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Focusing the Reparations Debate Beyond 1865 Book Review

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FOCUSING THE REPARATIONS DEBATE BEYOND 1865

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RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921. By Alfred L. Brophy. New York: Oxford University Press, 2002. xx + 187 pages. $25.00.

I. INTRODUCTION

"Forty acres and a mule" is an emotionally and politically charged phrase that not only evokes disturbing images of slavery's history in our country, but also serves as a reminder that the damage wrought by the South's "peculiar institution" remains uncompensated.[1] Indeed, the question of whether to make reparations to African-Americans for their period of enslavement in the United States has sparked heated debates among both scholars and the public at large since the conclusion of the Civil War. Following the cessation of hostilities between the States, Radical Republicans in the North, led by Pennsylvania Congressman Thaddeus Stevens, supported legislative measures that sought to dismantle the South's plantation system and redistribute those lands to the emancipated slaves.[2] An aggressive plan of land redistribution in the South, according to Radical Republicans, would ensure the destruction of the white power structure in the South that ran contrary to the idea of equality among all citizens.[3] Stevens proposed that the federal government take "the 400 million acres belonging to the wealthiest 10 percent of Southerners" and

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1. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 218 (2d ed. 1985) (citing KENNETH M. STAMPP, THE "PECULIAR" INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956)).

2. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 235-36 (1988) (noting that the Radical Republicans sought to duplicate the capitalism of the North in the South through their legislative efforts and, furthermore, that prominent industrialists outside of Congress supported the notion of redistributing seized land to former slaves as reparations for their enslavement).

3. LERONE BENNETT, JR., BLACK POWER U.S.A.: THE HUMAN SIDE OF RECONSTRUCTION, 1867-1877, at 53-54 (1967).

distribute them in forty-acre plots to former slaves to use as an economic base from which to advance their collective status in society.[4] To implement a plan of redistribution, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands in 1865 to "control all subjects relating to refugees and freedmen."[5] Facing opposition to Reconstruction in the South, however, President Johnson failed to support the land redistribution scheme to be implemented by the Freedmen's Bureaus.[6] Instead, President Johnson pursued an agenda that pardoned secessionist individuals and simultaneously restored their property rights, thereby sounding the death knell for Reconstruction era land redistribution schemes.[7] Thus, Stevens's nineteenth-century proposal and its subsequent presidential rejection spawned the infamous phrase, "forty acres and a mule," that today serves as an anthem for proponents of slavery reparations from the federal government.[8]

Although calls for slavery reparations continued after Reconstruction,[9] the movement to remedy the injustice of slavery disappeared into the shadows as the civil rights battle against de facto segregation, epitomized in cases like *Plessy v. Ferguson*[10] and ingrained throughout the South in the Black Codes,

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4. *See* FONER, *supra* note 2, at 235. The remainder of the land was to be sold "'to the highest bidder' in plots . . . no larger than 500 acres." *Id.*

5. GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 49 (Octagon Books 1970) (1955); *see also* BENNETT, *supra* note 3, at 33 (recounting that President Johnson offered Frederick Douglass the job as head of the Freedmen's Bureau, but Douglass declined in order to continue his social reform agenda). For example, as part of the redistribution scheme, a Freedmen's Bureau was established to cover the area from North Carolina and Florida and was set to seize and distribute 485,000 acres of land to former slaves. BENTLEY, *supra*, at 96-98.

6. BENTLEY, *supra* note 5, at 95-96; *see also* CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 31, 61-71 (1978) (discussing Johnson's policy of pardoning ex-Confederates and noting that Congress passed several bills designed to assist former slaves but each met with ultimate failure).

7. *See* OUBRE, *supra* note 6, at 61-71.

8. The complete phrase, particularly that associated with "a mule," originates from General William Tecumseh Sherman's Special Field Order No. 15 in which he ordered that former slaves be provided with forty acres of land along the coast of South Carolina and be given possessory title to the lands. *See* OUBRE, *supra* note 6 at 18-19, 182-83 (1978). In addition, Sherman ordered that animals unfit for military use be given to the former slaves so that they could cultivate the land. *Id.* at 19. Thus, the "mule" part of the phrase came into being even though there was never any specific legislation that mandated the giving of mules to former slaves. *See id.* at 183. In this sense, the phrase is more symbolic than accurate in terms of history.

9. Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 602 (1993) (observing that, at the turn of the twentieth century, a "second wave" of claims for reparations sprouted, a wave that was motivated by the living conditions and injustices experienced by African-Americans in the South).

10. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana law providing for segregated facilities for passengers on trains). The Court wrote that the goal of the Fourteenth Amendment

took center stage.[11] After the struggle for civil rights produced significant victories like *Brown v. Board of Education*,[12] however, the push for slavery reparations again moved to the forefront of the civil rights movement with the introduction of James Forman's Black Manifesto in 1969.[13] The Black Manifesto, a declaration announced to a group of shocked African-Americans during a church service in New York, charged that "racist white America has exploited our resources, our minds, our bodies, our labor" and has "forced [African-Americans] to live as colonized people inside the United States."[14] As a result of these conditions, Forman announced,

> We [African-Americans] are therefore demanding of the white Christian churches and Jewish synagogues which are part and parcel of the system of capitalism, that they begin to pay reparations to black people in this country. We are demanding $500,000,000 from the Christian white churches and the Jewish synagogues. This total comes to 15 dollars per n[*****]. This is a low estimate for we maintain there are probably more than 30,000,000 black people in this country.... Fifteen dollars for every black brother and sister in the United States is only a beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted. Underneath all of this exploitation, the racism of this country has produced a psychological effect upon us that we are beginning to shake off. We are no longer afraid to demand our full rights as a people in this decadent society.[15]

> was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544. From this case, then, emerged the "separate but equal" doctrine, which is written as "equal but separate" in the case but has mutated over time. *Id.* at 540 (quoting 1890 La. Acts 111).

11. *See* FRIEDMAN, *supra* note 1, at 504 (noting that the Black Codes were passed in "almost all of the states of the old Confederacy" and that they "were meant to replace slavery with some kind of caste system and to preserve as much as possible of the prewar way of life"); *see also* Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 891 (1993) (stating that "[f]ollowing these failed Reconstruction efforts, claims for reparations necessarily took a back seat to the struggle to survive racial terrorism and the fight to secure the basic dignities denied the descendants of former slaves through de jure segregation").

12. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down segregation in public schools and thereby representing a victory for the cause of integration).

13. BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS app. A at 167 (1973).

14. *Id.*; *see also* ARNOLD SCHUCHTER, REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA 6-7 (1970) (stating that Forman "interrupted the services at New York's Riverside Church").

15. BITTKER, *supra* note 13, at app. A at 167-70 (listing the Manifesto's demands that the money be spent to create a Southern land bank for use by African-Americans either forced off

Echoing the same concerns, though less militantly, Dr. Ernest Campbell, a minister at the church at which Forman delivered his polemic, argued that

> the demeaning and heinous mistreatment that black people suffered in this country at the hands of white people in the slave economy, and given the lingering handicaps of that system that still works to keep the black man at a disadvantage in our society, it is just and reasonable that amends be made by many institutions in society including, and perhaps especially, the church. . . .[16]

In sum, the resurfacing demands for reparations sought compensation for both the injustice of slavery as a historical institution and the modern barriers to full equality for African-Americans rooted in that institution. Therefore, the issue of reparations pierced the heart of the entire divisive debate about racial equality.

