* Section III.C.

¹⁹² Goble, *supra* note 107, at 4; see Miller, *Reparations*, *supra* note 106, at 370 ("The State and City labored to suppress public discussion of the Massacre.").

¹⁹³ Goble, *supra* note 107, at 10; Malveaux, *Statutes of Limitations*, *supra* note 115, at 93 n.158 (stating that state and city government officials buried evidence).

¹⁹⁴ Goble, *supra* note 107, at 13 ("Not one of these criminal acts was then or ever has been prosecuted or punished by government at any level, municipal, county, state, or federal."); see also OKLA. STAT. ANN. tit. 74, § 8000.1(3) (West 2022); HEATH, *supra* note 178, at 41 (stating that government "routinely under-investigated, under-responded, undercharged, mishandled and failed to protect [victims] from a series of criminal acts or prosecute those responsible for such acts" (quoting *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *3)).

¹⁹⁵ Goble, *supra* note 107, at 6-8; see also tit. 74, § 8000.1(2).

¹⁹⁶ Brooks & Witten, *supra* note 108, at 124-32 (investigating evidence of potential mass graves grounded in geophysical and eyewitness evidence).

¹⁹⁷ See tit. 74, § 8000.1(4)-(5) (finding Massacre was "virtually forgotten" for seventy-five years); Goble, *supra* note 107, at 8.

¹⁹⁸ tit. 74, § 8000.1(5) (stating that work of Tulsa Commission has "forever ended the 'conspiracy of silence'"); Franklin & Ellsworth, *supra* note 2, at 21, 25 ("Some observers have claimed that the lack of attention given to the riot over the years was the direct result of

Attorney Bill LaFortune had never heard of the Massacre when asked in 1996.¹⁹⁹ The Massacre was a “public relations nightmare” for a city and state that wanted to continue to “attract new businesses and settlers.”²⁰⁰ Moreover, with a government populated with the Klan from top to bottom,²⁰¹ discussed above,²⁰² it is unsurprising that a massive effort would be made to hide its perpetrators, some of whom were government officials themselves.²⁰³

The silencing campaign’s success is evidenced by the requisite effort it took to unearth the truth.²⁰⁴ Almost eighty years following the Massacre, the state of Oklahoma commissioned a bipartisan investigation to find out what happened.²⁰⁵ This four-year effort resulted in over 10,000 pages of materials of evidence pulled from archives, libraries, and court records nationwide.²⁰⁶ Hundreds of survivors and witnesses gave interviews and historians, legal scholars, forensic specialists, archeologists, and anthropologists aided the investigation.²⁰⁷ This groundbreaking endeavor excavated evidence never before available to Massacre survivors.²⁰⁸ The state of Oklahoma, itself, conceded in its findings, codified by statute, that “[p]erhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten.”²⁰⁹ Upon learning for the first time of the government’s leadership role in Greenwood’s decimation²¹⁰ and of the government’s refusal to make legal amends,²¹¹ Massacre survivors challenged the government in federal court

nothing less than a ‘conspiracy of silence.’”).

¹⁹⁹ Franklin & Ellsworth, *supra* note 2, at 25.

²⁰⁰ tit. 74, § 8000.1(4).

²⁰¹ Goble, *supra* note 107, at 11 (“Tulsa’s atmosphere reeked with a Klan-like stench that oozed through the robes of the Hooded Order.”); see Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 40-45 (2004) [hereinafter Brophy, *Norms*].

²⁰² See *supra* Section II.A.2.

²⁰³ Goble, *supra* note 107, at 11-12 (“Despite duties to preserve order and to protect property, no government at any level offered adequate resistance, if any at all, to what amounted to the destruction of the neighborhood”); see tit. 74, § 8000.1(2) (“[S]trong evidence [exists] that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area”).

²⁰⁴ Goble, *supra* note 107, at 1-2.

²⁰⁵ *Id.* at 1 (“The 1921 Tulsa Race Riot Commission originated in 1997 with House Joint Resolution No. 1035.”).

²⁰⁶ *Id.* at 1, 8.

²⁰⁷ *Id.* at 3.

²⁰⁸ *Id.* at 6-8.

²⁰⁹ OKLA. STAT. ANN. tit. 74, § 8000.1(4) (West 2022).

²¹⁰ See Goble, *supra* note 107, at 19.

²¹¹ The Oklahoma Legislature only acknowledged its “moral responsibility”—not its legal one. See tit. 74, § 8000.1(6); Goble, *supra* note 107, at 19.

for constitutional violations.²¹² To comply with the statute of limitations, plaintiffs filed their complaint exactly two years to the day after the Commission's Report went public.²¹³

B. *The Statute of Limitations Provides Cover*

Having cracked the conspiracy of silence around the Massacre, Greenwood survivors' next challenge was preventing the filing deadline from silencing their claims. On the one hand, it can be argued that the statute of limitations does not suppress claims, it merely gives a plaintiff a reasonable amount of time in which to bring them.²¹⁴ A statute of limitations is simply a deadline that signals to a plaintiff the parameters of the civil justice system's availability and protects a defendant's ability to mount a sound defense.²¹⁵ Statutes of limitation serve a number of important functions. In a nutshell, limitations law has three primary goals: (1) enhancing fairness to the defendant; (2) encouraging efficiency; and (3) bolstering institutional legitimacy.²¹⁶ First, statutes of limitation seek to promote fair treatment of defendants by: (a) providing them with repose; (b) giving them sufficient notice to collect evidence before its accuracy is compromised; and (c) discouraging plaintiff misconduct, such as filing fraudulent claims, sitting on their rights, and "time shopping."²¹⁷ Second, statutes of limitation promote efficiency by: (a) reducing costs related to evidentiary concerns and uncertainty; (b) clearing burgeoning federal court dockets, especially for disfavored claims; and (c) simplifying decisions through the application of a bright-line test, no matter how arbitrary.²¹⁸ Third, statutes of limitation bolster the legal system's institutional legitimacy by establishing transsubstantive procedural norms that enhance an evenhanded administration of justice.²¹⁹ In broad strokes, filing deadlines aim to balance a desire for a merits determination with operational pragmatism.²²⁰

On the other hand, statutes of limitation are arbitrary, political creations of the legislature. They reflect not only practical considerations, but values about which claims and claimants matter.²²¹ Limitations periods are judgment calls,

²¹² See *Alexander v. Oklahoma*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *2 (N.D. Okla.), *aff'd*, 382 F.3d 1206 (10th Cir. 2004).

²¹³ See First Amended Complaint at 163-74, *Alexander*, No. 03-cv-00133 (N.D. Okla. Feb. 28, 2003). Plaintiffs later filed a Second Amended Complaint on April 29, 2003. See Second Amended Complaint at 1, *Alexander*, No. 03-cv-00133 (N.D. Okla. Apr. 29, 2003).

²¹⁴ See Malveaux, *Statutes of Limitations*, *supra* note 115, at 80 n.70.

²¹⁵ See *id.* at 76.

²¹⁶ *Id.* at 75, 79, 81.

²¹⁷ *Id.* at 75.

²¹⁸ *Id.* at 79.

²¹⁹ *Id.* at 81-82 ("To the extent that the public believes that limitations law serves important and legitimate goals . . . , limitations law reinforces and strengthens the legal system's institutional legitimacy.").

²²⁰ See *id.* at 91 n.146.

²²¹ See *id.* at 121-22.

reflecting a balance struck between expediency and justice.²²² Limitations periods have disadvantages, which explain their several exceptions.²²³ First, one of the most compelling justifications for exempting limitations periods is to preserve a plaintiff's proverbial right to their day in court.²²⁴ The Constitution's guarantee of due process²²⁵ and *Marbury v. Madison*'s promise of a remedy where there is an injury²²⁶ contradict a rigid time bar. Second, a statute of limitations prevents defendants from escaping liability on mere technicalities, thereby protecting law enforcement and deterrence objectives.²²⁷ As such, limitations exceptions ensure that procedure serves substance, and not vice versa.²²⁸ Third, inflexible application of limitations periods—that arbitrarily grant some people substantive rights but deny others—risks disillusionment and dissatisfaction with the judicial system and encourages revolt.²²⁹ As such, deadline exceptions reinforce the legal system's legitimacy by serving equitable interests over pedantic ones.²³⁰ Fourth, to the extent that judicial opinions develop the law and espouse societal values, letting claims go forward promotes such aims.²³¹ Fifth, time bars are exempted to treat plaintiffs fairly and to disincentivize defendant misconduct. The exemption applies when a defendant tricks a plaintiff into not filing, a plaintiff has a "legal disability" or other vulnerability that impedes filing, or a legal condition prohibits a plaintiff from filing.²³²

Courts implement these exceptions through various mechanisms, which impact whether a claim will be silenced. A brief explanation of the common mechanisms—accrual, equitable estoppel, and equitable tolling—is instructive. Accrual is when a plaintiff may bring a cause of action; in other words, when

²²² *See id.* at 79 n.60.

²²³ *See id.* at 83 (explaining that courts often allow otherwise time-barred claims to go forward to promote fairness and enforce the law).

²²⁴ *Id.* at 82.

²²⁵ U.S. CONST. amend. XIV, § 1; *see* *Traux v. Corrigan*, 257 U.S. 312, 332 (1921) ("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 . . ."); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

²²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The 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.").

²²⁷ *Malveaux, Statutes of Limitations*, *supra* note 115, at 83 ("A fundamental objective of the Anglo-American legal system is that disputes be resolved on their merits and not on procedural grounds.").

²²⁸ *Id.*

²²⁹ *Id.* at 84 ("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.").

²³⁰ *Id.*

²³¹ *Id.* at 85.

²³² *Id.* at 85-86.

the proverbial clock starts to run. An action may accrue when a plaintiff discovers or reasonably should have discovered their injury (the “discovery rule”),²³³ or when a plaintiff suffers an injury that is outside the limitations period but is contiguous with a timely injury (the “continuing violations” doctrine).²³⁴ Equitable estoppel prohibits a defendant from asserting the statute of limitations as a defense when their own misconduct prevented a plaintiff from timely filing.²³⁵ A defendant’s misconduct may be fraudulently concealing their illegal behavior or inducing the plaintiff to file late. Similarly, equitable tolling stops the clock from running when equity demands.²³⁶ The reasons for arresting the clock are numerous, including the presence of “extraordinary circumstances”²³⁷ and when the underlying reasons for the limitations period have otherwise been served.²³⁸ In sum, statutes of limitation are creatures of choice. The legislature has the power whether or not to create them, and the courts have the discretion whether or not to enforce them.²³⁹ Simply, “[t]he shelter of statutes of limitation is not guaranteed and has come into law by legislative grace” and judicial pleasure.²⁴⁰

1. Accrual

The court’s application of these commonplace mechanisms once again silenced Tulsa Massacre victims in their lawsuit against the government. As an initial matter, the court applied the relatively generous discovery rule of accrual, stating that plaintiffs’ cause of action did not arise until they knew or reasonably

²³³ *Id.* at 86-87.

²³⁴ *Id.* at 88 (“[C]ourts treat the series of acts as one continuous act that ends before the statute of limitations period expires.”). This doctrine is particularly salient to civil rights claims. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 262 n.16 (1980) (“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, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (declaring one-year period for establishing paternity rights as essentially extinguishing equal protection for children born outside of marriage).

²³⁵ Malveaux, *Statutes of Limitations*, *supra* note 115, at 89. In other words, defendant is estopped from relying on the defense for equitable reasons.

²³⁶ *Id.* at 89-91. Equitable tolling, in fact, is presumed by courts when interpreting statutes. *See* Young v. United States, 535 U.S. 43, 49 (2002).

²³⁷ *See* Hardin v. Straub, 490 U.S. 536, 543-44 (1989) (upholding Michigan’s decision to toll statute of limitations for inmates during their imprisonment).

²³⁸ *See, e.g.*, Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974) (“[T]he imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations . . .”).

²³⁹ For example, there is no statute of limitations for 42 U.S.C. § 1983 claims brought seeking damages for government violations of the Constitution. Therefore, litigants borrow the most analogous state common law claim, here, personal injury, to provide the applicable statute of limitations. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985). In Oklahoma, that is two years. OKLA. STAT. ANN. tit. 12, § 95(A)(3) (West 2022).

²⁴⁰ Malveaux, *Statutes of Limitations*, *supra* note 115, at 92.

should have known of their injury.²⁴¹ This generosity, however, stopped there. Plaintiffs argued that their cause of action accrued over eighty years after the Massacre erupted. It was not until the publication of the Commission Report in 2001 that plaintiffs became sufficiently aware of the state and local government's complicity in the Massacre to bring a credible constitutional law challenge.²⁴² The court, however, interpreted injury and causation in a cramped and narrow fashion, which started running the proverbial clock immediately after the Massacre.²⁴³ Indeed, the court concluded that it was "obvious" that Greenwood residents would have observed the misconduct of the City during the Massacre itself.²⁴⁴

This understanding of the injury and its causation is misguided. Plaintiffs' challenge was not of a few individual state actors who were bad apples committing individual torts with a crazed mob that day. To the contrary, plaintiffs alleged that the government deliberately and effectively wielded the power of the state to carry out collective erasure of Tulsa's Black people.²⁴⁵ These were constitutional and federal statutory rights violations. City officials not only looked the other way, but also "organized, armed, and deputized white citizens who then committed gross atrocities against the residents of Greenwood under color of law."²⁴⁶ The government's legal machinery enabled this crime against humanity. This was not an individual beef, but a collective attack on a community designed to "keep one race 'in its place.'"²⁴⁷

The court, however, concluded that Black Tulsa residents—caught in the crosshairs of this raging mayhem—would have been able to clearly identify the government's enabling role.²⁴⁸ Yes, the Oklahoma National Guardsmen were there, but many of the deputized citizens who killed, looted, and burned down Greenwood did so anonymously, without wearing badges or uniforms.²⁴⁹ With only approximately 2% of the white mob—made up of 15,000 to 25,000 men—deputized, it is unreasonable to expect Massacre victims to have fully ascertained the government's participation in the moment.²⁵⁰ The court also mistook contemporaneous Black newspaper accounts—criticizing the police

²⁴¹ *Alexander v. Oklahoma*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *22-23 (N.D. Okla.), *aff'd*, 382 F.3d 1206 (10th Cir. 2004).

²⁴² Malveaux, *Statutes of Limitations*, *supra* note 115, at 69-70.

²⁴³ *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *37.

