

REPARATIONS FOR A PUBLIC NUISANCE? THE EFFORT
TO COMPENSATE SURVIVORS, VICTIMS, AND
DESCENDANTS OF THE TULSA RACE MASSACRE ONE
HUNDRED YEARS LATER

Adam Coretz[†]

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[†] Staff Editor, *Cardozo Law Review* (Vol. 42); J.D. Candidate (May 2022), Benjamin N. Cardozo School of Law; B.A., George Washington University (2012). I would like to thank Professor Ekow Yankah for his thoughtful feedback throughout this writing process, and in particular for encouraging me to center the stories of the people of Greenwood in 1921, their descendants, and what they lost in—and following—the massacre. I am forever grateful for my entire family, including my seven siblings (Ariella, Mindy, Tyler, Sam, Ryan, Daniel, and Amy), my parents (Kim and Rob) who have always encouraged me to pursue my interests and aspirations, and my wife Sara, who has been my rock throughout law school and whose unrelenting support made this Note possible.

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INTRODUCTION

The doctrine of public nuisance,¹ initially manifested in American law through criminal prosecutions or injunctive actions by government officials to inhibit conduct by private individuals that is harmful to the broader public,² has evolved and expanded considerably over time into a sort of “super tort.”³ The wide-ranging uses of public nuisance today have led to no small amount of criticism from scholars who argue that the use of the tort has strayed too far from its original purpose and breached rational boundaries.⁴ Notwithstanding these criticisms, the tort serves a valuable purpose: protecting public values.⁵

In a 2020 lawsuit filed in Tulsa County District Court in Tulsa, Oklahoma (the Tulsa Lawsuit),⁶ plaintiffs argued that the city’s role in

¹ See RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979) (defining public nuisance as “an unreasonable interference with a right common to the general public”).

² Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 745–46 (2003).

³ In recent decades, public nuisance has been used to cover mass products liability in actions seeking damages from manufacturers of all manner of products including tobacco, firearms, lead paint, the gasoline additive methyl tertiary-butyl ether (MTBE), and more. See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543, 552 (2006) (using the term “super tort” to describe the ever-expanding use of public nuisance). In an even further afield application of public nuisance, a series of separately filed lawsuits against the same electric power producers for their carbon dioxide (CO₂) emissions contributing to global warming reached the Supreme Court in 2011. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). One city even sued banks involved in subprime lending practices that led to the economic crisis in 2008 for creating a public nuisance. Christopher Maag, *Cleveland Sues 21 Lenders over Subprime Mortgages*, N.Y. TIMES (Jan. 12, 2008), <https://www.nytimes.com/2008/01/12/us/12cleveland.html> [https://perma.cc/9DAK-ZK6R].

⁴ See, e.g., Schwartz & Goldberg, *supra* note 3.

⁵ Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 762 (2001).

⁶ First Amended Petition, *Randle v. City of Tulsa*, No. CV-2020-1179 (Okla. Dist. Ct. Feb. 2, 2021).

the 1921 Tulsa Race Massacre⁷ and its actions in the aftermath of that event, constitute a public nuisance under the state's broad public nuisance statute.⁸ This suit follows the recent invocation of public nuisance by the State of Oklahoma against the pharmaceutical manufacturer Johnson & Johnson for harm to public health due to its role in the opioid crisis.⁹ On Tuesday, September 28, 2021, the Tulsa County District Court held a hearing on the defendants' motion to dismiss the Tulsa Lawsuit, and a decision by Judge Caroline Wall on whether to dismiss the case or send it to trial is expected imminently.¹⁰

There are many obstacles and possible bars to a public nuisance claim succeeding in a suit seeking reparations for racial violence.¹¹ Even if those barriers are overcome, there remains a limit on how impactful such litigation can be relative to the immense and nearly immeasurable harm of America's history of racism and racial violence.¹² However, this novel legal strategy, if successful in the Tulsa Lawsuit, could serve as a model for other communities that have suffered events of mass racial

⁷ Other defendants include Tulsa Regional Chamber, Tulsa Development Authority, Tulsa Metropolitan Area Planning Commission, Board of County Commissioners for Tulsa County, Oklahoma, the Sheriff of Tulsa County, and the Oklahoma Military Department. *Id.* at 1–2.

⁸ *Id.* at 3.

⁹ See *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019) (holding the company liable for its misleading marketing of opioids under the state's public nuisance statute). The Oklahoma Supreme Court later overturned this district court decision, finding that "Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids." *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021).

¹⁰ Elizabeth Caldwell, *1921 Tulsa Race Massacre Survivors See Long-Awaited Day in Court*, PUB. RADIO TULSA (Sept. 28, 2021, 7:53 PM), <https://www.publicradiotulsa.org/post/1921-tulsa-race-massacre-survivors-see-long-awaited-day-court#stream> [<https://perma.cc/A4S3-QG48>].

¹¹ For example, plaintiffs must meet the special injury rule. See *infra* Section II.A.3. Other potential obstacles include the "statute of limitations, sovereign immunity, identification of victims, identification of plaintiffs, causation, and measurement of harm." Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 103 (2004).