While our modern era is far removed from that of slavery and the 1960s are a distant memory for many, the issue of reparations for slavery continues to be a hotly debated political and legal topic nationwide. As evidence of the ongoing vitality of the reparations debate, Representative John Conyers annually introduces a bill to Congress alleging that slavery "constituted an immoral and inhumane deprivation of Africans' life, liberty, African citizenship rights, and cultural heritage, and denied them the fruits of their own labor."[17] Moreover, the bill asserts that "sufficient inquiry has not been made into the effects of the institution of slavery on living African Americans and society in the United States."[18] As a result, the bill calls for the establishment of a committee to study reparation proposals for slavery and to recommend "appropriate remedies" based upon its investigation.[19] Even though Conyers has injected his bill into the congressional agenda every year since 1989, the legislative proposal dies in committee each year.[20] Capturing the essence of the opposition to the investigatory committee contained in the

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of their land or leaving voluntarily to pursue other land-based ventures, four publishing and printing industries to create investment in the community, four television networks, a research center, a training center, a welfare rights organization, a labor strike and defense fund, a pan-African business cooperative, and a university). Asterisks have been placed in the quotation to remove racially offensive language.

16. SCHUCHTER, *supra* note 14, at 6-7 (noting that other groups objected to Forman's confrontational methods despite agreeing with him in principle). Some churches pledged money to fight continuing racism but stipulated that none of that money could be used to support Forman's group. *Id.* at 7-13.

17. H.R. 1684, 102d Cong. § 2(a)(3) (1991).

18. *Id.* § 2(a)(4).

19. *Id.* § 3(b)(7).

20. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 433 n.15 (1998) (listing the bills as H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997)).

Conyers proposal, Representative James Sensenbrenner opined that "[t]here's no more detestable institution than slavery . . . but I don't think trying to monetarize that history lesson is going to provide a useful purpose."[21]

In addition to the reparations schism on the national front, the impasse touched the international community during the recent United Nations Conference on Racism held in September 2001.[22] Because part of the meeting's agenda sought to explore measures to remedy the damage resulting from slavery, African leaders at the conference took the opportunity to demand that Western nations extend official apologies for slavery.[23] Furthermore, African conference representatives attempted to label the institution of slavery as a crime against humanity, which would subject nations that engaged in the slave trade to legal claims for reparations.[24] Amid the growing fervor for reparations, the United States delegation walked out of the Conference on Racism, allegedly in protest over the criticism of Israel for its practices towards Palestinians.[25] However, other conference delegates viewed the official justification for the departure of the United States as nothing more than a pretext to avoid the issue of reparations for the period of slavery in its history.[26] Nevertheless, National Security Advisor Condoleeza Rice argued that the conference spent too much time condemning Israeli practices and focused too much on the past, particularly with regard to slavery, because the blame for slavery could be divided broadly among African, Arab, and Western nations.[27] In the end, the walkout allowed the United States to avoid the reparations debate, but it came at the expense of its

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21. Susan Hansen, *Slavery Reparations Bill Moves Forward*, BALT. SUN, Oct. 25, 1990, at 3A.

22. Serge Schmemann, *U.S. Walkout: Was It Repudiated or Justified by the Conference's Accord?*, N.Y. TIMES, Sept. 9, 2001, § 1, at 16. The full title of the conference was the United Nations Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. *Id.*

23. Paul Salopek, *UN Summit on Racism Bogs Down on Slavery*, CHI. TRIB., Sept. 8, 2001, at N1. The reparations sought included debt relief and funds to help build infrastructure in the affected nations. *Id.*

24. *Id.* (noting that "the talks deadlocked when African nations pushed for language labeling the practice a crime against humanity, thus opening up Western governments to possible lawsuits for financial reparations").

25. *See* Schmemann, *supra* note 22.

26. *Id.*; *cf. The NewsHour with Jim Lehrer: Tough Talks* (PBS television broadcast Sept. 10, 2001) (Monday transcript #7151) (quoting Representative Tom Lantos as saying that "[t]he whole focus of the conference was to be a punitive expedition against the state of Israel").

27. Rachel L. Swarns, *After the Race Conference: Relief, and Doubt over Whether It Will Matter*, N.Y. TIMES, Sept. 10, 2001, at A10 (quoting Rice as saying on NBC's *Meet the Press*, "I think reparations—given the fact that there is plenty of blame to go around for slavery, plenty of blame to go around among African and Arab states, and plenty of blame to go around among Western states—we are better to look forward and not point fingers backward").

assent to the "expression of profound remorse"[28] for the institution of slavery in the conference's final report. Ironically, joining an expression of remorse for slavery could have been a powerful symbolic message to send to the world without costing the United States a penny.[29]

Out of the shadow of the modern reparations controversy, embodied in the legislative death of the Conyers proposal and the United States' walkout, emerges a fresh perspective on the reparations issue in Alfred L. Brophy's *Reconstructing the Dreamland: The Tulsa Riot of 1921*. Although a wealth of recent scholarship focuses on the dreadful history of lynching in this country,[30] far fewer scholars tread into the history of racially divided riots that dot our nation's past. Brophy's work, however, ventures into this relatively uncharted territory to describe one of the numerous, racially divided clashes during the early twentieth century. In contrast to the "white washed" version of the events of that day, Brophy uses stories that appeared in African-American newspapers, the memories of African-American victims of the conflict, and papers associated with the subsequent litigation to explore his subject (p. x). As a result, Brophy not only illuminates the 1921 Tulsa riot from a unique perspective, but also constructs a framework to address the issue of reparations for the benefit of both the survivors in Tulsa as well as other victims subjected to egregious wrongs in the past.

II. THE ORIGINS OF THE RIOT AND ITS DAMAGE

Reflecting the modern scholarly interest with the relationship between race and the law in general,[31] Brophy locates the origin of the riot within the

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28. *Id.*

29. *But see* Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997) (suggesting that apologies for past injustices are devoid of meaning and are given in response to growing societal pressure).

30. *See, e.g.*, W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 (1993) (containing an analysis of nearly 600 cases); MICHAEL FEDO, THE LYNCHINGS IN DULUTH (2000) (documenting the story of the lynching of three young African-American males—who were accused of raping a white girl—by a white mob on June 15, 1920, in Duluth, Minnesota); JAMES H. MADISON, A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA (2001) (recounting the lynching of two African-American teenagers in 1930 Marion, Indiana, where no member of the mob was prosecuted for the crime despite ample evidence of the crime in the form of witnesses and photographs); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995); UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997) (examining the history of lynching and its meaning from the perspective of several disciplines, including sociology and folklore).

31. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (arguing that criminal justice is meted out by a race-based double standard); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) (introducing critical race theory and describing its impact on other

conflicting racial interpretations of the meaning of "law" as understood by the riot's combatants. For many of the 8,000 residents of Greenwood, an African-American neighborhood located just north of the center of Tulsa, Oklahoma, and physically separated from it by a set of railroad tracks, the experience of World War I instructed them to equate law with equality (pp. 1-2). The veterans returning from the Great War believed that the nation had fought the war to protect and promote democracy on a global scale (p. 3). Moreover, fighting for democracy during World War I, according to local African-American newspapers that spread the message to Greenwood's readers, meant that "spoilation and exploitation of black men's property and labor shall cease, it means that segregation, Jim Crowism and mob violence must die, and that in its stead there must rise justice, equity, and fairness"[32] (p. 3). Given the lofty aspirations ascribed to the nation's war effort, Greenwood's war veterans expected to find a "new reconstruction" upon their return, a notion reinforced by the vitality of Greenwood as a community (pp. 1-4). In 1921, Greenwood was a vibrant, economically self-contained section of Tulsa containing a school, a hospital, a variety of stores, and a theater called the Dreamland (p. 1). Moreover, Greenwood became so prosperous as a community that its main street became known as "the black Wall Street" (p. ix). In sum, the idealized promise of democracy associated with World War I and the economic prosperity of "Little Africa" (p. 1) both initiated and promoted the idea of equality in the minds of Greenwood's residents.