²⁴⁴ *Id.* at *26 ("[A]llegations in the Complaint demonstrate the obvious, that victims of the Riot would have observed the City's actions during the Riot.").

²⁴⁵ Malveaux, *Statutes of Limitations*, *supra* note 115, at 96.

²⁴⁶ *Id.*

²⁴⁷ Goble, *supra* note 107, at 16-19; *see* OKLA. STAT. ANN. tit. 74, § 8000.1(2)-(3) (West 2022) (noting failure of officials to contain or calm situation during initial riots and listing several statistics regarding lives and property lost).

²⁴⁸ *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *26.

²⁴⁹ Malveaux, *Statutes of Limitations*, *supra* note 115, at 96. Nor were the deputized citizens' names recorded. *Id.*

²⁵⁰ *Id.*

and the Oklahoma National Guard—for knowledge of the government’s collusion. But a full and real understanding of the government’s complicity was not known, or even knowable, until the Commission Report’s publication.²⁵¹ Nonetheless, the court rejected the publication date as the accrual trigger, instead pinning it on the victims to have figured it out sooner.

This application of the discovery rule illustrates the judiciary’s problematic understanding of what constitutes plaintiff due diligence—one of the founding blocks of accrual and policy rationales for limitations periods.²⁵² The Tulsa court found the plaintiffs’ claims wanting because they failed to bring litigation challenging Jim Crow violence, when other Massacre victims filed suit much earlier. To be sure, there were some exceptional and laudable efforts made to seek justice in the court system on the heels of the Massacre.²⁵³ It is not surprising that in a largely self-sufficient city dubbed “Little Africa” one would find incredible stories of resilience and courage.²⁵⁴ For example, Black attorney Buck Colbert (B.C.) Franklin,²⁵⁵ just days after the massacre, put together a makeshift law firm under a tent with his law partner I.H. Spears and secretary Effie Thompson.²⁵⁶ Armed with nothing but a typewriter and his books, on June 6, 1921, B.C. Franklin filed insurance claims on behalf of Black Tulsans who lost property just days prior.²⁵⁷ Such examples, however, should not be fodder for a cramped discovery rule decision. These early lawsuits were brought primarily against insurance companies for property loss at the hands of individuals, not the government.²⁵⁸ Many of these cases were unsuccessful, leading Black Tulsans to forgo filing “out of rationality, not slothfulness.”²⁵⁹

²⁵¹ Goble, *supra* note 107, at 6-8 (detailing procedural history in creating report and surprising quantity of information that was uncovered in process).

²⁵² See Malveaux, *Statutes of Limitations*, *supra* note 115, at 97.

²⁵³ See *id.* at 93 (stating that many survivors were left “homeless, destitute, and terrorized” and therefore “were in no position to pursue a judicial remedy,” while others who did seek “relief in the courts soon realized its futility”); see also Letter from Eric D. Caine, Dep’t of Psychiatry, Univ. of Rochester Med. Ctr., to Michael D. Hausfeld, Attorney, Cohen, Milstein, Hausfeld & Toll (Aug. 25, 2003) [hereinafter Caine Letter], *appended to Defendant City of Tulsa’s Motion To Exclude the Report and Testimony of Dr. Eric D. Caine: Brief in Support* at 5, *Alexander*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131; Brophy, *Norms*, *supra* note 201, at 41-45.

²⁵⁴ See BROPHY, DREAMLAND, *supra* note 97, at 1.

²⁵⁵ B.C. Franklin is the father of renowned historian John Hope Franklin. See Alaina E. Roberts, *B.C. Franklin and the Tulsa Massacre*, PERSPS. ON HIST. (May 26, 2021), <https://www.historians.org/research-and-publications/perspectives-on-history/may-2021/bc-franklin-and-the-tulsa-massacre-a-triracial-history> [<https://perma.cc/S5KF-6BEE>].

²⁵⁶ Malveaux, *Keynote*, *supra* note 35, at 20-22.

²⁵⁷ Roberts, *supra* note 255 (detailing history of B.C. Franklin and his lawsuit filings immediately following Massacre); *The Victory of Greenwood: B.C. Franklin*, VICTORY OF GREENWOOD, <https://thevictoryofgreenwood.com/2020/10/20/the-victory-of-greenwood-b-c-franklin/?v=7516fd43adaa> [<https://perma.cc/29HH-C3UA>] (last visited Dec. 7, 2022).

²⁵⁸ Malveaux, *Statutes of Limitations*, *supra* note 115, at 98 n.196.

²⁵⁹ *Id.*

The few cases actually brought against the City of Tulsa were dismissed.²⁶⁰ In a legal system corrupted by the KKK, the government refused to prosecute white people for theft, arson, and murder, and grand juries indicted only Black people.²⁶¹ Efforts by Black Tulsans—while laudable—were admittedly futile, as they quickly observed.²⁶² Given this context, the discovery rule unfairly and unreasonably burdens plaintiffs, silencing their legal outcries.²⁶³

2. Equitable Estoppel

Like accrual, the equitable estoppel doctrine squashed Massacre victims' claims. Despite the government's role in covering up its own complicity in the attack and lulling plaintiffs into not filing because of empty promises to provide restitution—the courts nevertheless permitted the government to assert untimeliness as a defense.²⁶⁴ The Commission Report exposed the government's fraudulent concealment, unearthing over 10,000 pages of evidence after a rigorous, four-year, bipartisan investigation.²⁶⁵ The state of Oklahoma itself incorporated into its legislative record the “conspiracy of silence,” conceding that “[o]fficial reports and accounts of the time that viewed the Tulsa Race Riot as a ‘Negro uprising’ were incorrect,” and that the truth had been “swept well beneath history’s carpet.”²⁶⁶ No matter. Concluding that plaintiffs must have observed the government's misconduct during the massive racial assault, the court permitted the government to rely on the statute of limitations as a defense despite the government's fraudulent concealment.²⁶⁷

²⁶⁰ *Id.* (stating that the only two cases litigated against City of Tulsa were dismissed).

²⁶¹ *Id.* (“Black riot victims were further dissuaded from filing suit against the government by grand jury indictments against Blacks only.”).

²⁶² *Id.* at 93 n.156 (noting that, out of around 150 lawsuits filed, there were no insurance payouts or convictions for any violent acts against African Americans).

²⁶³ *Id.* at 98 (“[T]he 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.”). When a plaintiff is aware of their injury, but not the source, a cause of action should not accrue. *See Drazan v. United States*, 762 F.2d 56, 59 (7th Cir. 1985). Under different circumstances, Judge Richard Posner reasoned 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.” *Id.*

²⁶⁴ Malveaux, *Statutes of Limitations*, *supra* note 115, at 99 (stating that despite Commission's acknowledgement of conspiracy of silence, Court nevertheless refused to estop the government from relying on statute of limitations).

²⁶⁵ *Id.*

²⁶⁶ *See* OKLA. STAT. ANN. tit. 74, § 8000.1(2), (4) (West 2022).

²⁶⁷ Jewish victims and survivors of the Nazi Holocaust, however, fared better in their fraudulent concealment claim. *See* Malveaux, *Statutes of Limitations*, *supra* note 115, at 100-02. For example, plaintiffs contended in 1997 that the banks had participated in the Holocaust with the Vichy and Nazi regimes and had covered up their role over fifty years prior. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 121 (E.D.N.Y. 2000). An independent commission organized by the French government generated a report revealing the banks' wrongdoing. *Id.* at 122, 132. The court unequivocally equitably estopped defendants from relying on the

The government was also permitted this grace, despite false assurances to plaintiffs that it would provide restitution shortly after the Massacre. Faced with a national public relations nightmare, the City of Tulsa promised that it would “make good the damage, so far as can be done, to the last penny.”²⁶⁸ Such promises by the mayor, head of the Welfare Board, and president of the Chamber of Commerce filled the white newspapers just days after news of the bloodshed had spread worldwide.²⁶⁹ Plaintiffs, to their detriment, relied on these promises. But defendants not only failed to make good on their promises, they actively undermined plaintiffs’ recovery and Greenwood’s rebuilding.²⁷⁰ Rather than exercise its equitable authority to estop the government from benefiting from its deceit, the court stopped Massacre victims from pursuing their constitutional rights.²⁷¹

The court rejected this alternative ground for equitable estoppel, concluding that plaintiffs’ reliance on defendants’ promises was unreasonable.²⁷² Plaintiffs were caught in a catch-22. As an initial matter, plaintiffs were expected to contemporaneously discern the government’s full involvement in the Massacre, and fully comprehend the government’s subsequent deception about promises of restitution immediately afterwards.²⁷³ At the same time, plaintiffs were expected to file claims against this same government in the very system that was partly responsible for the bloodshed and unremorseful about its role.²⁷⁴ What is

statute of limitations because of their deception. *See id.* at 121-23, 132, 135-36. Fraudulent concealment is a basis for equitable tolling, as well as equitable estoppel. *See, e.g.,* Rosner v. United States, 231 F. Supp. 2d 1202, 1203-06, 1209 (S.D. Fla. 2002) (explaining how Hungarian Jews successfully tolled statute of limitation where hidden information about their stolen property during World War II was not available until publication of Presidential Advisory Commission on Holocaust Assets Report on the Gold Train).

²⁶⁸ *Tulsa*, NATION, June 15, 1921, at 839 (quoting former Tulsa Mayor and head of the welfare board, Loyal J. Martin).

²⁶⁹ *See A Grand Jury Riot Probe: And Tulsa Business Men Will Rebuild Negroes’ Homes*, KAN. CITY TIMES, June 3, 1921, at 1; *Tulsa Is Repentant Now: All Efforts Being Directed To Ward Reparation for Tragedy*, KAN. CITY STAR, June 3, 1921, at 1; *Corporation of Tulsa Businessmen Will Rebuild “Little Africa,”* DAILY ARDMOREITE, June 6, 1921, at 1; *Tulsa Will*, TULSA TRIB., June 3, 1921, at 20; Alva J. Niles, *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.”).

²⁷⁰ *Alexander v. Oklahoma*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *28-29 (N.D. Okla.), *aff’d*, 382 F.3d 1206 (10th Cir. 2004) (discussing government’s restrictive zoning laws and refusals to provide economic assistance to victims).

²⁷¹ *Id.* at *28 (“The Court does not find that the City’s promises of restitution are sufficient to give rise to equitable estoppel.”).

²⁷² *Id.*

²⁷³ *Id.* at *26-27 (opining that “victims of the Riot would have observed the City’s actions during the Riot”).

²⁷⁴ The court itself conceded, “[t]he political and social climate after the riot simply was

a reasonable person in this unreasonable situation to do? Here, the law rewarded the morally bankrupt over the innocent.²⁷⁵

3. Equitable Tolling

Finally, the court silenced plaintiffs' constitutional claims by failing to equitably toll the statute of limitations to the point of the claims' legal viability. Plaintiffs took the position that publication of the Commission Report provided the requisite information to support their constitutional claims against the government for its participation, and even orchestration, of the Massacre.²⁷⁶ Armed with newly available, concrete evidence and supported by a dream team of legal counsel, historians, community organizations, and experts, with court access, the plaintiffs believed it was time to challenge the constitutionality of the government's wrongdoing.²⁷⁷ What stopped plaintiffs in their tracks was the court's failure to equitably toll the limitations period beyond the formal dismantlement of Jim Crow. De jure progress—in the form of federal civil rights statutes enacted in the 1960s—ironically justified shutting down the courts to Black Massacre victims seeking to right the government's constitutional wrongs.²⁷⁸

To its credit, the court tolled the limitations period for over forty years, an important first for those seeking restitution for government-sanctioned racial massacres.²⁷⁹ The court concluded that the record established “intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow,” and found these facts sufficient to justify equitable tolling.²⁸⁰ These were unquestionably “extraordinary circumstances” that warranted grace from the filing deadline.²⁸¹ But plaintiffs' victory was

not one wherein the Plaintiffs had a true opportunity to pursue their legal rights.” *Id.* at *31.

²⁷⁵ Interestingly, after the Commission Report publication, the state of Oklahoma accepted moral responsibility for its role and recommended reparations. *See Goble, supra* note 107, at 15, 19; *see also* OKLA. STAT. ANN. tit. 74, § 8000.1(6) (West 2022) (“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.”).

²⁷⁶ *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *23.

²⁷⁷ *See Malveaux, Statutes of Limitations, supra* note 115, at 99 (discussing various experts involved in conducting Commission Report).

²⁷⁸ *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *30-32.

²⁷⁹ *Malveaux, Statutes of Limitations, supra* note 115, at 106.

²⁸⁰ *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *32.

²⁸¹ *Id.* at *30-32. The court's ruling is consistent with similar rulings. *See, e.g.,* *Rosner v. United States*, 231 F. Supp. 2d 1202, 1203-04, 1208-09 (S.D. Fla. 2002) (ruling that limitations period equitably tolled for forty-six years in Holocaust reparations case); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 121, 124 (E.D.N.Y. 2000) (ruling that limitations period equitably tolled for over fifty years in Holocaust reparations case).

Pyrrhic. The new cutoff date failed to account for the impact that the government's treachery had on plaintiffs in the form of ignorance of their claim and ongoing intimidation, which had kept plaintiffs from bringing their claims.²⁸² De jure and de facto progress are not the same. As the Supreme Court declared 150 years ago: "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."²⁸³ Such logic did not prevail in the Massacre victims' case.

4. Policy Exemptions

Moreover, the court could have excused plaintiffs from the filing deadline on the ground that the underlying policy rationales for the deadline were not served in this case. The court's refusal to do so was arguably an abuse of discretion where none of the primary justifications—(1) enhancing fairness to the defendant, (2) encouraging efficiency, and (3) bolstering institutional legitimacy—were present. This has been fully covered elsewhere,²⁸⁴ but each is briefly addressed in turn.

First, the goal of maximizing fairness to the defendant was not furthered in the Tulsa constitutional case. Instead, plaintiffs bore the brunt of the law's silencing of their claims. For example, prioritizing the government's desire and expectation for repose was inappropriate here. Defendants were arguably on notice that a lawsuit might be forthcoming after it issued a report establishing its complicity and admitting its moral culpability for constitutional violations.²⁸⁵ Where the government failed to voluntarily provide restitution, it could not then cry foul when plaintiffs sought to compel restitution through the federal court system. Humoring defendants' sense of entitlement is not more important than enforcing the Constitution.²⁸⁶

Another example of how the fairness-to-defendant justification did not apply in this case concerns evidentiary preservation issues. A filing deadline is admittedly overinclusive—excluding both meritorious and meritless claims. While it is true that the passage of time can compromise dependable evidence, in the Tulsa case this was mitigated by: (1) a historic, multiyear, bipartisan investigation and subsequent groundbreaking Commission Report; (2) powerful testimonials of survivors and witnesses; and (3) modern technology that unearthed buried evidence.²⁸⁷ Far from faded memories, many Massacre

²⁸² See Malveaux, *Statutes of Limitations*, *supra* note 115, at 111 & n.275.

²⁸³ *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 184-85 (1872) (quoting *Semmes v. Hartford Ins. Co.*, 80 U.S. (13 Wall.) 158, 160 (1871)).

²⁸⁴ See Malveaux, *Statutes of Limitations*, *supra* note 115, at 111-22.

²⁸⁵ See Goble, *supra* note 107, at 6-8.

²⁸⁶ See Malveaux, *Statutes of Limitations*, *supra* note 115, at 113-14.

²⁸⁷ See Brooks & Witten, *supra* note 108, at 126-32 (explaining use of modern archaeological techniques to examine subsurface areas at site of undocumented mass graves for Massacre victims).

survivors can recount the horror as if it were yesterday. For example, at 106-years-old, Massacre survivor Mother Randle to this day “experiences flashbacks of Black bodies that were stacked up on the street as her neighborhood was burning.”²⁸⁸ Testifying before Congress in 2021, she recalled: “[R]unning outside of my house . . . past dead bodies. . . . It wasn’t a pretty sight. I still see it today in my mind—100 years later.”²⁸⁹ Similarly, in 2007, ninety years after the Massacre, Dr. Olivia Hooker testified before Congress: “I still remember the sound of gunfire raining down on my home and that the mob burned all my doll’s clothes.”²⁹⁰ Her memory of the government shooting at their home as a six-year-old is vivid.²⁹¹ Even stale evidence—while not ideal—is better than nothing in a system that already produces “rough justice” at best.²⁹²

A final example of the fairness-to-defendant rationalization’s falling short was its use as a justification to curtail plaintiff misconduct. In the Tulsa constitutional case, there was little, if any, threat of plaintiff mischief. Where there were live Massacre survivors and their direct descendants, plaintiffs’ identities and injuries were clear. And where there were defendants who conceded culpability, defendant identities and causation were also clear.²⁹³ Such clarity largely erases the possibility of fraudulent claims. Additionally, because plaintiffs were ignorant of their constitutional claims until the publication of the Commission Report, the limitations period did (and could) not prevent plaintiffs from sitting on their rights. Moreover, plaintiffs’ ignorance made impossible the spoliation of evidence or litigation by ambush. Plaintiffs did not have the opportunity to exploit evidentiary challenges, and, if anything, were less likely to have evidence than defendants given the government’s “conspiracy of silence.”²⁹⁴

Second, the goal of promoting efficiency was not served by silencing the Tulsa plaintiffs. It is questionable whether the costs related to such an old case would have dwarfed those of a case brought earlier. This was especially true in a legal system so corrupted and Klan-driven.²⁹⁵ Additionally, using filing deadlines to shrink mushrooming federal dockets is ineffective for cases like the

²⁸⁸ See First Amended Petition, *supra* note 76, at 8. Mother Fletcher, also at 106 years old, experiences the same memories. *See id.* at 9.

²⁸⁹ *Continuing Injustice*, *supra* note 5, at 17 (statement of Lessie Benningfield Randle (“Mother Randle”), Tulsa Race Massacre Survivor).

²⁹⁰ *Accountability Act Hearing*, *supra* note 27, at 32 (statement of Olivia Hooker, Ph.D., James B. Duke Professor Emeritus of History, Duke University School of Law).

²⁹¹ *See id.*; Malveaux, Keynote, *supra* note 35, at 28.

²⁹² *See* Malveaux, *Statutes of Limitations*, *supra* note 115, at 116-17 (describing various ways system is designed to accept “rough justice” outcomes).

²⁹³ *See* OKLA. STAT. ANN. tit. 74, § 8000.1(2) (West 2022).

²⁹⁴ *See* Franklin & Ellsworth, *supra* note 2, at 25.

²⁹⁵ *Alexander v. Oklahoma*, No. 03-cv-00133, 2004 U.S. Dist. LEXIS 5131, at *30-31 (N.D. Okla.), *aff’d*, 382 F.3d 1206 (10th Cir. 2004) (“Plaintiffs assert extraordinary circumstances in a legal system that was openly hostile to them . . . an era of Klan domination of the courts and police force, and the era of Jim Crow.”).

Tulsa case, which compromise a minute fraction of the roster.²⁹⁶ Moreover, filing deadlines for such cases do a poor job of culling out the frivolous ones.²⁹⁷ Timeliness is not equivalent to strength or importance. While a bright-line test is admittedly easy to administer, it fails as a means of quality control. There are a myriad of reasons why someone might not file their claim within a short two-year window—trauma and fear being among them. For example, even as a centenarian, Mother Fletcher still relives the childhood trauma:

I will never forget the violence of the White mob when we left our house. I still see Black men being shot and Black bodies lying in the street. I still smell smoke and see fire. I still see Black businesses being burned. I still hear airplanes flying overhead. I hear the screams. I have lived through the [M]assacre every day.²⁹⁸

For many who survived the Massacre, the trauma has kept them afraid long after its occurrence.²⁹⁹

Third, a rigid application of filing deadlines for cases challenging government-sponsored racial violence undermines the legal system's legitimacy. While limitations periods promote equal treatment at the hands of the law across various claims and claimants, this formal equality masks important differences.³⁰⁰ Even-handed, consistent application of objective standards makes sense, but equally important is judicial discretion exercised equitably and justly. The Tulsa case is a perfect test: it presents one of the starkest examples of a stale claim and some of the most egregious circumstances under which equitable principles would imaginably apply. A system that promises every member the right to due process and equal protection but breaks its oath when the implications are most profound is understandably suspect.

In sum, the court's refusal to hear the Tulsa case is a form of silencing. The statute of limitations shut down not only the plaintiffs' constitutional claims, but

²⁹⁶ More specifically, the use of filing deadlines is ineffective for cases involving government-sanctioned racial violence.

²⁹⁷ See Malveaux, *Statutes of Limitations*, *supra* note 115, at 112 (“Rather than ensuring fairness for the defendant, foreclosing reparations claims because of untimeliness devalues fairness for the plaintiff.”).

²⁹⁸ *Continuing Injustice*, *supra* note 5, at 8 (statement of Viola Fletcher (“Mother Fletcher”), Oldest Living Tulsa Race Massacre Survivor).

²⁹⁹ See Caine Letter, *supra* note 253, at 3-4; Miller, *Reparations*, *supra* note 106, at 370 (“The State campaign of race-based oppression inflicted intense psychological trauma on the victims. Even after eighty years, ‘[m]any of the [survivors] still believe[d] that the state and municipal government will punish them for discussing openly what happened during the Riot.’ (alterations in original)); see also GATES, *supra* note 31, at 41-114 (documenting stories of Massacre survivors). Indeed, the trauma and fear are even more acute, given that many of the Massacre survivors experienced the attack as children. For example, Mr. Clark grieved the loss of his parent (stepfather) and pet dog Bob, and Olivia Hooker grieved the fact that her dollhouse and doll clothes were destroyed. See *supra* Part I.

³⁰⁰ Malveaux, *Statutes of Limitations*, *supra* note 115, at 117.

also the claimants themselves. But this would not be the last time the law would play this role.

C. *Legislating Silence 100 Years Later*

On the cusp of the Massacre's centennial—just as knowledge of the worst government-sponsored racial attack was gaining momentum in the public consciousness³⁰¹—the law is now being wielded to squelch such knowledge. This time it is in the form of public school education proscriptions.³⁰² The through line from the Massacre, to the sabotage of rebuilding efforts, to structural discrimination, to the denial of a constitutional remedy, now extends to the present. Today, the law has effectively pressed the mute button on teaching about the Massacre and its complex origins and impact.

The 2020 racial reckoning—catalyzed by the brutal killing of an unarmed Black man, George Floyd, by a white police officer, Derek Chauvin, and by similar atrocities recorded on cell phones across the country³⁰³—has motivated many Americans to bolster their knowledge of U.S. history and its impact. Students hungry for a more complete, accurate, and deeper understanding of this complex history have found a wealth of diverse perspectives, robust theoretical frameworks, and alarming factual revelations. Professor Nikole Hannah-Jones's *1619 Project*, for example, challenges readers to examine the centrality of race in the founding of the United States.³⁰⁴ Books like Michelle Alexander's *The New Jim Crow*³⁰⁵ and Robin DiAngelo's *White Fragility*³⁰⁶ have similarly garnered wide attention.³⁰⁷ Diversity, Equity, and Inclusion (“DEI”) professionals and trainings, once exceptional, have grown to meet demand in

³⁰¹ HBO's popular series *Watchmen* opened with a graphic depiction of the Tulsa Race Massacre. *Watchmen: It's Summer and We're Running Out of Ice* (HBO television broadcast Oct. 20, 2019). Many viewers conceded that they had never heard of the Massacre until then, and some thought the depiction was fictional. Aaron Perine, *Watchmen Has Fans Discussing the Tulsa Race Massacre*, COMICBOOK (June 19, 2020, 11:24 PM), <https://comicbook.com/tv-shows/news/watchmen-tulsa-race-massacre-fans-discussing/> [<https://perma.cc/BS85-EJ6P>].

³⁰² See OKLA. STAT. ANN. tit. 70, § 24-157 (West 2022).

³⁰³ *What George Floyd Changed*, POLITICO MAG. (May 23, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/05/23/what-george-floyd-changed-490199> [<https://perma.cc/3YFF-FQHY>].

³⁰⁴ NIKOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* 11 (2021) (“The United States is a nation founded on both an ideal and a lie.”).

³⁰⁵ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

³⁰⁶ See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

³⁰⁷ Mary Cadden, *Books About Race Flying Off Shelves, Climbing Best-Seller Lists Following the Death of George Floyd, Protests*, USA TODAY (June 5, 2020, 2:57 PM), <https://www.usatoday.com/story/entertainment/books/2020/06/04/books-race-flying-off-shelves-following-george-floyds-death/3143169001/> [<https://perma.cc/GS2T-MNH9>] (discussing how books about racism in United States increased in popularity after murder of George Floyd and protests about systemic racism).

corporations, schools, churches, and governments, and have become embedded and normalized in mainstream private and public institutions. The Movement for Black Lives has launched countless young persons into activism, organizing, and even attending law school.³⁰⁸ For many Americans, this reckoning has been nothing short of transformative.³⁰⁹

Teaching and learning about the 1921 Massacre have helped to close the ignorance gap. The Massacre victims' 2003 constitutional case was itself an important teachable moment and catalyzed various modes of educational efforts.³¹⁰ Significant documentaries were produced in the immediate aftermath of the litigation, such as Art Fennell's Emmy-award winning *Terror in Tulsa, History Uncovered*, and Reggie Turner's *Before They Die!*³¹¹ These have been bolstered more recently by Nailah Jefferson's *Descended from the Promised Land: The Legacy of Black Wall Street*³¹² and HBO's popular series *Watchmen*.³¹³ The Smithsonian's National Museum of African American History and Culture, opened in 2016, showcases this iconic history and the legal struggle that ensued.³¹⁴ Finally, after ninety-five years of absence from the Oklahoma public school curriculum,³¹⁵ in 2019 the Oklahoma State Board of

³⁰⁸ This observation has been called the "Trump bump." See Stephanie Francis Ward, *The 'Trump Bump' for Law School Applicants Is Real and Significant, Survey Says*, ABA J. (Feb. 22, 2018, 6:00 AM), https://www.abajournal.com/news/article/the_trump_bump_for_law_school_applicants_is_real_and_significant_survey_say [<https://perma.cc/KP2V-ESA7>] ("According to a Kaplan Test Prep survey of more than 500 pre-law students, 32 percent indicated that the 2016 presidential election [of Trump] influenced their desire to become lawyers."). An increase in Law School Admission Test takers and law school applications occurred following Trump's election. *Id.*

³⁰⁹ *What George Floyd Changed*, *supra* note 303.

³¹⁰ See Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 61-62 (2004) ("The opportunity presented by the Tulsa litigation is to provide a broad-based educational program that alerts the people of Oklahoma to the history of racism that precipitated the riot and continues in its wake.").

³¹¹ See George Yancy, *Robin D.G. Kelly: The Tulsa Race Massacre Went Way Beyond "Black Wall Street,"* TRUTHOUT (June 1, 2021), <https://truthout.org/articles/robin-kelley-business-interests-fomented-tulsa-massacre-as-pretext-to-take-land/> [<https://perma.cc/RF6E-A9XW>] (emphasizing popular works of various media detailing the events and history of Massacre); see also *TERROR IN TULSA, HISTORY UNCOVERED* (CN8 2007); *BEFORE THEY DIE!* (Mportant Films, LLC 2008). The Commission investigation and report also generated significant media attention. A contributor to the report, Gates shared: "Thanks to widespread media coverage of them for the past three and a half years, the survivors have earned a place in the hearts of people all over the world." GATES, *supra* note 31, at 51.

³¹² *DESCENDED FROM THE PROMISED LAND: THE LEGACY OF BLACK WALL STREET* (Transform Films 2021).

³¹³ The series opened with a graphic depiction of the Massacre. Perine, *supra* note 301.

³¹⁴ *About the Museum*, SMITHSONIAN: NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/about/about-museum> [<https://perma.cc/3HFT-BVAA>] (last visited Dec. 7, 2022) (detailing origins of museum and its purpose).