In contrast to the egalitarian mindset percolating in Greenwood, the white hegemony of Tulsa—and Oklahoma at large—stood ready to prevent the equality dreamt about in "Little Africa" by using their definition of "law." For Oklahoma's white citizens, "talk of law too often meant black obedience to the white commands and capricious and unequal treatment by the government" (p. 15). As a result, white persons opposed to the increasing aspirations of African-Americans defined the word "law" to mean the status accorded to each race prior to the Civil War and were determined "to put the negro back where he was before the War" (p. 6).[33] To that end, both the legislature and the courts in Oklahoma worked in concert with prejudiced white citizens to suppress the egalitarian dreams of African-Americans.

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disciplines); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) (examining the relationship between race and crimes committed by delinquents); STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE (1997) (investigating the hiring practices of a restaurant chain during the Jim Crow era and the class action case that resulted from these hiring practices and, through the title, referring to the practice of darkening the "o" in "Shoney's" if a job applicant happened to be African-American); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (looking at the relationship between race and American justice).

32. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 3 (2002) (citing *Bristow Celebrates*, BLACK DISPATCH, Jan. 4, 1918, at 1).

33. *Id.* at 6 (emphasis omitted) (quoting *Are We Entitled to the Moral Leadership of the World?*, BLACK DISPATCH, Aug. 15, 1919, at 4).

Despite the existence of the Equal Protection Clause in the Constitution, the Oklahoma legislature passed statutes that served to promote racial discrimination, such as voter registration laws designed to disenfranchise Oklahoma's African-American population (p. 15). By implementing the legislature's laws and doing their part to suppress African-American dreams, both the Oklahoma Territory Supreme Court and the state's lower courts commonly denied recovery to African-Americans who suffered brutal violence at the hands of whites (pp. 9, 14). Furthermore, the absence of legal protection even extended to whites who dared to have any working affiliation with African-Americans. For example, Brophy recalls that the Oklahoma Supreme Court denied compensation to a white man who was attacked by a white mob in Norman after merely bringing a young African-American into the town to work on a construction project (p. 9). In sum, the practice of Oklahoma's legislature and courts dissected the idea of "equal protection" by gutting the "equal" half of the concept while providing an abundant amount of "protection" for those seeking to maintain white superiority.

The inequality facing African-American Oklahomans did not end within the ivory halls of the legislature and courts, but instead trickled downward to police enforcement of the law in the street. Oklahoma's law enforcement officials frequently did little to protect African-American citizens under the constant threat of white violence. With police looking the other way as threat turned into reality, the white violence perpetrated against African-Americans traversed a spectrum from "'negro drives,'—the use of violence to drive out blacks from a town or count" (pp. 8-9)—to lynchings (pp. 9-12). White mobs reserved the severe penalty of lynching for African-Americans accused of raping or attacking a white woman, which constituted the most egregious transgression of the social order in the white world (pp. 10-11). Indeed, attacking a white woman transgressed such a deep-seated social norm that "whenever the Negro oversteps the white man's dead line he knows, and he is so informed by the right-thinking members of his own race, that he thereby takes his life in his own hands."[34] Similarly, an opponent of a federal anti-lynching bill defended harsh penalties for transgressing white social boundaries and announced,

> We are ofttimes forced to use extreme measures with the Negro. This is caused by the Negro getting the wrong idea of his relation to the white man. He gets this erroneous idea from improper propaganda generally originating in sections other than the South. The man who does not know the darkey and who would help him by persuading him that he is the equal of the white man works the destruction of the Negro race.[35]

In other words, extreme penalties, such as lynching, symbolically preserved

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34. *Id.* at 10 (citing 62 CONG. REC. 1375 (1922) (statement of Rep. Jeffers)).

35. *Id.* (citing 62 CONG. REC. 1371 (1922)).

and reinforced the appropriate status of race relations in the Southern white mind (p. 11). Thus, white violence represented the physical manifestation of the clash between competing abstract definitions of "law"—African-Americans pushed for greater social and legal equality while whites fought their advance by using outright racial intimidation.[36]

Because imposing barriers obstructed the path to equality for Oklahoma's African-Americans, Greenwood's Dreamland Theater served as an apt metaphor for the disjunction between the egalitarian aspirations of, and the reality for, African-Americans in Greenwood. Although equality existed in the pristine world of ideas, sanitized platitudes failed to describe the everyday experiences of African-Americans in Oklahoma (p. 15). Even residents of Greenwood, where African-Americans lived in relative freedom from both an individual and economic perspective, could not escape newspaper stories describing the horror of lynchings in Oklahoma and beyond (p. 12). As a result, the threat of mob violence not only functioned as a sanction for violating social boundaries, but it had a far more subtle effect—it altered the meaning of "equality" in the minds of Greenwood's residents. Greenwood's inhabitants believed that there should be equal—"even if separate"—railroad amenities, funding for education, voting rights, and respect from police (pp. 2, 6). To that end, Brophy finds that the residents of Greenwood did not believe that the formal law stamped them as inferior, but simply that the law as written should be applied impartially to all citizens (p. 2).

The remarkable aspect of the definition of "equality" in Brophy's description of Greenwood is that, instead of demanding full-blown equality in a modern sense, the meaning of "equality" among those in Greenwood conformed to the Supreme Court's requirements for equality defined in *Plessy v. Ferguson*.[37] In *Plessy*, the Court upheld a Louisiana statute that called for

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36. Intimidation by outright force in the form of lynching was shockingly common and brutal throughout the United States during late nineteenth and early twentieth centuries. Between 1889 and 1918, a lynching occurred at a rate of about "one every three days." *See* James M. SoRelle, *The "Waco Horror": The Lynching of Jesse Washington*, 86 SW. HIST. Q. 517, 517 (1983). The "vast majority" of these violent events occurred in the South. *Id.* In one particularly gruesome attack, a mob in Waco, Texas lynched an African-American man, cut off the man's fingers, toes, and ears, allegedly emasculated him, and then burned his corpse. *See id.* at 519-29. As if that was not enough, the corpse was then dragged through the middle of town by a horseman. *Id.* at 528. The townspeople failed to show much concern about the disgusting nature of the acts. One person claimed that "[i]f only they had just hung [*sic*] him, . . . they felt that would have been all right, but the burning—the dragging of the charred torso through the streets is so much worse than his crime." *Id.* at 529.

37. *See* Plessy v. Ferguson, 163 U.S. 537 (1896). With regard to the Thirteenth Amendment challenge, the *Plessy* Court found that the statute did not "destroy the legal equality of the two races, or reëstablish a state of involuntary servitude." *Id.* at 543. Moreover, the Court deemed the statute to be a reasonable exercise of Louisiana's police power and brushed aside the assertion that "the enforced separation of the two races stamps the colored race with a badge of inferiority" in violation of the Fourteenth Amendment. *Id.* at 551. Conversely, the

"equal but separate accommodation for the white, and colored races"[38] against challenges based upon the Thirteenth and Fourteenth Amendments, thereby giving birth to the now discredited "separate but equal" doctrine. Given the similarity between the Greenwood and Supreme Court interpretations of "equality," Brophy's description not only exemplifies the ability of positive law to infiltrate society, but also provides a single historical snapshot of the incremental steps taken during the struggle for civil rights. Assuming Brophy's assertion applies beyond Greenwood's residents, the Supreme Court's landmark decision in *Brown v. Board of Education*[39] is the result of a series of smaller steps taken in conjunction with the evolution of the meaning of "equality." In the area of civil rights, then, progress has been made by taking baby steps rather than leaps and bounds.