³¹⁵ Nate Morris, *Bill Blocking Accurate Teaching of Tulsa Race Massacre Sits on Governor's Desk*, BLACK WALL ST. TIMES (May 6, 2021) [hereinafter Morris, *Bill Blocking*],

Education (“BOE”) mandated that the Massacre be part of its social studies curriculum.³¹⁶

As the Massacre’s history is finally starting to penetrate the public school curriculum and mainstream psyche, however, Oklahoma’s law has retreated to retrenchment and silencing. On May 7, 2021, just weeks before the 100th anniversary of the Massacre, the governor of Oklahoma signed House Bill 1775 (“HB 1775”), a highly controversial law that purports to prohibit discrimination by teachers, administrators, and other school employees in Oklahoma’s public schools.³¹⁷ HB 1775 was opposed by the Tulsa Race Massacre Centennial Commission, the Oklahoma City Board of Education,³¹⁸ the University of Oklahoma (the state’s flagship institution), and numerous local authorities and community members.³¹⁹ Its enactment was so deeply troubling to the Tulsa Race Massacre Centennial Commission that it ousted the Governor for signing the bill.³²⁰

A quick read of the bill’s purpose and prohibitions might lead one to wonder if the conflict is much ado about nothing. The bill’s stated purpose is innocuous enough, facially targeting discriminatory differential treatment on the basis of race or sex:

It shall be the policy of the Oklahoma State Board of Education to prohibit discrimination on the basis of race or sex in the form of bias, stereotyping, scapegoating, classification, or the categorical assignment of traits, morals, values, or characteristics based solely on race or sex. Public schools in this state shall be prohibited from engaging in race or sex-based discriminatory acts by utilizing these methods, which result in treating individuals

<https://theblackwallstimes.com/2021/05/05/bill-blocking-accurate-teaching-of-tulsa-race-massacre-sits-on-governors-desk/> [<https://perma.cc/544B-UEWD>].

³¹⁶ OKLA. ADMIN. CODE § 210:15-3-107(e)(2)(A)-(F) (West 2022).

³¹⁷ Sean Murphy, *Oklahoma Governor Signs Ban on Teaching Critical Race Theory*, AP NEWS (May 7, 2021), <https://apnews.com/article/oklahoma-race-and-ethnicity-d69cf5d38e3293884fca00ad3963a90e> [<https://perma.cc/S985-CVNL>]; OKLA. STAT. ANN. tit. 70, § 24-157 (West 2022). In addition, HB 1775 prohibits mandatory gender or sexual diversity training or counseling, which can help to create inclusive classrooms for LGBTQ students. *Id.* An examination of this issue is beyond the scope of this paper.

³¹⁸ Nuria Martinez-Keel, *OKC School Board Denounces Critical Race Theory Law*, OKLAHOMAN (May 11, 2011, 8:51 AM), <https://www.oklahoman.com/story/news/education/2021/05/11/okc-school-board-denounces-house-bill-1775-nothing-short-racism-critical-race-theory/5032007001/> [<https://perma.cc/B72T-AKTS>].

³¹⁹ Letter from Joseph Harroz, Jr., President, Univ. of Okla., to Univ. of Okla. Cmty. (May 7, 2021), https://www.ou.edu/web/news_events/articles/news_2021/a-message-from-president-harroz-HB-1775 [<https://perma.cc/E2SX-9WEC>] (stating university’s “strong objection” to HB 1775 and university’s “advocacy against it”).

³²⁰ Randy Krehbiel, *Tulsa Race Massacre Centennial Commission Formally Severs Tie with Governor Kevin Stitt*, TULSA WORLD (June 19, 2022), https://tulsa-world.com/news/local/racemassacre/tulsa-race-massacre-centennial-commission-formally-severs-ties-with-gov-kevin-stitt/article_efc4d76c-b4f6-11eb-b405-bbf3f0572bc7.html [<https://perma.cc/7YBF-DSZV>].

differently on the basis of race or sex or the creation of a hostile environment.³²¹

The Act explicitly prohibits “[a]ny orientation or requirement that presents any form of race or sex stereotyping or a bias on the basis of race or sex”³²² and bans the enumerated “concepts”³²³ below, which again may confound. The Act states plainly:

No teacher, administrator or other employee of a school district, charter school or virtual charter school shall require or make part of a course the following concepts:

(a) one race or sex is inherently superior to another race or sex, . . .

(c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex, . . .

(e) an individual’s moral character is necessarily determined by his or her race or sex . . .³²⁴

Moreover, the Act does “not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.”³²⁵ These standards not only permit, but require, instruction about the Massacre, its genesis, and its impact.³²⁶ Thus, a purely textual interpretation of this part of the discrimination ban can be misleading. On its face, this part of the Act seems to simply forbid public educators from espousing outright racism and sexism. The Act’s language certainly suggests that.³²⁷ However, to better understand how this seemingly simple, antidiscrimination statute actually silences meaningful, robust discourse about the Massacre and the complex history and currency of race in the United States today, the following exploration of the Act is instructive. Examining the Act’s genesis and impact reveals its danger as the next legal tool used to carry out state-mandated silence.

³²¹ OKLA. ADMIN. CODE § 210:10-1-23(a) (West 2022) (stating purpose of HB 1775 within implementing rule promulgated by Oklahoma BOE); *see* OKLA. STAT. ANN. tit. 70, § 24-157 (West 2022).

³²² tit. 70, § 24-157(A)(1).

³²³ *Id.* § 24-157(B)(1)(a)-(h) (listing various prohibited concepts).

³²⁴ *Id.* § 24-157(B)(1)(a), (c), (e).

³²⁵ *Id.* § 24-157(B).

³²⁶ For a discussion of the standards, *see* OKLA. STATE DEP’T OF EDUC., OKLAHOMA ACADEMIC STANDARDS FOR SOCIAL STUDIES 43-47 (2019), <https://sde.ok.gov/sites/default/files/documents/files/Oklahoma%20Academic%20Standards%20for%20Social%20Studies%208.26.19.pdf> [<https://perma.cc/EKC4-ADDJ>] (outlining curriculum requirements, including “causes of the Tulsa Race Riot and its continued social and economic impact”). *See also* OKLA. ADMIN. CODE § 210:15-3-107(e)(2)(E) (West 2022); *id.* § 210:15-3-110(d)(1)(B) (requiring students to learn about “race riots as typified by the Tulsa Race Riot”).

³²⁷ *See* tit. 70, § 24-157(B)(1)(a)-(h) (listing various prohibited concepts).

1. The Act's Genesis

As an initial matter, why would the Oklahoma legislature choose to enact an antidiscrimination law now, when there are already sufficient ones on the books?³²⁸ HB 1775's origin story reveals a concerted effort to silence robust public education about troubling topics grounded in race and gender. Confusion about and a gross distortion of Critical Race Theory ("CRT")—a fifty-year-old theoretical legal framework for understanding historical and present structural racism—have been successfully wielded to pass sweeping educational censorship.³²⁹ Educational efforts to provide a richer, more accurate historical accounting of the United States and to be more inclusive of the experiences and perspectives of marginalized groups have been demonized as an effort "to define and divide young Oklahomans about their race or sex."³³⁰ Without evidence,³³¹ supporters justify the bill as necessary to protect white students from being taught to feel personally responsible for past racism and students of color from being stereotyped as victims.³³² Supporters of HB 1775 contend that the law "simply bans indoctrination," not education.³³³

The contemporaneous legislative debate surrounding HB 1775, however, suggests that its purpose was fueled by political and racial, rather than educational, motives. For example, one state representative voiced his support for the bill because he viewed Black Lives Matter (an organization not

³²⁸ See OKLA. STAT. ANN. tit. 25, §§ 1101-1706 (West 2022) (prohibiting discrimination in employment, public accommodation, and housing in Oklahoma).

³²⁹ Madison Well-James, *Critical Race Theory: Why It Still Matters in Oklahoma*, OKLA. EAGLE (Aug. 2, 2022), <http://theoklahomaeagle.net/2022/08/02/critical-race-theory-why-it-still-matters-in-oklahoma/> [<https://perma.cc/3WBM-Q2TZ>] (explaining critical race theory and how HB 1775 prohibits it in classrooms).

³³⁰ See Ray Carter, *Stitt Signs Ban on Racist Teaching*, OKLA. COUNCIL OF PUB. AFFS. (May 7, 2021), <https://www.ocpathink.org/post/stitt-signs-ban-on-racist-teaching> [<https://perma.cc/FS55-HV2F>] (quoting Oklahoma Governor Kevin Stitt, who said: "I firmly believe that not one cent of taxpayer money should be used to define and divide young Oklahomans about their race or sex. That is what this bill upholds for public education.").

³³¹ Robby Korth, *How Oklahoma's Classroom Curriculum Bans Affect Black Educators and Families*, ST. IMPACT OKLA. (Feb. 24, 2022, 5:00 AM), <https://stateimpact.npr.org/oklahoma/2022/02/24/how-oklahomas-classroom-curriculum-bans-affect-black-educators-and-families/> [<https://perma.cc/EB3N-D5WR>] ("There were no complaints filed with Oklahoma's State Department of Education about CRT before the law was passed and only two unfounded complaints were filed last fall.").

³³² See Well-James, *supra* note 329 (describing bill supporters' concerns that CRT labels children as oppressors who would feel guilt and shame for being white, which the bill opponents describe as "protect[ing] white fragility").

³³³ See Ray Carter, *NEA/OEA Admits Anti-CRT Law Does Not Ban Teaching History*, OKLA. COUNCIL OF PUB. AFFS. (Dec. 9, 2021) [hereinafter Carter, *NEA/OEA Admits*], <https://www.ocpathink.org/post/nea-oea-admits-anti-crt-law-does-not-ban-teaching-history> [<https://perma.cc/V7A7-P9FZ>] (quoting Oklahoma Secretary of Education Ryan Walters, who further commented that "we should all agree [indoctrination] has no place in our schools").

mentioned anywhere in HB 1775) as a terrorist organization, akin to the KKK.³³⁴ Another Representative characterized the debate as an existential battle with CRT and the fate of America: “We are in a fight for the future of our children and our grandchildren . . . Critical Race Theory prescribes a revolutionary program that would overturn the principles of the Declaration [of Independence] and destroy the remaining structure of the Constitution.”³³⁵ Other supporters urged the bill’s passage to eliminate teaching CRT and its “Marxist indoctrination.”³³⁶ as well as other concepts like “institutionalized racism” and “white supremacy.”³³⁷ While HB 1775 never mentions “critical race theory” or “CRT” in its text, the legislative history shows that CRT (or some grossly distorted perversion of it) was the target of the Act.³³⁸

HB 1775’s banned concepts are carbon copies of eight of the nine concepts listed in former President Donald Trump’s Executive Order 13950, rolled out shortly after the police killing of George Floyd and the ensuing nationwide civil rights protests.³³⁹ Executive Order 13950 was issued on September 22, 2020, “in part [to forbid] . . . federal contractors and federal grant recipients from engaging in workplace training that . . . ’inculcate[d]’” various enumerated concepts—later adopted wholesale by HB 1775.³⁴⁰ The Administration also made clear its desire to shut down discussion of concepts such as “‘intersectionality,’ ‘critical race theory,’ ‘white privilege,’ systemic racism, and . . . Black Lives Matter.”³⁴¹ These were, in the Administration’s view, “‘radical,’ ‘leftist,’ and anti-American, among other derogatory descriptors,”

³³⁴ Morris, *Bill Blocking*, *supra* note 315.

³³⁵ House Floor Debate on H.R. 1775, 58th Leg., 1st Reg. Sess. (Okla. Apr. 29, 2021) (statement of Rep. Kevin West, 54th Dist. of Okla.). When asked directly what HB 1775 sought to eliminate, Representative West responded “critical race theory.” *Id.* He later issued a press statement attacking CRT as a “Marxist ideology that is designed to teach children to hate American exceptionalism and distrust others based on skin color or gender.” Connor Hansen, *Proposed Law Would Ban Teaching Certain Race and Gender Topics*, FOX 25 (Apr. 30, 2021), <https://okcfox.com/news/local/proposed-law-would-ban-teaching-certain-race-and-gender-topics> [<https://perma.cc/4AYM-Z8N9>].

³³⁶ See Amended Complaint at 52-53, 56, Black Emergency Response Team v. O’Connor, No. 5:21-cv-01022 (W.D. Okla. Nov. 9, 2021).

³³⁷ Press Release, Sen. Standridge Issues Statement Thanking Fellow Members for Supporting HB 1775, (Apr. 22, 2021), <https://oksenate.gov/press-releases/sen-standridge-issues-statement-thanking-fellow-members-supporting-hb-1775> [<https://perma.cc/6H3K-FG8R>].

³³⁸ OKLA. STAT. ANN. tit. 70, § 24-157 (West 2022) (omitting any references to CRT).

³³⁹ Compare Amended Complaint, *supra* note 336, at 48 & n.39 (finding concepts prohibited by HB 1775 to be almost identical to former President Donald Trump’s Executive Order 13950, which intended to censor speech and perspectives that opposed his rhetoric and addressed racial discrimination), with Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020) (elaborating on Executive Order 13950’s “divisive concepts” and denial of America’s recent racist history and ongoing racial discrimination), and H.R. 1775, 58th Leg., 1st Reg. Sess. § 1(B)(1)(a)-(h) (Okla. 2021).

³⁴⁰ See Amended Complaint, *supra* note 336, at 47.

³⁴¹ *Id.* at 48.

and unpatriotic indoctrination.³⁴² Just days before issuing Executive Order 13950, Trump held a White House Conference on American History announcing that he would establish the 1776 Commission to counter CRT and “to promote patriotic education.”³⁴³ This was in direct response to Professor Nikole Hannah-Jones’s 1619 Project, which Trump blasted as “toxic propaganda, ideological poison that, if not removed, [would] . . . destroy our country,” and as part of a “crusade against American history.”³⁴⁴

Despite a federal court order forbidding Executive Order 13950 from proceeding, in part because of First Amendment vagueness concerns,³⁴⁵ the Oklahoma Legislature marched on with HB 1775, which included language identical to the Executive Order.³⁴⁶ Oklahoma’s legislature has since continued with efforts to discourage teaching about CRT, the 1619 Project, and similar initiatives.³⁴⁷

For example, the state’s recent efforts to ban books belies its true intent. On the heels of passing HB 1775 censoring classroom instruction, the Oklahoma legislature has turned to censoring books.³⁴⁸ Classic literary works dealing with race and gender, such as *To Kill a Mockingbird*,³⁴⁹ *A Raisin in the Sun*,³⁵⁰ *Their Eyes Were Watching God*,³⁵¹ *I Know Why the Caged Bird Sings*,³⁵² and

³⁴² *Id.*

³⁴³ Donald Trump, President of the U.S., Remarks by President Trump at the White House Conference on American History (Sept. 17, 2020) (transcript available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/> [<https://perma.cc/8AEL-7G8S>]).

³⁴⁴ *Id.*

³⁴⁵ *See Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543, 546 (N.D. Cal. 2020). The district court also characterized the Trump Administration’s position as a “gross mischaracterization of the speech Plaintiffs want to express and an insult to their work of addressing discrimination and injustice towards historically underserved communities.” *Id.* at 546.