In addition to mutating the meaning of equality, threats and reports of mob violence forced Greenwood's residents to recognize that the "law," however conceived, had its limits and could not be counted on for protection or justice. Although people in Greenwood believed justice should be obtained by reference to the law, their adherence to, and respect for, the law disintegrated as lynchings continued (p. 12). For residents of Greenwood, the prevention of lynching outweighed their reverence for the law because they realized that the formal laws prohibiting such crimes would not be enforced so long as social norms sanctioned such violent acts (p. 11). Frustrated with the inability of law enforcement officials to protect African-Americans, the local newspaper encouraged citizens to take a more active role in the prevention of lynching, and that message found a receptive audience in Greenwood (p. 17). If the government failed to protect them, Greenwood residents believed that they had both a right and a duty to act in defense of their lives (p. 19). Unless lynching ceased, individuals in Greenwood foresaw that a racial conflict would erupt if whites continued to diverge from the formal law.[40]

The forecasts of violence made by Greenwood's residents proved to be unusually prescient in light of events that began on May 30, 1921. On that day, a nineteen-year-old African-American man allegedly attacked a seventeen-year-old white elevator girl in downtown Tulsa (pp. 24-25). After conducting a search for the alleged assailant, police captured the young African-American male on the morning of the 31st and charged him with an attempted assault of the white elevator girl (p. 25). Despite the charge of attempted assault, the *Tulsa Tribune* sensationalized the incident by running

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Court declared that if a badge of inferiority existed, then "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*

38. *Id.* at 540 (quoting 1890 La. Acts 111).

39. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

40. *See* BROPHY, *supra* note 32, at 12 (citing *One Hundred Men Lynch Negro Woman Near Waggoner*, TULSA STAR, Apr. 4, 1914, at 1 ("These conditions are becoming very alarming and a serious calamity is sure to follow if something is not done to force all citizens to respect the law.")).

a story on its front page that referred to the confrontation as an "attempted rape," moving the racial powder keg closer to ignition (p. 24). The *Tribune*'s front-page story created an air of anticipated violence among white Tulsans as "800 men, women, and children" gathered at the courthouse by 6 p.m. on the evening of the 31st (p. 26). However, the *Tribune*'s tale also affected citizens of Greenwood, who were keenly aware of the risk of lynching that faced the young African-American in light of other Oklahoma lynchings in the recent past (p. 26). As a result, armed Greenwood men traveled in shifts to and from the courthouse on the night of the 31st to ensure the safety of the young man in police custody (p. 28). During one of their missions to protect the imprisoned African-American male, a Tulsa man attempted to disarm one of the Greenwood men, but the Greenwood resident refused to relinquish his weapon (p. 33). A struggle ensued for the weapon and a shot rang out into the crowd—the riot had begun (p. 33). After the shot, the streets initially cleared and then chaos broke out all over downtown Tulsa (pp. 33-34).

In response to the confusion in the streets, the Tulsa Police Department decided to commission 250 "special officers" to quell the "negro uprising" (p. 38-39). As a result, Tulsa's Police Commissioner deputized a number of whites, who had armed themselves after the initial outbreak of violence, without asking questions of the men to be deputized (p. 39). In addition to deputizing white volunteers, local police officials issued an order that anyone who was not deputized was to be disarmed (p. 40). After hearing a wild-eyed rumor that 500 men from Greenwood planned to attack downtown Tulsa, Tulsa-based units of the National Guard arrived to preserve the peace and soon began to work with local police authorities to implement the disarmament order (pp. 38-39). Sensing the danger in downtown Tulsa, African-Americans in the area fled over the railroad tracks and back to Greenwood in order to defend it from any attempted attack by the growing white mob (p. 41).

As dawn emerged on June 1, police officers, "special officers," and other violence-hungry white citizens decided to take an offensive strategy and gathered across the railroad tracks from Greenwood in preparation for an invasion of the neighborhood (p. 44). At 5 a.m., a whistle sounded to signal the beginning of the attack after which gunfire could be heard from many directions (p. 45). From the start, Greenwood found itself at a disadvantage because the National Guard had disarmed a number of its residents during the previous night (p. 44). In addition to lacking firepower, the community lacked manpower because the National Guard had sent African-Americans deemed non-dangerous to internment camps whether or not they were involved in any violence (pp. 50-51). Although the rationale for internment was to protect the interned African-Americans from the mob, the internment, in fact, facilitated the attack on Greenwood (p. 51). The white mob simply followed the National Guard throughout Greenwood and, once an African-American resident had been removed from his or her home to be shipped to an internment camp, the white mob looted and then burned that individual's home (pp. 51, 56). If the mob met armed resistance, it responded with

excessive brutality and actually murdered some Greenwood citizens in cold blood (pp. 53-58).

Whether through murder or internment, with the accompanying arson, the attack on Greenwood utterly devastated the once prosperous African-American suburb of Tulsa. Although official estimates put the death toll at "twenty-four blacks and ten whites," current estimates place the loss of life at somewhere between 75 and 150 people (pp. 59-60). Moreover, the mob torched thirty-five blocks of Greenwood—including the Dreamland Theater, which symbolized the clash of expectation with reality—and in the process, destroyed the homes of over a thousand of its residents (pp. 55, 60, 88). In the end, the citizens of Greenwood prevented the lynching of one young man, whom a court later declared innocent of any crime,[41] but they did so at the expense of their own lives and property.

III. THE AFTERMATH OF THE RIOT

Shortly after the riot and the recognition of its destruction, promises to rebuild Greenwood echoed throughout Tulsa. The *Tulsa Tribune* reported that "[e]very city that is worth saving has always built something better out of every shocking disaster. This is not only Tulsa's chance, but Tulsa's duty to itself—and TULSA WILL."[42] As a result, Tulsa first organized a Welfare Committee to coordinate the reconstruction effort and then formed a Reconstruction Committee that focused on minor projects in Greenwood (pp. 88-91). However, neither of these committees proved to be successful in rebuilding the once thriving community of Greenwood (pp. 89-91). While Tulsa undertook these modest efforts under the guise of rebuilding Greenwood, the people composing Tulsa's power structure twisted Greenwood's tragedy into a forum that once again allowed them to assert their racial superiority. The *Tulsa World* noted, for example, that "[a]ll of this should not be construed as sympathy for the colored people so much as penance on the part of the superior race."[43] Furthermore, many Greenwood residents who had stayed at an internment camp received green "Police Protection" badges to wear upon release from the camp that distinguished their wearers as acceptable, whereas those without such a symbol were subject to suspicion (pp. 91-92). Analogizing to the South's "peculiar institution," Brophy keenly observes that these badges "looked like a hold-over relic of slavery, in which blacks were required to carry passes from their masters" (pp. 91-92). In sum, the City of Tulsa reneged on its promise to rebuild Greenwood and victims of the riot discovered that "'Tulsa Will' really meant

41. *Id.* at 60 (citing A.J. Smitherman, Poem, *The Tulsa Riot and Massacre* (circa Jan. 1922), *available in* NAACP Papers, Library of Congress, A.J. Smitherman file).

42. *Id.* at 89 (citing *Tulsa Will*, TULSA TRIB., June 3, 1921).

43. *Id.* at 157 n.7 (quoting *Give Until It Hurts*, TULSA WORLD, June 5, 1921, at 4).

that 'Tulsa Will Dodge.'"[44]

Finding no relief forthcoming from the City of Tulsa, victims of the riot turned to state and federal court venues in Oklahoma to obtain a legal remedy for the damages inflicted by the mob. Although victims of the riot filed more than one hundred lawsuits seeking redress for the riot's damage, only two of those actually went to trial, and neither of those plaintiffs obtained recovery (pp. 96-100). Plaintiffs' claims found a hostile environment in Oklahoma's state courts based upon precedent that limited a city's liability for damages under such circumstances.[45] Similarly, the Supreme Court's post-Civil War decisions that "limited federal criminal liability for violations of civil rights" left victims without an avenue by which to obtain relief from the federal government.[46] Given the insurmountable obstacles to recovery in the courts and Tulsa's empty reconstruction promises, victims of the riot received no compensation for the destruction of their homes and lives. Die-hard residents of Greenwood rebuilt the Dreamland Theater in 1922 (p. 95), but Tulsa and the legal system failed to resuscitate life on the Black Wall Street.

IV. THE REPARATIONS ISSUE AND A NEW FRAMEWORK

The failure of Tulsa and the courts to make reparations to the riot's victims provides Brophy with a platform from which to discuss the contemporary policy implications of his work on the issue of reparations. While Brophy acknowledges that reparations cannot rebuild a vanished community such as Greenwood, the author argues that remedial monetary payments not only provide justice for victims of past wrongs, but also strengthen community trust in government (p. 112). Although there is precedent for reparations based on past wrongs, such as the reparations made to Japanese-Americans for their internment during World War II, Brophy recognizes that our nation "cannot possibly compensate for each wrong done in the past."[47] Because legal and economic resources are scarce, Brophy identifies four factors that can be used to mediate the balance between paying reparations for past injustices and keeping a tight lid on the public treasury.

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44. *Id.* at 102 (quoting *Tulsa Will?*, BLACK DISPATCH, Aug. 28, 1921, at 1 ("We wonder if the author of 'Tulsa Will' meant Tulsa will dodge.'"))

45. *Id.* at 96 (citing to *Wallace v. City of Norman*, 60 P. 108 (Okla. 1900)).

46. *Id.* at 97 (referring to John E. Nowak, *The Gang of Five & the Second Coming of the Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1105-09 (2000) (containing a description of the post-Civil War decisions)); *see* United States v. Cruikshank, 92 U.S. 542 (1875) (claiming that the decision shows the Court's hostility to protect against violence perpetrated by local officials).

47. BROPHY, *supra* note 32, at 103 (citing to BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) and also noting that reparations have been paid to Native Americans for dispossession their lands and to assist in the rebuilding of Los Angeles after the Rodney King ordeal in 1992).

To identify cases that "cry out for reparations,"[48] Brophy's analysis assesses whether there is (1) governmental culpability for the past injustice, (2) a human connection between the past wrong and the present, (3) a concentration of harm in time and place, and (4) a recognition of the wrong by people at the time of its occurrence (pp. 105-07).

Without question, the primary objective of Brophy's framework is to limit the number of claims eligible to be included in the reparations debate because while "[o]ur age is one of reparations and apologies," our "age is also weary of reparations claims" (p. 103). Interestingly, a close look at the factors enumerated in Brophy's framework reveals that the framework limits the eligibility of reparations claims by correlating them to the constituents of a valid legal claim. The second factor, a human connection between the past injustice and the present, mandates that a living person be available to receive the benefit of justice offered by reparations. Using either lay or legal descriptions, the person meeting Brophy's second tenet is simply called a plaintiff. Furthermore, the first factor, governmental culpability, is the equivalent of requiring a person to have perpetrated the wrong, and the third factor represents the damage traceable to the governmental defendant. Notably, the damages examined under Brophy's microscope must be concrete and specific, as opposed to widely shared injustices, such as general racial discrimination. When broken down into its factors, then, Brophy's construct limits reparations claims by analogizing them to the basic requirements for litigation—a plaintiff, a defendant, and damages.

Although the first three factors have comparable analogs in litigation terms, Brophy's fourth factor, contemporary recognition of the wrong, illuminates the reparations debate by recognizing that the reparations issue is both legal and political. Within the courtroom, claims for reparations represent prayers for remedies as a result of acts in violation of the law, an understanding that is embodied in the first three factors of Brophy's evaluative tool. The fourth factor, however, has no analog in litigation terms; it operates outside of the courtroom and endows a claim for reparations with the moral force that reflects the political aspect of any reparations claim. In a very real sense, a claim for monetary compensation based upon past injustice is a demand for greater political empowerment via the redistribution of wealth from the moral wrongdoer to the victim. Brophy's fourth factor is the match that ignites the reparations fire—because morality is malleable, what society accepts, abhors, and understands not only changes with time, but also from person to person.[49]

Applying his analysis to the Tulsa Race Riot of 1921, Brophy concludes that reparations should be made to its victims. Because Tulsa's police chief

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48. *Id.* at 107.

49. For example, society once deemed divorce intolerable but today it is commonly accepted. *See generally* FRIEDMAN, *supra* note 1, at 204-08, RODERICK PHILLIPS, UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE (1991).

deputized citizens without discretion and the National Guard facilitated mob violence, Brophy argues that both the city and state were culpable for the damages to Greenwood and its residents; the first prong of his reparations test is therefore satisfied (pp. 106, 116). Because approximately one hundred of the riot's survivors remain alive, the second prong, a living connection between the present day and the past harm, is also met.[50] Moreover, Brophy asserts that the past harm was sufficiently concentrated in place and time to satisfy his third requirement for reparations (p: 106). The community of Greenwood alone experienced the loss of life and property destruction caused by the riot, which stands in contrast to all-encompassing claims for racial discrimination in society. Finally, Brophy points out that Tulsans of the time recognized the injustice levied upon Greenwood (pp. 106-07). As evidence of the sentiment of 1921 Tulsa toward the riot and its victims, Brophy notes that the chair of the eventually defunct Reconstruction Committee declared:

> Tulsa can only redeem herself from the country-wide shame and humiliation into which she is today plunged by complete restitution and rehabilitation of the black belt. The rest of the United States must know that . . . Tulsa weeps at this unspeakable crime and will make good the damage, so far as it can be done, to the last penny.[51]

While advancing the reparations dialogue toward compensation for the victims of Tulsa's 1921 Riot is clearly one of Brophy's main objectives, the author further suggests that his factors apply beyond Tulsa to the most vexing of all modern reparations issues—slavery (p. 118). From Brophy's point of view, "[t]he United States government was intimately involved in the maintenance of the institution of slavery" and there are living survivors of slavery's legacy (p. 118). These survivors suffer decreased opportunities in areas such as housing and voting access because of the country's inability to render the entire apparatus of slavery inoperable—a task that involves more than the mere elimination of the institution of racial servitude (p. 118). Brophy opines that slavery's damages are concentrated in place and time because the damage fell uniquely on individuals based upon race (p. 118). To complete his application of the reparations framework to slavery, Brophy states that contemporaries living at the time of slavery, such as abolitionists, recognized that slavery constituted a wrong and that greater societal effort was needed to advance the cause of formerly enslaved people (p. 118). Although Brophy falls just short of openly endorsing comprehensive reparations for slavery, the implicit conclusion from his analysis is that he believes that such a remedy is long overdue from the federal government.

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50. The number of known survivors of the riot at the time of the book's writing was 118. BROPHY, *supra* note 32 at 117.

51. *Id.* at 107 (citing *Tulsa*, THE NATION, June 15, 1921).