³⁴⁶ Amended Complaint, *supra* note 336, at 22-23 (highlighting HB 1775’s use of same vague language from Executive Order 13950 that raised First Amendment violation issues).

³⁴⁷ *See, e.g.*, H.R. Res. 1038, 58th Leg., 1st Reg. Sess. (Okla. 2021).

³⁴⁸ *See, e.g.*, S. 1142, 58th Leg., 2nd Sess. (Okla. 2022) (stating that after parent complaint over book, school has thirty days to remove it, or employee may be fired and school district fined \$10,000); *see also* OKLA. STAT. ANN. tit. 70, § 11-201 (West 2022); Ben Felder & Nuria Martinez-Keel, *Oklahoma Legislative Committee Advances School Library Book Ban Bill*, OKLAHOMAN (Mar. 2, 2022, 5:01 AM), <https://www.oklahoman.com/story/news/2022/03/02/oklahoma-education-committee-approves-book-ban-bill-public-schools/6979214001/> [<https://perma.cc/UVK4-37UD>] (providing overview and predicting effect of Senate Bill 1142).

³⁴⁹ *See generally* HARPER LEE, *TO KILL A MOCKINGBIRD* (60th Anniversary ed., Arrow 2020) (1960).

³⁵⁰ *See generally* LORRAINE HANSBERRY, *A RAISIN IN THE SUN* (Methuen Drama 2021) (1958).

³⁵¹ *See generally* ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (Gift ed., HarperCollins 2021) (1937).

³⁵² *See generally* MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (Random House

Narrative of the Life of Frederick Douglass, An American Slave,³⁵³ have been removed from reading lists.³⁵⁴ This recent push to censor books is politically-driven,³⁵⁵ nationally-propelled,³⁵⁶ and largely focused on works by people of color, women, and other marginalized groups.³⁵⁷

Book bans across the country are being challenged as content-driven violations of students' First Amendment rights under *Board of Education v. Pico*.³⁵⁸ A study conducted by the nonprofit PEN America, which indexed books banned in the United States from July 1, 2021, to March 31, 2022, has identified a number of "alarming" trends.³⁵⁹ One such trend is the large proportion of banned books that are associated with racial minority identities, specifically: 41% with BIPOC (Black, Indigenous, and People of Color) as lead characters; 22% addressing race and racism; and 9% containing rights and activism themes.³⁶⁰ These sweeping book bans are substantively and procedurally problematic. According to PEN America, 98% of the indexed book bans from

Trade Paperback ed. 2021) (1969).

³⁵³ See generally FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (Macmillan Collector's Library 2022) (1845).

³⁵⁴ Jaclyn Diaz, *Teachers and Civil Rights Groups Sue Over Oklahoma's Ban on Critical Race Theory*, NPR (Oct. 20, 2021, 3:40 AM), <https://www.npr.org/2021/10/20/1047519861/aclu-sues-over-oklahoma-law-on-critical-race-theory> [https://perma.cc/R4YE-HFCU] (stating that certain books were removed from reading lists in Oklahoma school districts as result of HB 1775); see also Amended Complaint, *supra* note 336, at 3.

³⁵⁵ See Marisa Shearer, *Banning Books or Banning BIPOC?*, 117 NW. U. L. REV. ONLINE 24, 30 (2022) (stating that elected officials rather than parents are initiating book bans nationwide); Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights*, PEN AMERICA (Apr. 2022), <https://pen.org/banned-in-the-usa/> [https://perma.cc/CJ5D-GTWS] (stating that 41% of book bans in United States from July 1, 2021, to March 31, 2022, were initiated by state officials or elected lawmakers); Elizabeth A. Harris & Alexandra Alter, *With Rising Book Bans, Librarians Have Come Under Attack*, N.Y. TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/06/books/book-ban-librarians.html> (describing move from few concerned parents quietly resolving issues in committee to contentious school board meetings over books with Proud Boys in attendance); Claire Moses, *The Spread of Book Banning*, N.Y. TIMES (July 31, 2022), <https://www.nytimes.com/2022/07/31/briefing/book-banning-debate.html>.

³⁵⁶ See Shearer, *supra* note 355, at 29 (chronicling book banning nationwide following Trump anti-CRT advocacy and 1776 Commission).

³⁵⁷ See *id.* at 28; Friedman & Johnson, *supra* note 355.

³⁵⁸ 457 U.S. 853, 872 (1982) ("[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))); see Friedman & Johnson, *supra* note 355 (describing challenges to book bans).

³⁵⁹ Friedman & Johnson, *supra* note 355.

³⁶⁰ *Id.*

July 1, 2021, to March 31, 2022, have departed from recognized best practices for protecting First Amendment rights.³⁶¹

Oklahoma's education and book ban movements follow the Trump Administration's denouncement of DEI training, CRT, and race-related material in public schools, announced through his 1776 Commission.³⁶² While President Biden terminated many of Trump's regressive policies on his first day in office, the Trump blueprint has been widely influential.³⁶³ The use of law to silence marginalized voices is snaking its way through the classroom and curriculum.

Oklahoma's educational censorship bill—disguised as a civil rights law—is just one of many that has been enacted or is being considered across the country, aiming to control and shut down robust, difficult discussions of the history of racism and its impact in the United States. Over two dozen states have passed or proposed legislation banning teaching concepts allegedly linked to CRT.³⁶⁴ Just as fear-mongering fueled the Massacre and its aftermath of obstruction, fear-mongering around CRT and other groundbreaking, culturally competent, inclusive pedagogical initiatives and ideas has been central to the passage of HB 1775 and similar bills.³⁶⁵ The Act's origin story illustrates a far more complex narrative than its simple antidiscrimination text would suggest.

2. The Act's Impact

Context aside, what impact has the Act had? Some would argue the Act is just a reminder to educators of “thou shalt not discriminate” (which, while redundant under current law, would be harmless).³⁶⁶ In its short life, however, the Act has already functionally silenced marginalized voices.³⁶⁷ A century after the Massacre, the law continues to morph with time, finding different hosts to cannibalize, the latest being the public education system, where nothing short of

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Nicquel Terry Ellis, *Critical Race Theory Has Become a Social and Political Lightning Rod. This Is How We Got Here*, CNN (July 14, 2021, 2:57 PM), <https://edition.cnn.com/2021/07/14/us/critical-race-theory-what-is-it/index.html> [<https://perma.cc/BC6B-E3MM>] (chronicling rise of CRT debate in school districts and legislatures, fueled by Trump Administration).

³⁶⁵ See Brittany Graves, Opinion, *Letter to the Editor: Gov. Stitt Should Veto HB 1775 Because It Upholds White Supremacy*, BLACK WALL ST. TIMES (May 7, 2021), <https://theblackwallstimes.com/2021/05/07/letter-to-the-editor-gov-stitt-should-veto-hb-1775-because-it-upholds-white-supremacy/> [<https://perma.cc/MN4J-USD6>] (stating that HB 1775 is “dangerous” and “a wolf in sheep’s clothing, with anti-racist and anti-sexist rhetoric, [but with a] hidden agenda”).

³⁶⁶ See *supra* note 328 and accompanying text.

³⁶⁷ The Act's proscriptions are arguably content-based viewpoint restrictions, in violation of the First Amendment. See Amended Complaint, *supra* note 336, at 22-23 (alleging First Amendment violations). A full examination of this argument is outside the scope of this Article, but the issue also speaks to the power of law to silence thought and expression, especially for marginalized populations.

the next generation is at stake. Putting the easy antidiscrimination commandments aside, the law inflicts harm in many ways.

First, the Act discourages the understanding of systemic discrimination and its generational impact and dissuades civic engagement in structural restorative solutions.³⁶⁸ The Board of Education Rule, enabled by the Act, states:

No teacher, administrator or other school employee shall require or make part of any Course offered in a Public School the following discriminatory principles: . . .

(2) An individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or *unconsciously*, . . .

(6) An individual, by virtue of his or her race or sex, *bears responsibility for actions committed in the past* by other members of the same race or sex³⁶⁹

Provision two arguably prohibits educators from teaching about the concept of unconscious bias—a well-established principle that recognizes how people may unconsciously absorb stereotypes or biases through messages that permeate their culture.³⁷⁰ The recognition that unintentional, yet harmful, tropes stemming from oppressive historical and modern systems may impact all of us allows students to make mistakes and learn without personal blame or shame. Provision six discourages students from considering white privilege and the legacy of having generations of racial privilege. Recognizing the through line from the Massacre to today, and the attendant beneficiaries and casualties of state-sponsored racial violence and institutional racism, is not the equivalent of shaming white students or victimizing Black students today.³⁷¹ Unfortunately, rather than engage the merits of such concepts, supporters of the Act have resorted to name-calling and inflammatory rhetoric.³⁷² Notably, as the Massacre

³⁶⁸ See Amended Complaint, *supra* note 336, at 45 (“[HB 1775] represents a politically motivated use of the power of the state government to chill, censor, and prohibit Inclusive Speech”); see Morris, *Bill Blocking*, *supra* note 315 (noting that HB 1775 “aims to limit teaching of racism and discrimination” and “prohibits teaching students about the dangers of a white supremacist culture”).

³⁶⁹ OKLA. ADMIN. CODE § 210:10-1-23(c)(2), (c)(6) (West 2022) (emphasis added); see OKLA. STAT. ANN. tit. 70, § 24-157(B) (West 2022).

³⁷⁰ Amended Complaint, *supra* note 336, at 5.

³⁷¹ See Madeline Holcombe, *ACLU Sues Oklahoma Over Law Prohibiting Critical Race Theory Topics From Being Taught in Schools*, CNN (Oct. 19, 2021, 9:02 PM) [hereinafter Holcombe, *ACLU Sues Oklahoma*], <https://edition.cnn.com/2021/10/19/us/oklahoma-lawsuit-critical-race-theory/index.html> [<https://perma.cc/G6V9-7J9F>] (quoting author of HB 1775, State Representative Kevin West: “The law ensures that all history is taught in schools without shaming the children of today into blaming themselves for problems of the past, as radical leftists would prefer.”).

³⁷² *Id.* (quoting State Representative Kevin West as stating that “[i]t is unfortunate, but not surprising, to see radical leftist organizations supporting the racist indoctrination of our children that HB 1775 was written to stop” and claiming that recent lawsuit is “full of half-truths” and “blatant lies”).

survivors and their descendants continue their battle in the courts for government accountability and restitution, the Act essentially primes the next generation to reject such systemic solutions.

Second, the Act discourages empathy and deep examination of difficult concepts.³⁷³ The BOE Rule prohibits schools from causing “[a]ny individual [to] feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex.”³⁷⁴ The excessively subjective nature of this provision makes it impossible to fully and accurately teach difficult material that touches on race or gender.³⁷⁵ While recognizing that the Massacre is required subject matter in the Oklahoma public school curriculum,³⁷⁶ teachers accurately perceive that teaching the topic has just become harder.³⁷⁷ Even a cursory coverage of the material would seem to invite discomfort among many students as compassionate human beings and deep thinkers.³⁷⁸ Oklahoma has an extensive history of racially-motivated violence against indigenous communities and communities of color—a reality that undoubtedly can lead to difficult classroom discussions.³⁷⁹ One can have a number of appropriate emotional reactions to learning this history, including “discomfort, guilt, anguish,” or other distress. Moreover, racialized and gendered societal violence can understandably evoke emotions grounded in race and gender group membership. Teachers cannot be expected to predict, much less police, their students’ reactions. Indeed, this is where the learning begins.

³⁷³ See Morris, *Bill Blocking*, *supra* note 315 (noting that HB 1775 “prohibits teachers from engaging students in dialogue around systemic racism and white supremacy”).

³⁷⁴ OKLA. ADMIN. CODE § 210:10-1-23(c)(7) (emphasis added).

³⁷⁵ See Juan Perez Jr., *Antiracism Teaching Ban Divides Oklahoma Ahead of Tulsa Massacre Centennial*, POLITICO (May 25, 2021, 12:55 PM), <https://www.politico.com/news/2021/05/25/antiracism-teaching-ban-oklahoma-490159> [<https://perma.cc/82GK-CK28>] (quoting democratic state senator and chair of 1921 Tulsa Race Massacre Centennial Commission, Kevin Matthews, who stated that law’s prohibition is “so subjective that it’s an affront to Black people”).

³⁷⁶ See, e.g., Nuria Martinez-Keel & Carmen Forman, *Bill Forbidding Schools from Teaching Critical Race Theory Divides Oklahoma Educators, Politicians*, OKLAHOMAN (May 6, 2021, 6:00 AM), <https://www.oklahoman.com/story/news/education/2021/05/06/oklahoma-bill-banning-critical-race-theory-in-schools-divides-educators/4944150001/> [<https://perma.cc/CXM9-KBU4>] (quoting State School Superintendent Joy Hofmeister: “Schools will still teach all of the academic standards, including the Tulsa Race Massacre . . .”).

³⁷⁷ See Morris, *Bill Blocking*, *supra* note 315 (“If signed into law, HB 1775 would complicate a teacher’s ability to cover the full history of the [M]assacre.”).

³⁷⁸ See, e.g., Perez, *supra* note 375 (quoting Tulsa School Superintendent Deborah Gist, who explained that “a complete intellectual and emotional exploration of our history” is “not going to be easy and it’s going to make us uncomfortable,” which is “different from having the intention or a goal for certain students or adults to be made to feel bad”).

³⁷⁹ Dianna Everett, *The Encyclopedia of Oklahoma History and Culture: Lynching*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=LY001> [<https://perma.cc/V9DE-9G29>] (last visited Dec. 7, 2022) (providing statistics and accounts of lynchings of people of color throughout Oklahoma’s past).

This expectation of teachers has serious implications for teaching the Massacre. As project director for the 1921 Tulsa Race Massacre Centennial Commission's Greenwood Rising History Center, Phil Armstrong, reminds: "American and Oklahoma history is uncomfortable; and reconciliation requires truth and processing that is not comfortable. Our entire mission and work is centered in this necessary discomfort."³⁸⁰ Indeed, the ramifications of such silencing has greater ramifications for civic education:³⁸¹ "If teachers are unable to help students process the implications of our Nation's history without discomfort how can we teach about the Trail of Tears? How can we teach about Women's Suffrage? How can we teach about the Civil War?"³⁸²

While well-intentioned, the National Education Association's ("NEA") and the Oklahoma Education Association's ("OEA") teacher's guide seems inconsistent with HB 1775's language. Their guidance gives teachers wider berth than HB 1775 would suggest without more concreteness: "You do not . . . need to avoid discussions or readings that may be deeply provocative and upsetting. Confronting the horrors of slavery and the continuing legacy of racism in our country is upsetting, but the new laws do not ban all emotional discussions."³⁸³ While it is true that no moratorium on emotions in public school classrooms exists, wading into such waters may be treacherous.