Although Brophy's framework can be readily applied to the victims of the Tulsa Race Riot of 1921, the reparations framework, upon closer inspection, does not counsel as strongly in favor of reparations for slavery from the federal government. Indeed, even Brophy himself recognizes this by noting that "[o]ne supporting reparations for slavery might argue for them using a *slightly expanded version* of the Tulsa factors" (p. 118) (italics added). Despite Brophy's claim that "[t]he United States government was intimately involved in the maintenance of the institution of slavery," (p. 118) compelling arguments exist to contradict such a bold assertion—arguments that would not have been applicable to contradict Brophy's Tulsa analysis. On Brophy's side of the scale, the United States government, in its infancy, arguably maintained slavery by allowing the importation of slaves,[52] and later, by passing legislation like the Fugitive Slave Act of 1850.[53] Weighting the opposite side of the scale, however, the federal government also ended the deplorable institution of slavery embraced by Southern state governments through bloodshed and legislation. The United States government sent federal troops to fight the states of the secessionist South, an action motivated in part to rid the country of the scourge of slavery,[54] and the federal government repealed troubling laws like the Fugitive Slave Act.[55] Furthermore, Congress enacted the post-Civil War constitutional amendments[56] to ensure "the freedom of the

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52. *See* U.S. CONST. art. I, § 9, cl. 1. The Constitution reads,

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Id.; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 85-88 (1996) (discussing the political bargains that were struck and the accompanying dilemmas associated with the importation question during the Constitutional Convention).

53. Ch. 60, 9 Stat. 462 (repealed 1864) (the Fugitive Slave Act required law enforcement officials in the North to hunt and return runaway slaves in their respective states to their owners).

54. Of course, there were causes of the Civil War other than just slavery. *See e.g.*, DAVID HERBERT DONALD, LINCOLN 268-69, 277 (1995) (recounting that Lincoln's initial motivation for authorizing the use of federal troops was a desire to avert a constitutional crisis and preserve the Union). Later, the elimination of slavery in the South became one of the primary objectives of the war. *Id.* at 362; *see also* FRIEDMAN, *supra* note 1, at 218-29 (implicitly assigning a cultural clash between the North and the South as a cause of the war). The several states in the industrialized North "took definite steps to rid themselves of slavery." *Id.* at 218. In the agricultural South, however, slavery had become "an essential pillar" of both the labor and social system. *Id.* at 219.

55. *See* Act of June 28, 1864, ch. 166, 13 Stat. 200 (repealing the Fugitive Slave Act of 1850).

56. U.S. CONST. amends. XIII-XV; *see also* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (confronting the disabilities created by the "Black Codes," which Southern states had

slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[57] Thus, the culpability of the federal government for the maintenance of slavery is, at best, ambiguous and measurably counterbalanced by its efforts to eradicate the South's "peculiar institution." That stands in stark contrast to the overt governmental facilitation of Tulsa's riot.[58]

Regardless of how the balance of governmental culpability for slavery is weighed, Brophy's second and third requirements for reparations are not satisfied when applied to the issue of slavery. Contrary to the living survivors of Tulsa's nightmare, there are no living former slaves for whom reparations would provide some, albeit inadequate, compensation for their suffering. In fact, one must travel several generations into the past to locate a time period when a large number of former slaves would be alive to benefit from reparations; therefore, the types of harm that reparations would compensate must be expanded to benefit individuals alive in the present. Even Brophy recognizes this extrapolation of his third factor when he notes that "there are certainly living victims of the legacy of slavery, people whose educational, employment, housing, and voting opportunities were limited because the system of slavery had not been effectively dismantled during their lifetimes" (p. 118). However, paying reparations for the *legacy* of slavery is not equivalent to paying reparations to victims of slavery. The legacy of slavery not only includes the period during which slave labor went uncompensated,[59] but also that period following the abolition of slavery during which "systematic and government—sanctioned economic and racial oppression . . . impeded and interfered with the self-determination of African Americans and excluded them from sharing in the growth and prosperity of the nation."[60] In a temporal

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established in an attempt to retain some aspects of slavery); Civil Rights Act of 1870, ch. 64, 16 Stat. 140 (dealing with the denial of voting rights for those formerly enslaved); Civil Rights Act of 1871, ch.22, 17 Stat. 13 (establishing criminal and civil penalties for violations of the Fourteenth Amendment that are substantially preserved today in statutes such as 42 U.S.C. §1983 (1994)).

57. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872).

58. *See* BROPHY, *supra* note 32, at 61 (citing Redfearn v. Am. Cent. Ins. Co., 243 P. 929, 931 (Okla. 1926) (stating that "the evidence shows that a great number of men engaged in arresting the negroes found in the negro section wore police badges, or badges indicating they were deputy sheriffs, and in some instances were dressed in soldiers' clothes and represented to the negroes that they were soldiers")).

59. *See* Westley, *supra* note 20, at 465-66; *see also* Verdun, *supra* note 9, at 608 (observing that "slaves were not paid for their labor for more than two hundred and sixty-five years, thereby depriving the descendants of slaves of their inheritance; the descendants of the slavemasters inherited the benefit derived from slave labor, which properly belonged to the descendants of slaves" (footnote omitted)).

60. Verdun, *supra* note 9, at 608; *see also* Magee, *supra* note 11, at 881 (citing L.G. Sherrod, *Forty Acres and a Mule*, ESSENCE, Apr. 1993, at 124, for the argument that reparations

sense, the legacy of slavery encompasses "the first 250 years of American economic history" during which time "the law excluded blacks from the market in a society in which market participation was emerging as vital to personal, political, and social well being."[61] Because any number of racial injustices against African-Americans are conceivably traceable to slavery, compensating individuals who are not victims of slavery for its legacy trumps the restrictive value of Brophy's reparations guidelines.

Brophy's fourth factor, contemporary recognition of the injustice, likewise fails to point the moral compass unambiguously in the direction of reparations for slavery from the federal government. Of course, many individuals decried the immorality of the brutal institution of slavery during its existence, and Congress enacted laws designed to promote the equality of emancipated individuals, which was a tacit recognition of past injustice.[62] However, because demands for slavery reparations are made on the federal treasury, a contemporary sample of moral understanding must include the entire country, tipping the contemporary morality scale back into balance. The South certainly did not view slavery as a moral wrong in general; this is particularly evident because the "South dug in its heels" by passing laws to protect its slaveholding interests in advance of the Civil War[63] and to preserve slavery's remnants after the war.[64] Although not as pronounced as in the

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should not only be paid for slavery, but also for the period of Jim Crow laws in the country that followed the formal end of slavery). Magee notes that reparations must include the amount by which African-Americans overpaid their taxes because African-Americans paid "first-class taxes" but were relegated to "second-class citizenship." *Id.* (footnote omitted).

61. Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUM. RTS. BR. 3, 4 (2000); *see also* Westley, *supra* note 20, at 465-66 (stating that the claims of reparations to African-Americans rests in part upon "the century-long violation of Black civil rights through state-enforced segregation").

62. *See* FRIEDMAN, *supra* note 1, at 218-19 (describing the abolition movement in the North); *see also supra* note 54 (illustrating the federal government's involvement with slavery).

63. FRIEDMAN, *supra* note 1, at 219-20, 222. Southern states passed laws that punished slave insurrections and restricted the laws of manumission in response to the increasing pressure from the abolition movement. *Id. See generally* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1996) (tracing the sources of slavery law in the South and its implementation).