Third, the Act, while silencing difficult but accurate history, also promotes a version of history that is factually inaccurate.³⁸⁴ In particular, the Act prohibits schools from teaching that: "*meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race to oppress members of another race.*"³⁸⁵ This provision explicitly prohibits educators from teaching the truth. For example, white American society, in an effort to oppress its Black population, *did* create the stereotypes that African Americans were "lazy and incompetent"³⁸⁶ and that meritocracy and hard work were what

³⁸⁰ Martinez-Keel & Forman, *supra* note 376.

³⁸¹ In a letter urging the Governor to veto HB 1775, Project Director of the 1921 Tulsa Race Massacre Centennial Commission wrote: "HB 1775 would not only interfere with the teaching of Black history, but the entire history of the United States." Kevin Canfield, *Tulsa Race Massacre Centennial Commission Asks Stitt To Veto Bill on 'Critical Race Theory,'* TULSA WORLD (June 8, 2022), https://tulsa-world.com/news/state-and-regional/govt-and-politics/tulsa-race-massacre-centennial-commission-asks-stitt-to-veto-bill-on-critical-race-theory/article_7d30aa30-ac38-11eb-9ad1-f715fbb09cdd.html [https://perma.cc/82GK-CK28].

³⁸² *Id.* (quoting Phil Armstrong speaking at news conference about HB 1775).

³⁸³ OKLA. EDUC. ASS'N & NAT'L EDUC. ASS'N, KNOW YOUR RIGHTS: OKLAHOMA 6 (2021) [hereinafter KNOW YOUR RIGHTS], https://neaedjustice.org/wp-content/uploads/2021/11/KYR_Oklahoma-Final.pdf [https://perma.cc/NYA8-U4GZ] (outlining HB 1775 provisions and providing FAQ regarding teacher rights).

³⁸⁴ See Morris, *Bill Blocking*, *supra* note 315 (noting that HB 1775 "would hinder full and accurate teaching").

³⁸⁵ OKLA. STAT. ANN. tit. 70, § 24-157(B)(1)(h) (West 2022) (emphasis added).

³⁸⁶ Evi Taylor, Patricia Guy-Walls, Patricia Wilkerson & Rejoice Addae, *The Historical Perspectives of Stereotypes on African-American Males*, 4 J. HUM. RTS. & SOC. WORK 213,

explained racial differentials. The development of such beliefs, among others, served to “rationalize [white slave owners’] economic, social, and political dominations.”³⁸⁷ Negative stereotyping was necessary to give cover to the inhumane treatment and dehumanization of Black Americans. As historians Evi Taylor and her colleagues note:

For slave owners, their strong stereotypical beliefs governed how African-Americans were to be treated, never as individuals, but always collectively. Hence, the racist premises from which laws and policies were based maintained societal perceptions of African-Americans. Even after slavery was abolished, the standards for treatment of African-Americans remained the same.³⁸⁸

Negative stereotyping was also necessary to justify ongoing racial oppression. Historian Scott Ellsworth describes the ubiquity of 1920’s “racist literature” that accompanied the swell in white supremacy.³⁸⁹ Ellsworth notes that one of the challenges of studying the literature is its sheer volume: “[O]ne historian concluded that the ‘chief difficulty in studying racist attitudes towards Negroes during the early twentieth century is the existence of mountains of readily available materials.’”³⁹⁰ One 1920s classic, *The Passing of the Great Race*, concluded that “negroes have demonstrated throughout recorded time that they do not possess the potentiality of progress or initiative from within.”³⁹¹

This familiar trope—that merit and hard work explain racial inequities rather than historical and structural racism—continues today. Indeed, employer interviews reveal persistent characterizations of Black workers as having a “bad work ethic” and being “lazy and unreliable.”³⁹² Despite evidence to the

214, 217 (2019); see also ELISA MINOFF, *THE RACIST ROOTS OF WORK REQUIREMENTS* 11 (2020) (“[R]eports of Black people’s ‘incurable laziness’ . . . filled the pages of planters’ letters and Southern newspapers and magazines.” (quoting ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 132 (1988))).

³⁸⁷ Taylor et al., *supra* note 386, at 214; see also MINOFF, *supra* note 386, at 4-5 (“For more than 200 years, enslavers and pro-slavery ideologues characterized Black people as inherently indolent in order to justify their enslavement and defend the institution of slavery.”).

³⁸⁸ Taylor et al., *supra* note 386, at 214; see also MINOFF, *supra* note 386, at 5 (“After the formal end of slavery, White leaders in both the North and the South invoked the established stereotype to justify criminal justice and social welfare policies designed to keep Black people working in the fields and houses of White people.”).

³⁸⁹ ELLSWORTH, *PROMISED LAND*, *supra* note 89, at 20.

³⁹⁰ *Id.*

³⁹¹ *Id.* (quoting MADISON GRANT, *THE PASSING OF THE GREAT RACE, OR THE RACIAL BASIS OF EUROPEAN HISTORY* 77 (1916)).

³⁹² See Elaine McCrate, *Why Racial Stereotyping Doesn’t Just Go Away: The Question of Honesty and Work Ethic* 6, 33 (Pol. Econ. Rsch. Inst., Working Paper No. 115, 2006) (finding that “employers viewed black motivation much more negatively than they did that of other ethnic groups” and noting how employers fall back on “racialized conventions about black laziness” in employee assessments); see also MINOFF, *supra* note 386, at 4 (describing ongoing stereotype of Black people as “lazy and work-shy”).

contrary,³⁹³ “over the long course of American history, Black people’s work ethic has been called into question more than any single other group” as a way “to promote policies and institutions that coerce . . . labor that perpetuates the economic and political power, and inflates the social standing, of White people.”³⁹⁴

The Supreme Court itself has further contributed to the stereotyping of Black people as inherently inferior in order to serve white interests. Classic landmark cases such as *Plessy v. Ferguson*³⁹⁵ and *Dred Scott v. Sandford*³⁹⁶ respectively, declared a “colored man . . . not lawfully entitled to the reputation of being a white man”³⁹⁷ and not a ‘citizen’ within the meaning of the Constitution of the United States.³⁹⁸ The Constitution itself apportioned congressional representation by counting Black people as “three fifths of all other Persons.”³⁹⁹

Contemporary society continues to vociferously debate whether meritocracy, social factors, or other phenomena explain the persistent inequities that plague American society.⁴⁰⁰ What is not debatable, however, is that meritocracy, work ethic, and similar concepts have been racially weaponized over the course of American history. Thus, punishing educators for teaching this history is not only intellectually disingenuous, but discriminatory itself. Mandating that teachers present incomplete, superficial, historical accounts that fail to check dangerous stereotypes perpetuates, rather than combats, discrimination.

Legislators also sought to ban teaching the concept of intersectionality through enacting HB 1775.⁴⁰¹ This prohibition also seems counterfactual. “Intersectionality” is simply, as Professor Kimberlé Crenshaw discussed over thirty years ago in her groundbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*,

³⁹³ See MINOFF, *supra* note 386, at 4 (“Black people have worked . . . more than any other group in American history.”).

³⁹⁴ *Id.*

³⁹⁵ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁹⁶ 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

³⁹⁷ *Plessy*, 163 U.S. at 549; *see also id.* at 559 (Harlan, J., dissenting) (stating that “white race deems itself to be the dominant race . . . in prestige, in achievements, in education, in wealth and in power” and that “it will continue to be for all time”).

³⁹⁸ *Dred Scott*, 60 U.S. (19 How.) at 393 (“When the Constitution was adopted, they were not regarded in any of the States as . . . among its ‘people or citizens.’ Consequently, the special rights and immunities guaranteed to citizens do not apply to them.”); *id.* at 407 (holding that Black people were “beings of an inferior order”).

³⁹⁹ U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

⁴⁰⁰ *See, e.g.*, THOMAS SOWELL, *RACE, CULTURE, AND EQUALITY* 5-9 (1998) (exploring factors leading to racial disparities).

⁴⁰¹ *See* Tyler Kingkade & Antonia Hylton, *Oklahoma’s Anti-Critical Race Theory Law Violates Free Speech Rights, ACLU Suit Says*, NBC NEWS (Oct. 20, 2021, 1:35 PM), <https://www.nbcnews.com/news/us-news/oklahoma-critical-race-theory-lawsuit-aclu-rcna3276> [<https://perma.cc/H7ZD-RCYP>] (explaining that HB 1775’s proponents aimed to prevent classroom dialogue about topics like intersectionality).

Feminist Theory and Antiracist Politics, the unique experience that a person has at the intersection of two identities.⁴⁰² For example, it posits that Black women may suffer a combination of race and gender discrimination unlike that of Black men or white women.⁴⁰³ The concept pushes back against gender and racial essentialism—the notion that there is a uniform, monolithic default female or Black experience, occupied by the privileged.⁴⁰⁴ To the extent that HB 1775 prohibits a teacher from teaching the existence of intersectionality, the Act denies the reality of Oklahoma’s students who sit at the margins. This erasure itself is discriminatory.

Fourth, the Act creates confusion. Some prohibited concepts are incomprehensible. For example, one of the Act’s concepts uses a double negative, which suggests two competing interpretations.⁴⁰⁵ One possibility is that educators cannot promote one race or sex disrespecting another, and an alternative possibility is that educators cannot promote one race or sex acting without respect to such characteristics.⁴⁰⁶ Additionally, the Act is unclear as to whether the mere presence of any of its prohibitory principles or concepts—even if for criticism—is forbidden.⁴⁰⁷ Surely, a robust examination and condemnation of racism and sexism cannot exist without a full-throated acknowledgement of the problem to begin with. Ironically, the Act fails to clearly permit—much less mandate—that teachers allow education that starts from this baseline. Educators are left instead with assurances that forbidding the presence of the concepts, even if for criticism, was not what the legislature intended and that the former should continue with business as usual.⁴⁰⁸

⁴⁰² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40.

⁴⁰³ *Id.* at 149-50.

⁴⁰⁴ *Id.* at 139 n.3 (explaining how experiences of Black women are often excluded).

⁴⁰⁵ OKLA. STAT. ANN. tit. 70, § 24-157(I)(B)(1)(d) (West 2022) (prohibiting schools from teaching that “members of one race or sex cannot and should not attempt to treat others without respect to race or sex”).

⁴⁰⁶ *Id.*

⁴⁰⁷ Graham Piro, *Chilling Effect Remains as Oklahoma’s ‘Divisive Concepts’ Law Becomes Effective*, FIRE (July 12, 2021), <https://www.thefire.org/chilling-effect-remains-as-oklahomas-divisive-concepts-law-becomes-effective/> [<https://perma.cc/8R4U-A7E8>] (explaining how HB 1775 leaves teachers unsure of whether they are allowed to mention race and gender issues). HB 1775 forbids orientation or training that “presents” bias or stereotyping. tit. 70, § 24-157(A)(1). “Presenting” is far broader than, for example, “promoting” concepts. The law also forbids an educator from “mak[ing] part of a course” the enumerated disapproved “concepts.” *Id.* § 24-157(B)(1). Again, “concepts” that are part of a course can be there for criticism and warning so as to prevent repeating history.

⁴⁰⁸ Wendy Suarez, *New Race Law Worries Teachers; Districts Offer Reassurance*, FOX 25 (Aug. 18, 2021), <https://okcfox.com/news/local/new-race-law-worries-teachers-districts-offer-reassurance> [<https://perma.cc/D6DJ-BFS3>] (reporting that school district has reassured teachers that because they are legally obligated to teach standards that include troubling pieces of American history, they will be protected); see also, KNOW YOUR RIGHTS, *supra* note 383, at 5 (outlining how national and state unions can encourage teachers to adhere to past

This advice, however, begs the question: what then was the need for the legislation? If indeed the legislation does not introduce any changes to educational policy, then why the push for its passage over tremendous opposition? Why invest in the development of an extensive apparatus for the law's enforcement, and promulgate an emergency order for its immediate implementation? Educators wisely suspect it is not business as usual and that there is a high price to pay should they misinterpret the law's meaning. This confusion inures to the benefit of undereducating and miseducating students about complex, important subjects that are tethered to race and gender.

Not surprisingly, the law has had a chilling effect, as colleges and faculty attempt to understand the law's ramifications.⁴⁰⁹ Oklahoma City Community College's reaction to the Act is illustrative of the hesitancy educators have expressed.

As an initial matter, the text of HB 1775 is unclear as to its application to institutions of higher education in Oklahoma.⁴¹⁰ Adjunct Professor Melissa Smith learned this the hard way when, shortly following HB 1775's enactment, the college suspended her "Race and Ethnicity in the United States" sociology class, fearing that its content violated the law.⁴¹¹ Interpreting the Act to prohibit critical race theoretical concepts, such as the notion of white privilege, the College "paused" the course until two days before the semester's commencement.⁴¹² While the administration ultimately resumed Smith's course without altering its content, the administration demoted the course from a requirement to an elective.⁴¹³ This demotion exempted students from being required to engage with difficult sociopolitical and historical material. Moreover, the chaotic course assessment by the administration painted a discouraging picture of the future for culturally-competent educators.

Confusion exists over how, and even whether, to teach about the Massacre in Oklahoma schools after HB 1775's enactment. For example, during the legislative debate, Oklahoma House of Representatives member and former teacher, Melissa Provenzano, believed that teaching about the Massacre was

practices).

⁴⁰⁹ Piro, *supra* note 407 ("[Under-enrollment in courses is] clear evidence of a meaningful chilling effect and a stark example of how imperfect legislative action coupled with overzealous college bureaucracy can chill student and professor involvement with difficult and complex issues.").

⁴¹⁰ *See id.* (arguing that it is unclear whether HB 1775 applies to colleges and universities). HB 1775 states that students "within The Oklahoma State System of Higher Education" cannot "be required to engage in any form of mandatory gender or sexual diversity training or counseling." H.R. 1775, 58th Leg., 1st Reg. Sess. (Okla. 2021). HB 1775 further prohibits "[a]ny orientation or requirements that presents any form of race or sex stereotyping or a bias on the basis of race or sex." *Id.*

⁴¹¹ Piro, *supra* note 407.