64. FRIEDMAN, *supra* note 1, at 504-08 (describing the Black Codes enacted in the South after the Civil War); *see also* William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31 (1976) (examining various state laws in the South that allowed African-American laborers to be held at will); Pete Daniel, *Up From Slavery and Down to Peonage: The Alonzo Bailey Case*, 57 J. AM. HIST. 654 (1970) (describing how labor law in the "turpentine camps" and "cotton belts" of the South created a form of peonage within the sharecropping system of the late nineteenth century); C. Vann Woodward, *The Birth of Jim Crow*, 15 AM. HERITAGE, Apr. 1964, at 52 (explaining that Jim Crow was the name generally given to those laws promoting segregation of the races from the late nineteenth century until the 1950s). *See generally* REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH (William H. Chafe et al. eds., 2001) (containing tales

South, support for slavery, or at least an indifference to it, undoubtedly existed in the North both prior to, and after, the war. For example, many sermons in New Jersey commented on the morality of slavery, thus reflecting the "weakness of abolitionism" in the state prior to the war.[65] Going one step further, the Illinois General Assembly "threatened to pass resolutions denouncing [the] Emancipation Proclamation" in 1863.[66] Additionally, the post-war discrimination created by Jim Crow not only predominated in the South, but also pervaded the North both before and after the Civil War.[67] In the end, evidence exists to force the contemporary moral compass regarding slavery and its legacy to point in two directions, which is unlike Tulsa's seemingly unidirectional repentant attitude that is presented in Brophy's work.[68]

Even though nineteenth-century opinion did not necessarily recognize the moral injustice of slavery, it is beyond doubt that modern eyes generally agree that slavery constitutes one of the most egregious wrongs in our nation's history. As a result, the modern push for reparations derives an omnipresent "moral and emotional power from the 'super-wrong' propagated by the institution of slavery,"[69] despite the dubious legal grounds for the claims. In *Cato v. United States*,[70] for example, several descendants of slaves appealed an adverse decision in their lawsuit against the United States "for damages

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of the hardship imposed upon African-Americans by Jim Crow laws).

65. Lee Calligaro, *The Negro's Legal Status in Pre-Civil War New Jersey*, 85 N.J. HIST. 167, 171 (1967).

66. Roger D. Bridges, *Equality Deferred: Civil Rights for Illinois Blacks, 1865-1885*, 74 J. ILL. ST. HIST. SOC'Y 83, 84 (1981). The threat never materialized into legislative action. *Id.*

67. James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 494-95 (1965) McPherson states that "racial segregation was more deeply rooted and pervasive in some parts of the North than it was in the South." *Id.* at 494. McPherson further comments that "[f]ew people in the North seemed to take the Civil Rights Act [(1875)] seriously. The Chicago *Tribune* called it a 'harmless' and 'unnecessary' bill, and the Washington *National Republican* described it as a 'piece of legislative sentimentalism.'" *Id.* at 509; *see also* FRIEDMAN, *supra* note 1, at 505 (noting that the North's "passion for equality had all but dribbled away by 1875"); Bridges, *supra* note 66, at 87 (observing that Illinois "moved very slowly in providing civil rights protection" to African-Americans within its borders after the war).

68. Arguably, the fourth factor is absent when applied to the tragedy in Tulsa in 1921. Certainly not all citizens of Tulsa, and possibly not even a majority of Tulsans, denounced the riot as a moral outrage and demanded that reparations be made to its victims. As a result, one question surrounding the application of the fourth factor is how to gauge contemporary recognition of moral injustice. One way is to equate contemporary recognition with public opinion, but public opinion often is multi-directional. Brophy portrays his application of the fourth factor as unidirectional, which makes any conclusion as to the propriety of reparations under the framework subject to question.

69. Magee, *supra* note 11, at 901 (citing to Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 158 (1974)).

70. 70 F.3d 1103, 1105 (9th Cir. 1995).

due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgment of discrimination, and for an apology."[71] Evaluating the claim, the court noted that the plaintiffs' claim rested upon a "generalized, class-based grievance" and failed to be traceable to any governmental misconduct that would be redressed by the requested remedy.[72] In legal jargon, the court essentially held that the plaintiffs had no standing to pursue their claim,[73] which translates as the inability to satisfy the first three prongs of Brophy's framework. Nevertheless, the court observed,

> Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.[74]

In other words, the *Cato* court recognized the moral legitimacy of the claim for reparations to modern eyes, but found such claims better suited for legislative, rather than legal, redress.

As the wording of the *Cato* decision illustrates, in the courtroom, the legal aspects of reparations claims outweigh those associated with morality or politics. Nevertheless, courts and individuals recognize the cancerous injustice of slavery while they simultaneously argue that the modern legal world is ill-equipped to remedy a harm from so long ago. Facing obstacles in

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71. *Id.* at 1105. Specifically, the complaint requested "$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnaping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character." *Id.* at 1106.

72. *Id.* at 1109. The court also held that it lacked subject matter jurisdiction to hear the claim because the Federal Torts Claims Act formed part of the basis for the suit and there was no waiver of sovereign immunity for damage claims accruing in the 1800s. *Id.* at 1107. The court reasoned that such a waiver would be required because the plaintiff's claim violated the two-year statute of limitations associated with the Federal Torts Claims Act for claims accruing after January 1, 1945. *Id.* Finally, the court rejected any theory of compensation based upon the Thirteenth Amendment because the Thirteenth Amendment did not authorize personal damage claims against the federal government. *Id.* at 1110.

73. Standing is a jurisprudential concept that serves a gate-keeping function in that it ensures that only those who have an interest in the outcome of litigation are allowed to participate in it. *See* 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 24:1-24:36 (2d ed. 1983). Modern standing analysis utilizes a three-pronged scheme that asks whether a plaintiff suffered injury in fact, whether the defendant caused the injury, and whether the court can redress the plaintiff's injury. *See id.*; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

74. *Cato*, 70 F.3d at 1105.

the courtroom, but recognizing the moral strength of their cause, proponents of reparations turn to the political arena in the hope of finding a remedy for the generally acknowledged harm. To that end, the modern recognition of slavery's moral injustice provides proponents of reparations with the ammunition to pursue their cause in legislative hallways. Judicial characterizations of discrimination as "intolerable,"[75] slavery as "inexcusable,"[76] and reparations claims as "justified"[77] only serve to solidify the modern ground upon which reparations claims stand. From a proponent's perspective, if slavery is deemed to be a manifest moral injustice of the past to our modern eyes, then current legislatures have a responsibility to compensate for the evils associated with slavery and its legacy, even if courts will not provide relief. In this way, the moral question is intermingled with modern politics, and the issue remains in the public eye while stoking the fire of controversy.

It is all the more difficult to arrive at a solution because both sides in the reparations controversy seek political gain by focusing solely on the immorality of slavery. The reparations discourse is automatically imbued with a bombastic quality that drowns out any consideration of compensation for bygone wrongs other than slavery. For example, while proponents of slavery reparations paid by the federal government urge that compensation would be a "national atonement" for the moral wrongs suffered by African-Americans under enslavement,[78] opponents immediately counter that compensation should only be available from the moral wrongdoers and they are all dead.[79] Not only does this boilerplate point—and—counterpoint paralyze the reparations dialogue with regard to slavery itself, but the "preoccupation with slavery . . . has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead . . . and whose moral responsibility should not be visited upon succeeding generations."[80] As a result, the focus on slavery comes at the expense of addressing other racial injustices of the past that could be compensated, but which fail to escape from under the weight of the arguments over reparations for slavery. The Tulsa Riot of 1921 is just such an example of an egregious state-facilitated wrong visited uniquely upon African-Americans that is amenable to a claim for reparations by the riot's survivors, but which would largely be lost to history without Brophy's effort.

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75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Davis, *supra* note 61, at 3.

79. *See* Verdun, *supra* note 9, at 607; *see also* Westley, *supra* note 20, at 472 (noting that opponents might object to reparations because their ancestors actually opposed slavery thereby limiting what they feel should be their contribution towards reparations payments).

80. BITTKER, *supra* note 13, at 9.

Unfortunately, the tragedy in Tulsa is just one of a number of lesser-known, racially motivated wrongs that deserve airtime during any reparations discussion. In response to a break in a strike line by African-American workers in 1917, for example, a white mob invaded downtown East St. Louis and "randomly but systematically beat, shot, hanged, and burned black people."[81] Much like the situation in Tulsa four years later, local police officials failed to protect African-Americans, and the Illinois National Guard actually shot some African-Americans.[82] As the East St. Louis mob gained velocity, the whites not only burned African-American homes in the area to the ground, but also murdered their residents as they tried to escape the destruction.[83] In total, the riot in East St. Louis claimed the lives of at least forty African-Americans.[84] Exacting an even greater loss of life, whites in Elaine, Arkansas, armed themselves to defend against what they thought was an impending African-American insurrection during the "Red Summer" of 1919.[85] Aided by police officials and federal troops who caught and detained suspicious African-Americans, the Elaine mob killed as many as 250 African-Americans during the subsequent melee.[86] As the experiences in East St. Louis and Elaine show, Tulsa is not the only city to suffer a devastating loss of life at the hands of white mob violence.

In addition to the number of African-American lives lost during racial clashes, white mobs commonly destroyed property with the implicit approval of police during their calamitous sieges in the early twentieth century. Prior to the Tulsa riot, the property loss that resulted from the Philadelphia Race Riot of 1918 stemmed in part from consistent police refusal to prevent whites from stoning African-American homes and attacking African-American churches.[87] And twenty-five years after Tulsa's riot, a white mob unleashed

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81. ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY, 1890-2000, at 94 (2001) (explaining that a public meeting of whites in a labor union was called to stem "this influx of the undesirable negroes").

82. *Id.*

83. *Id.*

84. *Id.* (citing U.S. Congress, House of Representatives, Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Riots, 65th Cong., 2d Sess., July 15, 1918, pp. 1-24); Martha Gruening and W.E.B. DuBois, *The Massacre of East St. Louis*, CRISIS, Sept. 1917, at 219-38; ELLIOT M. RUDWICK, RACE RIOT AT EAST ST. LOUIS JULY 2, 1917, at 27-57 (1982)).

85. FAIRCLOUGH, *supra* note 81, at 102, 104. The "Red Summer" became so named as a result of the outbreak of racial violence across the country during that year. *Id.* at 102. The author locates the cause of the racial tension as being the conflict between the newfound optimism of African-Americans after WWI and the desire by whites to maintain the status-quo with regard to race relations. *Id.*

86. *Id.* at 105 (referring to NAACP statistics but noting that "[t]he true number was probably smaller").

87. Vincent P. Franklin, *The Philadelphia Race Riot of 1918*, 99 PA. MAG. HIST. & BIOGRAPHY 336, 343 (1975).

its racial fury on an African-American neighborhood in Columbia, Tennessee, in an episode eerily reminiscent of the Oklahoma tragedy.[88] Recognizing the prospect that a jailed African-American young man would be lynched, African-Americans gathered in the African-American business district, called the "Bottom" or "Mink Slide," to assist the imprisoned youth and to defend against the threat of mob violence.[89] Police understood that the situation could erupt into violence and sent four police officers to investigate reports of gunfire in the Bottom.[90] Fearing the worst, Mink Slide's African-American defenders showered the four officers with a hail of gunfire just as they arrived, leaving each of the officers wounded.[91] After the initial armed skirmish and ensuing chaos, the Tennessee Highway Patrol ostensibly moved in to restore order, but instead participated in "a predawn raid on the Bottom."[92] During the raid, Tennessee Highway Patrolmen physically assaulted African-Americans in the Bottom[93] and completely destroyed one entire block of the area.[94] According to one investigator following the riot, "[A]ny estimate of property damage would not be too high."[95] Thus, African-Americans in Columbia, Tennessee, like their counterparts in Philadelphia and Tulsa, unwillingly joined the ranks of innocent citizens who had suffered enormous property damage as a result of racially motivated violence.

V. CONCLUSION

As the early twentieth century experiences of African-Americans in places like Tulsa, Columbia, and Elaine illustrate, our nation's history is littered with racially motivated acts of violence that are worthy of inclusion in the reparations debate. Given the legal and political challenges facing those

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88. GAIL WILLIAMS O'BRIEN, THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH 7-12 (1999).

89. *Id.* at 11-12. The dispute began when the jailed man's mother discovered that a radio brought in for repair had been sold, subsequently retrieved, and then did not work even after paying an inflated price for the work. *Id.* at 7-8. The altercation involved the store manager, an apprentice at the store, and the two African-American customers. *Id.* at 9; *see also* Dorothy Beeler, *Race Riot in Columbia, Tennessee: February 25-27, 1946*, 39 TENN. HIST. Q. 49, 49-51 (1980).

90. O'BRIEN, *supra* note 88, at 17-18; *see also* Beeler, *supra* note 89, at 51 (claiming that the initial shots were fired by African-Americans at the lights in the area so that the area would be dark for defensive purposes).

91. O'BRIEN, *supra* note 88, at 17-18.

92. *Id.* at 19; *see also* Beeler, *supra* note 89, at 51 (observing that the wounding of the four officers "constituted [a loss of] one-half the Columbia police force" and so the sheriff moved to get assistance from state forces).

93. O'BRIEN, *supra* note 88, at 22-25.

94. *Id.* at 28 (stating that "not a single black-owned business in the first block of East Eighth Street was left unscathed").

95. *Id.*

favoring reparations for slavery, focusing attention on other episodes of racial violence offers alternative bases from which to address the subject. These episodes do not suffer from the infirmities of an 1865-centered investigation. Unlike slavery, victims of more obscure racial tragedies, like the Tulsa and Columbia riots, are still alive and have suffered discrete injustices that received at least tacit, if not overt, governmental approval. In that sense, the value of Brophy's work is not only his fresh perspective on the analysis of reparation claims, but also the unearthing of a relatively forgotten episode of racial violence for which lip service constitutes the only reparation paid. As a result, the ultimate lesson to be learned from Brophy's work is that multiple lenses can be used to view the issue of reparations to African-Americans, lenses that focus beyond 1865.

Ignoring other instances of racially motivated destruction, modern proponents of reparations for slavery point to racial differences in education, employment, and housing opportunities as evidence of the grip that the legacy of slavery still holds on our communities; proponents use these differences as a basis for claiming reparations. Despite the empirical appeal of these claims, reparations based on modern racial disparities arguably traceable to 1865 remain mired in a legal and political quagmire. In contrast, using other focal points for the reparations discussion holds the promise of obtaining compensation for the damage forged by the legacy of slavery. In fact, evidence suggests that investigating and pressing reparative claims for less publicized racially motivated wrongs yields positive results in comparison to efforts to obtain general slavery reparations. The federal government has not paid reparations for slavery in the 137 years since the end of the Civil War, and no compensation appears to be forthcoming in the near future. However, the City of Chicago made reparations to 22 victims of its 1919 race riot, and the City of St. Louis opened its vault to make similar compensation to the victims of the 1917 East St. Louis tragedy.[96] Moreover, each racially motivated tragedy, like the ones suffered by African-Americans in Chicago and Elaine, links slavery with its continuing legacy because these more recent manifest, yet discrete, racial injustices undoubtedly have their geneses in racist notions held over from the time of slavery. As a result, receiving compensation for other instances of racial violence repairs some of the damage caused by the remnants of slavery, which lies at the heart of all claims for slavery reparations. So, while the reparations dialogue might have its origin circa 1865, it should not be confined to that era.

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96. *See* BROPHY, *supra* note 32, at 108 (reporting that Chicago paid $100,000 and St. Louis paid $400,000); *see also* C. Jeanne Bassett, Comment, *House Bill 591: Florida Compensates Rosewood Victims and their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503 (1994) (describing the legislative compensation given to the victims of the Rosewood Massacre during which a white mob killed some residents of Rosewood, an African-American community, and burned the area's buildings to the ground).