⁴¹² *Id.*

⁴¹³ *Id.*

prohibited.⁴¹⁴ Others argued that the bill makes it more difficult for teachers to accurately and completely teach similar subjects.⁴¹⁵ In a lawsuit brought by Oklahoma students and educators, the Complaint is replete with examples of confusion and fear over how to teach challenging topics related to race and gender after the enactment of HB 1775.⁴¹⁶

In an effort to assuage teachers' fears about what they are allowed to teach, the NEA and OEA unions issued a guide trying to clarify the parameters of the Act's proscriptions. While recognizing the Act's attempt to silence culturally-competent education, the unions urge teachers to continue their efforts:

Lawmakers and policy makers across our country, in yet another attempt to divide Americans along partisan and racial lines, are pushing legislation that *seeks to stifle* discussions on racism, sexism and inequity in public school classrooms. The laws enacted to date generally do not prohibit teaching the full sweep of U.S. history Nor should the laws undermine efforts to ensure that all students, including historically marginalized students, feel seen in the classroom and benefit from culturally inclusive curricula and pedagogical tools that teach the full history of our country. In Oklahoma those efforts resulted in the passage of a new law [HB 1775] this past May.⁴¹⁷

The unions remind educators that Oklahoma's Academic Standards require teaching not only about the Massacre,⁴¹⁸ but also about the history of U.S. slavery, race relations,⁴¹⁹ the plantation system,⁴²⁰ the Civil War,⁴²¹ the Reconstruction era,⁴²² and Civil Rights struggles.⁴²³ The guide states that the Academic Standards require instruction on the historical impact of government policies on "Native American identity, culture, tribal government and sovereignty,"⁴²⁴ analysis of "ongoing social and political transformations within the United States,"⁴²⁵ and examination of current events such as "immigration,

⁴¹⁴ See Carter, *NEA/OEA Admits*, *supra* note 333 (reporting that Oklahoma State Representative Melissa Provenzano critiqued bill and said that it would not allow teachers to cover the Massacre).

⁴¹⁵ *Id.* (noting Oklahoma State Senator Carri Hicks' comments about bill's chilling effects).

⁴¹⁶ See Amended Complaint, *supra* note 336, at 10-13 (discussing how African American teacher fears teaching current events like detention centers at the border, principal fears offering DEI training, and Black high school teacher fears teaching about injustice regarding race and gender because they may violate HB 1775).

⁴¹⁷ KNOW YOUR RIGHTS, *supra* note 383, at 3 (emphasis added).

⁴¹⁸ *Id.* at 5 (citing OKLA. ADMIN. CODE § 210:15-3-107(e)(2)(E) (West 2022)).

⁴¹⁹ *Id.* (citing § 210:15-3-107(e)(2)).

⁴²⁰ *Id.* (citing § 210:15-3-105.8(i)(2)).

⁴²¹ *Id.* (citing § 210:15-3-105.8(j)).

⁴²² *Id.* (citing §§ 210:15-3-105.8(l), -110(a)).

⁴²³ *Id.* (citing § 210:15-3-110(a)(2), (g)(1)).

⁴²⁴ *Id.* (citing § 210:15-3-107(c)(1), (e)(1)).

⁴²⁵ *Id.* (quoting § 210:15-3-110(g)(2)).

criminal justice reform and race relations.”⁴²⁶ The guide expresses confidence in teachers using their discretion to act professionally in handling difficult material age-appropriately, and espouses a normative view that “nothing in these laws should constrain [their] ability to answer tough questions and encourage critical thinking among [their] students, even if those questions arise organically.”⁴²⁷

On the one hand, the NEA and OEA are correct. The face of the statute is deceptively simple. Teaching the superiority or inferiority of one race or sex over another is obviously prohibited, and for good reason. Moreover, the statute points its educators to the state’s educational standards as their substantive rudder.⁴²⁸ These meaty standards, described above, would seem to satiate teachers’ appetite for direction and content.⁴²⁹

On the other hand, the NEA and OEA recognize the uncertainty that teachers who want to foster inclusivity or promote pedagogical innovation face under the Act’s proscriptions and the public’s watchful eye. The guide urges teachers to notify or seek permission from their principals and school administrators when community controversy might be afoot.⁴³⁰ Thus, the onus falls squarely on teachers’ shoulders to define and test the Act’s parameters. Teachers, who are on the frontlines of the education wars, are tasked with the first line of defense. The consequence of the law’s confusion is a silencing of educators, who are uncertain where the boundary line is for deep instruction on the Massacre and other related matters.

Fifth, the Act instills fear. One of the most pernicious effects of a law so confusing and politically-motivated is its capacity to scare its targets. Several of its provisions accomplish this goal. As an initial matter, the BOE Rule promulgated to implement the Act encourages fear by requiring an investigation of any legally sufficient complaint and imposing severe penalties for a violation.⁴³¹ The Rule, and, therefore, the Act, casts a wide net, covering

⁴²⁶ *Id.* (citing § 210:15-3-107(f)(9)).

⁴²⁷ *Id.*

⁴²⁸ OKLA. STAT. ANN. tit. 70, § 24-157(B) (West 2022) (“The provisions of this subsection shall not prohibit the teaching of concepts that align to the Oklahoma Academic Standards.”).

⁴²⁹ Coauthor of HB 1775 and history teacher, Senator David Bullard, and Oklahoma Secretary of Education and history teacher, Ryan Walters, embraced the guide as confirmatory of their views that the Act merely bans discrimination, not accurate history. Carter, *supra* note 333. The unions nonetheless oppose HB 1775 and provide information to their members on how to do the same. *Id.*; *see, e.g.*, KNOW YOUR RIGHTS, *supra* note 383, at 7 (encouraging union members to sign pledge to oppose HB 1775). NEA President Becky Pringle’s criticism remains steadfast: “These dangerous attempts to stoke fears and rewrite history not only diminish the injustices experienced by generations of Americans, they prevent educators from challenging our students to achieve a more equitable future.” Carter, *supra* note 333.

⁴³⁰ KNOW YOUR RIGHTS, *supra* note 383, at 5-6.

⁴³¹ OKLA. ADMIN. CODE § 210:10-1-23(h)(2) (“[T]he Department shall investigate any complaint of any failure to comply with accreditation standards, including compliance with 70 O.S. § 24-157(B) or any requirement in this rule, within (30) days.”).

“superintendents of schools, principals, supervisors, librarians, school nurses, classroom teachers or other personnel performing instructional, administrative and supervisory services in the Public Schools.”⁴³² As part of the mandatory investigation process, Oklahoma’s State Department of Education is required to consider whether the school employee should lose their license or certification when a violation has been found.⁴³³ Moreover, in the event of a “willful violation,” the employee risks having their license or certification revoked.⁴³⁴ Of course, included in those who may willfully violate the Act are educators who, for pedagogical reasons, choose to expose students to a rigorous, sophisticated examination of systemic racism and patriarchy, risking potential student “discomfort” and parental disapproval.⁴³⁵ Such severe penalties are an effective means of chilling educators from teaching inside and outside of the parameters of the letter of the law. Given the confounding nature of HB 1775 and the immense costs it imposes for violations, educators will hew well within the boundary line, overcompensating to ensure job security.⁴³⁶

This is particularly true for low-paid, vulnerable workers like Oklahoma’s teachers. A brief example is instructive. Oklahoma is notorious for providing some of the lowest salaries to its public school teachers.⁴³⁷ Over three decades ago, in 1990, Oklahoma teachers walked out in protest over “low pay and poor working conditions.”⁴³⁸ Their plight remained largely the same for decades alongside “stagnant or declining” spending per student for K-12 education, which steadily dropped from 2008 to 2015.⁴³⁹ By early 2018, Oklahoma had reached a breaking point when the state ranked forty-ninth in the country for teacher salaries.⁴⁴⁰ While the legislature increased teacher salaries by \$6,000 that

⁴³² *Id.* § 210:10-1-23(j).

⁴³³ *Id.* § 210:10-1-23(j)(1).

⁴³⁴ *Id.* § 210:10-1-23(j)(2).

⁴³⁵ *Id.* § 210:10-1-23(c)(7) (prohibiting educators from making “[a]ny individual . . . feel discomfort, guilt, anguish or any other form of psychological distress on account of his or her race or sex”).

⁴³⁶ See Piro, *supra* note 407 (“Faculty . . . will read the laws broadly, rationally deciding that it’s better to avoid difficult subjects than to risk their livelihood.”).

⁴³⁷ See Deven Carlson, *Not Just a ‘Red-State Revolt’: The Story Behind the Oklahoma Teacher Walkout*, BROOKINGS: BROWN CTR. CHALKBOARD (Apr. 12, 2018) <https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/12/oklahoma-teacher-walkouts-backstory/> [<https://perma.cc/LZJ4-U5SD>] (“Education funding in Oklahoma—and the inseparable issue of teacher salaries—has been a long-simmering frustration of citizens in the state.”).

⁴³⁸ *Id.*

⁴³⁹ *Id.* (reporting that estimates of funding decline are between 16% and 28%).

⁴⁴⁰ Alexia Fernández Campbell & Kainaz Amaria, *Oklahoma Teachers Are Protesting 10 Years of Low Pay. Here’s What Their Walkout Looked Like.*, VOX (Apr. 3, 2018, 11:20 AM) <https://www.vox.com/policy-and-politics/2018/4/3/17191082/oklahoma-teachers-protest-pay> [<https://perma.cc/58QV-RQCF>]; see, e.g., Carlson, *supra* note 437 (“[A]bout 20 percent of districts in the state operate on a four-day school week, and low salaries have contributed to acute teacher shortages in some districts as qualified educators choose to seek employment

spring, many educators balked at the modest measure.⁴⁴¹ By then, Oklahoma's teacher salaries were the lowest in the country and had not been raised in a decade.⁴⁴² In fact, "a teacher with a doctorate degree and 25 years of experience could earn a salary of \$46,000 for the 2017-2018 school year"—an amount lower than Oklahoma's median household income.⁴⁴³ This led to over 30,000 teachers walking out and protesting their dismal wages on the steps of the Oklahoma State Capitol in the spring of 2018.⁴⁴⁴ With no legal right to strike, teachers took great risk leaving their jobs to demand a competitive wage.⁴⁴⁵ For two weeks straight, teachers, with their families and students, marched in support of a \$3.3 billion demand for education funding against vociferous objection from state politicians.⁴⁴⁶ The teacher-walkout ended after nine school days, with protestors falling short of achieving their goals.⁴⁴⁷ Oklahoma

in higher-paying states.”).

⁴⁴¹ Carlson, *supra* note 437 (asserting that teachers support raise but remain dissatisfied with salaries and funding).

⁴⁴² Vic Pasquantonio, *What You Need To Know About the Oklahoma Teacher Walkout*, PBS: NEWSHOUR (Apr. 2, 2018, 3:01 PM), <https://www.pbs.org/newshour/education/what-you-need-to-know-about-the-oklahoma-teacher-walkout> [<https://perma.cc/5KY6-Z37C>].

⁴⁴³ *Id.* (reporting \$46,000 as minimum pay for teachers and \$48,038 as state median household income for 2016).

⁴⁴⁴ Campbell & Amaria, *supra* note 440.

⁴⁴⁵ Marcia L. McCormick, *Book Review—Changing What They Cannot Accept: Teachers Unions Fighting Education “Reform” from Chicago to Oklahoma*, 22 EMP. RTS. & EMP. POL'Y J. 409, 426 (2018) (reviewing STEVEN K. ASHBY & ROBERT BRUNO, *A FIGHT FOR THE SOUL OF PUBLIC EDUCATION* (2016)) (discussing unconventional avenues for reform in states where teachers have no legal right to strike); *see also* Julie L. Miller, Rooney Virgin & Kim Bishop, *The Legal Issues Associated With a Teacher Work Stoppage*, OKLA. BAR J., Aug. 2018, at 24, 24 (summarizing legal landscape governing teacher strikes in Oklahoma).

⁴⁴⁶ *Timeline of Oklahoma Teacher Walkout 2018*, NEWS ON 6 (Apr. 13, 2018, 12:26 PM), <https://www.newson6.com/story/5e35e2ef2f69d76f6201fb12/timeline-of-oklahoma-teacher-walkout-2018> [<https://perma.cc/3TS9-455A>]; Campbell & Amaria, *supra* note 440 (“Teachers are demanding that state legislators come up with \$3.3 billion over the next three years for school funding, benefits, and pay raises for all public employees.”). For example, Oklahoma State Senator Joseph Silk criticized teachers for pushing for increased funding. Pasquantonio, *supra* note 442. Another example, Oklahoma Governor Mary Fallin initially compared the teachers to “a teenage kid that wants a better car.” Omar Villafranca, *Oklahoma Teachers Fight for Increased Funding: “We’re Doing This For Our Kids,”* CBS NEWS (Apr. 3, 2018, 6:41 PM), <https://www.cbsnews.com/news/oklahoma-teachers-fight-for-increased-funding-were-doing-this-for-our-kids/> [<https://perma.cc/ULZ3-G39Y>]. Governor Fallin later attempted to clarify her remarks, characterizing the teacher pay bump as a “huge step forward” and “the largest pay increase for the teachers in Oklahoma; ever in the history of Oklahoma.” Phil Cross, *Governor Clarifies Controversial Comment and Addresses Talks To End Teacher Walkout*, FOX 25 (Apr. 4, 2018), <https://okcfox.com/news/fox-25-investigates/governor-clarifies-controversial-comment-and-addresses-talks-to-end-teacher-walkout> [<https://perma.cc/5R3G-6MKE>].

⁴⁴⁷ Miller et al., *supra* note 445; Dana Goldstein & Elizabeth Dias, *Oklahoma Teachers End Walkout After Winning Raises and Additional Funding*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html>.

teachers, underpaid and under siege, are understandably wary and fearful of losing the little income they have.

Moreover, even the possibility of an investigation can create fear and deter educators from teaching difficult history and concepts. Public schools are required to adopt policies and procedures—incorporated into employee and student handbooks—related to the complaint process and to notify members of the public how to submit complaints.⁴⁴⁸ Parents and guardians, in particular, are entitled to annual notifications.⁴⁴⁹ An accusation of a “legally sufficient” complaint alone mandates an investigation that can harm educators.⁴⁵⁰ A public school is required to make a liability determination within forty-five days, during which time the educator must endure public scrutiny and major life disruptions.⁴⁵¹ In today’s climate of vociferous, and even violent, political difference, being the target of such an inquiry may be fraught with danger and personal costs.

Public schools are also subjected to harsh penalties should they run afoul of the Act. The scope of the Act is wide, prohibiting public schools from a range of activities based on the law’s “discriminatory practices” or “concepts.”⁴⁵² Such activities include: using money, property, assets, or resources; adopting programs or using educational materials, textbooks, assignments, curriculum, orientation, or counseling; contracting for services, training, or professional services; receiving conditional monies; adopting or requiring DEI plans or diversity trainings; and adopting policies that apply to students differently, such as supporting affinity groups.⁴⁵³ Ironically, public schools attempting to preempt and respond to sexual and racial harassment by teaching cultural competence through DEI initiatives may now be penalized for their proactive, restorative work. Schools found to have violated the Act face serious progressive punitive measures, devolving from “accreditation with deficiency” to “accreditation with probation” to nonaccreditation.⁴⁵⁴ Like individual educators, public schools face

⁴⁴⁸ See OKLA. ADMIN. CODE § 210:10-1-23(g) (West 2022) (“To ensure compliance, Public Schools shall be required to adopt policies and procedures, including incorporating into employee and student handbooks, the requirements of . . . this rule.”).

⁴⁴⁹ See *id.* (“Public Schools shall ensure that the parent or legal guardian of all students enrolled in the school are annually notified of the non-discrimination requirements . . .”).

⁴⁵⁰ *Id.* § 210:10-1-23(j)(1). In fact, a complainant need not produce any witnesses for their complaint to survive. See *id.* § 210:10-1-23(g)(1)(E) (“In order for a complaint to be accepted for investigation, it must . . . [i]dentify witnesses the Public School may interview, if applicable, provided the Public School will not dismiss a complaint for failure to identify witnesses.”). Thus, an investigation may turn into a credibility contest between parent and teacher, where mere allegations without corroborating witness evidence may suffice.

⁴⁵¹ See *id.* § 210:10-1-23(g)(3).

⁴⁵² OKLA. STAT. ANN. tit. 70, § 24-157(B) (West 2022); OKLA. ADMIN. CODE § 210:10-1-23(d)(1) (implementing goals and prohibitions of HB 1775).

⁴⁵³ See OKLA. ADMIN. CODE § 210:10-1-23(d) (detailing specific prohibitions to ensure compliance with HB 1775).

⁴⁵⁴ See *id.* § 210:10-1-23(h)(1)(A)-(B) (outlining accreditation consequences for noncompliance).

mandatory investigation of any complaint.⁴⁵⁵ The State Department of Education (“Department”) must submit public school violations and monthly reports to the BOE.⁴⁵⁶ Finally, the Department and Board, too, are prohibited from acting in ways that contravene the Act’s “non-discriminatory” principles.⁴⁵⁷

Instilling fear in and intimidating public schools is not a hypothetical. While the Act requires public schools to be reviewed annually, they have already been targeted for special scrutiny by the Governor.⁴⁵⁸ The Tulsa Public Schools (“TPS”) system is the subject of a “special audit,” in part because of a “concern that [they] may have violated . . . HB 1775, which bans public schools from teaching critical race theory.”⁴⁵⁹ In July 2022, the Governor announced a special audit of TPS for potential mishandling of \$200 million in public funds meant for COVID relief.⁴⁶⁰ As partial justification for the audit, the Governor explained: “I firmly believe that no, not one cent of taxpayer money should be used to define and divide young Oklahomans by their race or sex. Let’s teach students—not indoctrinate them.”⁴⁶¹ The Superintendent of TPS characterized the accusations as “baseless” and “made up,” explaining that TPS is “a district that believes in teaching a full and complete history of our country.”⁴⁶²

The law also stokes fear by encouraging vigilantism. The BOE Rule implementing the Act empowers and encourages policing by students, parents, teachers, school staff, and members of the public.⁴⁶³ Parents and legal guardians, in particular, have “the right to inspect curriculum, instructional materials, classroom assignments, and lesson plans to ensure compliance.”⁴⁶⁴ To punctuate the point, the Rule gratuitously reminds them that “no public school shall interfere with or infringe upon the fundamental rights of parents to determine their child’s education”—implying that such interference or infringement is

⁴⁵⁵ See *id.* § 210:10-1-23(h)(2).

⁴⁵⁶ See *id.* § 210:10-1-23(h)(2), (i)(1).

⁴⁵⁷ See *id.* § 210:10-1-23(f)(1) (prohibiting BOE from “mandating state standards or promulgating any rule that is based on, includes or incorporates discriminatory concepts of race or sex-based discrimination”).

⁴⁵⁸ See *id.* § 210:10-1-23(h) (requiring annual compliance evaluations for public schools); Raja Razek, *Oklahoma Governor Calls for Public Schools Audit for Potential Mishandling of Public Funds and Teaching CRT*, CNN (July 8, 2022, 3:09 PM), <https://edition.cnn.com/2022/07/08/us/oklahoma-governor-tulsa-schools-audit-crt/index.html> [<https://perma.cc/A8LG-AZYM>] (discussing governor’s attacks on teaching CRT in public schools).

⁴⁵⁹ Razek, *supra* note 458 (quoting Governor Kevin Stitt’s video announcement demanding special audit of TPS).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ See § 210:10-1-23(g)(1) (stating that parents or legal guardians should be annually notified of nondiscrimination requirements and their right to file complaints).

⁴⁶⁴ See *id.* § 210:10-1-23(e).

afoot absent action.⁴⁶⁵ Parents and others who are still unhappy with the outcome are further provided a right to appeal.⁴⁶⁶ Individual complainants may sue a public school directly, and school staff may file a discrimination complaint with the Oklahoma Attorney General's Office of Civil Rights.⁴⁶⁷ Teachers who complain against their home institutions are provided whistleblower protection and protection from retaliation.⁴⁶⁸ Pursuant to Title VI and Title IX, complainants have a private right of action, robust relief (including damages), and remedies available through the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division.⁴⁶⁹ This package of teacher penalties and complainant incentives is a recipe for educational vigilantism.

Finally, the law's emergency declaration and implementation stoked public fear, creating the impression that a crisis brought the Act to fruition. When signed into law, the Act went into effect immediately pursuant to an emergency provision in the bill stating that the law was "immediately necessary for the preservation of the public peace, health or safety."⁴⁷⁰ Such inflammatory language incentivizes people to look for a problem the bill was meant to solve.⁴⁷¹

The Act's supporters offer a number of counterarguments that are unpersuasive. They contend that educators who do not teach HB 1775's discriminatory "concepts" have nothing to fear; they are in compliance with the law and are not vulnerable to legally insufficient claims.⁴⁷² This contention is unconvincing because there is significant debate and confusion over whether some of the Act's concepts are in fact discriminatory, as discussed *supra*, and the Rule includes no definition of what constitutes a "legally sufficient" complaint.⁴⁷³ Educators are stuck between a rock and a hard place trying to

⁴⁶⁵ *See id.*

⁴⁶⁶ *See id.* § 210:10-1-23(g)(4)(C) ("Any complainant who believes that a Public School has incorrectly refused to investigate a complaint or has evidence that a Public School has reached an incorrect determination may subsequently file a complaint with the State Department of Education . . .").

⁴⁶⁷ *See id.* § 210:10-1-23(n) (listing forms of discrimination that would qualify school employee to file an employment discrimination complaint).

⁴⁶⁸ *See id.* § 210:10-1-23(k), (l). A teacher who falsely accuses their colleagues may act negligently with impunity under the Act. Only one who "willfully, knowingly and without probable cause makes a false report" may be subject to disciplinary action under the Act. *See id.* § 210:10-1-23(m).

⁴⁶⁹ *See id.* § 210:10-1-23(o).

⁴⁷⁰ H.R. 1775, 58th Leg., 1st Reg. Sess. (Okla. 2021).

⁴⁷¹ Notably, in the weeks after HB 1775's passage, Oklahoma City College received more concerns than typical regarding the handling of race in its sociology courses. Piro, *supra* note 407. Parent and student complaints dealt with topics as innocuous as redlining and its impact on Black homeownership and wealth. *Id.*

⁴⁷² *See* § 210:10-1-23(g)(1)(A)-(E) (listing requirements for complaints to allege violation).

⁴⁷³ *See id.* § 210:10-1-23(j)(1) (mentioning "legally sufficient complaint filed pursuant to subsection (g)" without providing further definition).

comply with an Act that sends mixed messages. On the one hand, teachers are required to fully and accurately teach the Massacre and its causes in compliance with State Academic Standards.⁴⁷⁴ On the other hand, teachers are required to ensure students don't feel uncomfortable on matters of race and gender when such material naturally surfaces such emotion.⁴⁷⁵

The Act's supporters also accuse teachers who remove texts from their courses because of uncertainty about the law's boundaries of overreacting and being unreasonable.⁴⁷⁶ Teachers afraid of living in their neighborhoods or teaching in their classrooms are told that their "fears are simply subjective and manufactured."⁴⁷⁷ This dismissive reaction disregards the dangerous and volatile climate in which the educational and cultural wars are taking place—a climate that the Act's proponents helped to create.⁴⁷⁸ Across the country, vociferous attacks and even violence are erupting over supposed CRT concepts creeping into school curricula.⁴⁷⁹ Understandably, teachers around the country are leaving the profession and seeking safer ground.⁴⁸⁰ Having created a law that sheds more heat than light on the subject, lawmakers cannot be said to have clean hands.

⁴⁷⁴ See *id.* § 210:15-3-107(e)(2)(E).

⁴⁷⁵ According to Robin DiAngelo, white fragility makes it particularly difficult to do this successfully. See generally DIANGELO, *supra* note 306. One can imagine the fear a teacher might experience when teaching about the Tulsa Race Massacre if asked: "Why was the white mob so angry?" or "Why didn't the City and State help the Black Tulsans after their community was destroyed?" A teacher may err on the side of silence rather than risk their job by explaining white supremacy.

⁴⁷⁶ See Defendants, Board of Regents for the University of Oklahoma, Michael Cawley, Frank Keating, Phil Albert, Natalie Shirley, Eric Stevenson, Anita Holloway and Rick Nagels', Motion To Dismiss Plaintiffs' Amended Complaint and Brief in Support at 15, *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022 (W.D. Okla. Nov. 23, 2021) (contending that complaints alleging constitutional violations stemming from HB 1775 are "purely speculative and formulated from hyper-technical reading and unreasonable interpretations of the statutory language").

⁴⁷⁷ *Id.* at 9.

⁴⁷⁸ For example, implementing the bill on an emergency basis suggests an imminent threat is afoot. See H.R. 1775, 58th Leg., 1st Reg. Sess. (Okla. 2021).

⁴⁷⁹ See, e.g., Leandra Bernstein, *Protests Erupt Over Teaching of Critical Race Theory in Schools*, ABC 4 NEWS (June 23, 2021), <https://abcnews4.com/news/nation-world/protests-erupt-over-teaching-of-critical-race-theory-in-schools> [<https://perma.cc/84WU-67XN>] ("Parents were cursing, screaming and at least two people were arrested and one person reportedly injured after a heated debate over critical race theory broke out in Northern Virginia . . .").

⁴⁸⁰ See Ethan Kimball, *Teacher Shortage: President Details What's Behind the 'Foreseeable' Problem*, YAHOO! FINANCE (Aug. 12, 2022), <https://www.yahoo.com/finance/news/teacher-shortage-union-president-details-whats-behind-the-foreseeable-problem-174318641.html> [<https://perma.cc/7FNL-4JUN>] (citing 2022 report by American Federation of Teachers stating that approximately one-third of teachers have seriously considered leaving their jobs in recent years and only about 20% are doing so for normal retirement).

Finally, parents and guardians certainly have a vested interest and a right to shape and control their children's education. The Supreme Court has steadfastly recognized this constitutional right: "In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes . . . [the right] to direct the education and upbringing of one's children."⁴⁸¹ There is a longstanding practice of parental figures intervening in and advocating for their children's education.

However, this recent push to censor the classroom is more politically-driven, and nationally-propelled than locally-grounded. As discussed previously, HB 1775 is part of a larger movement to silence alleged CRT concepts in particular and critical thinking and inclusive pedagogy in general.

In Oklahoma, it is indeed the Wild West for capturing the hearts and minds of the next generation. As the NEA President Becky Pringle warns: "These dangerous attempts to stoke fears and rewrite history not only diminish the injustices experienced by generations of Americans, they prevent educators from challenging our students to achieve a more equitable future."⁴⁸²

In sum, legal efforts to silence white brutality have run the gamut. Whether it is a government-orchestrated conspiracy of silence, a court-imposed procedural hurdle, or a legislative public education ban, the legal system has consistently pushed back at the kind of transparency needed for authentic racial healing and restitution post-Massacre.

CONCLUSION

Things have come full circle. The through line from the Massacre, to the sabotaging of rebuilding efforts, to structural discrimination, to the massive cover-up, to the denial of a constitutional remedy, now extends to the present. The law's recent turn to educational censorship is a more subtle attempt at subterfuge and silencing. Oklahoma's current attempt to police ideas through curriculum control and book bans is as pernicious as the obstructionist tools that preceded it. Notably, the statute of limitations silenced the legal claims related to the Massacre, but educational censorship silences understanding of the Massacre itself. Similarly, the limitations period—while bloodless—was as insidious as its predecessors. This procedural hurdle—cloaked in neutrality—could more easily mask its harm than the overt Jim Crow segregation laws that came before it. While the most obvious forms of government suppression—in the form of brute violence and terror—are no longer viable, in their place are policies no less dangerous.

In conclusion, the legal system has suppressed Black Tulsans' voices over the course of a century, revealing a taxonomy of silencing from the Massacre to

⁴⁸¹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted) (first citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

⁴⁸² *KNOW YOUR RIGHTS*, *supra* note 383, at 3.

today. That suppression, however, has been neither absolute nor successful. The last three living survivors, now up to 108 years old,⁴⁸³ remain steadfast in their fight for justice. Their voices—like the rest of Black Tulsa—will not be extinguished, no matter what form the opposition takes nor how far beyond the present circumstances. Award-winning poet Maya Angelou, now banned-book author, captures it best in her iconic poem, *Still I Rise*:

You may write me down in history
With your bitter, twisted lies,
You may trod me in the very dirt
But still, like dust, I'll rise.⁴⁸⁴

⁴⁸³ Mock, *supra* note 188.

⁴⁸⁴ Maya Angelou, *Still I Rise*, in *THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU* 163 (1994).