¹² See Khristopher J. Brooks, *Racism Has Cost the U.S. \$16 Trillion, Citigroup Finds*, CBS NEWS (Sept. 23, 2020, 9:09 PM), <https://www.cbsnews.com/news/us-gdp-growth-missed-16-trillion-systemic-racism-inequality-report> [<https://perma.cc/4VZM-JTWX>]; EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017), <https://ej.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf> [<https://perma.cc/4UF6-YNLS>]; Henry Louis Gates Jr., *Slavery, by the Numbers*, ROOT (Feb. 10, 2014, 12:01 AM), <https://www.theroot.com/slavery-by-the-numbers-1790874492> [<https://perma.cc/C9W5-ZFUV>]; WILLIAM DARITY JR. & A. KIRSTEN MULLEN, ROOSEVELT INST., *RESURRECTING THE PROMISE OF 40 ACRES: THE IMPERATIVE OF REPARATIONS FOR BLACK AMERICANS* (2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Report_ResurrectingthePromiseof40Acres_202005.pdf [<https://perma.cc/ZG7H-BCNS>] (estimating that the cost of erasing the Black-white wealth gap will cost ten to twelve trillion dollars).

violence without any form of reparations or redress.¹³ Whether or not the public nuisance claim is successful on the merits in this instance, it can still serve as a valuable tool within broader advocacy efforts to bring about reparations.¹⁴

This Note assesses the possibility and potential impact of taking a public nuisance tort approach to redressing incidents of mass racial violence, where other efforts at reparations have fallen short. Part I provides a historical overview of the 1921 Tulsa Race Massacre.¹⁵ It then examines the development of public nuisance as a tort and recent contexts in which it has been applied.¹⁶ It also examines state statutes defining public nuisance, particularly focusing on the relevant Oklahoma state statute.¹⁷ Finally, it reviews the factual background and claims included in the Tulsa Lawsuit centered around the events that transpired in the summer of 1921 and reviews the broader history of efforts toward reparations for slavery and mass racial violence in the United States to provide more context.¹⁸ Part II assesses the viability of the public nuisance claim in the Tulsa Lawsuit, identifying the necessary factors for a meritorious public nuisance claim against the backdrop of Oklahoma statutory and case law, as well as possible obstacles.¹⁹ Ultimately, it finds that the lawsuit at bar should be successful.²⁰ It then considers the applicability of the two possible remedies for a public nuisance—damages and injunctive relief to abate the nuisance—and finds that while both are legally permissible, injunctive relief is more appropriate to create the largest impact, in line with the goals of the litigation.²¹ Finally, it concludes that even if the public nuisance claim is dismissed, denied on the merits, or settled out of court, there is still value in bringing public nuisance suits like the one in Tulsa: no matter the legal outcome, these suits can serve to put local and state governments on notice that they must act quickly to abate any possible public nuisances emanating from past unaddressed incidents of mass racial harm to avoid liability—and once in motion, these lawsuits can

¹³ For example, this strategy of litigating under public nuisance doctrine could be applied to seek reparations for the Atlanta Riot of 1906. *See Brophy, supra* note 11, at 96.

¹⁴ *See infra* Section II.C.

¹⁵ *See infra* Section I.A.

¹⁶ *See infra* Sections I.B, I.C.

¹⁷ *See infra* Section I.D.

¹⁸ *See infra* Sections I.E, I.F.

¹⁹ *See infra* Section II.A.

²⁰ *See infra* Section II.A.

²¹ *See infra* Section II.B.

drive significant public attention, further placing pressure on local officials to act.²²

I. BACKGROUND

A. *History of the Greenwood District and the 1921 Tulsa Race Massacre*

The Greenwood neighborhood in Tulsa, Oklahoma, accomplished such astonishing levels of economic success during the oil boom in the 1910s that Booker T. Washington coined the term “Negro Wall Street”—now commonly “Black Wall Street”—to refer to it.²³ Facing racial segregation laws that prevented Greenwood’s Black residents from shopping elsewhere in Tulsa, Black Tulsans in Greenwood became incredibly self-reliant, building an economy in which most dollars earned stayed within the community.²⁴ The success of Greenwood and the spirit of independence among its residents, however, bred a great deal of jealousy and racial resentment among white Tulsans.²⁵ In addition, a spirit of mob violence and lawlessness abounded.²⁶ In this context, Tulsa in the summer of 1921 was like a ticking time bomb; the combination of a deeply resentful, racist white citizenry and unchecked vigilante justice needed only a spark to combust.²⁷ It is not particularly surprising then, that when a young Black boy known as “Dick” Rowland was baselessly accused of assaulting a white girl in an elevator, all hell broke loose.²⁸ A white mob, including men who were deputized by city officials,²⁹ responded by burning virtually all of the Greenwood

²² See *infra* Section II.C.

²³ See Kweku Larry Crowe & Thabiti Lewis, *The 1921 Tulsa Massacre: What Happened to Black Wall Street*, HUMANITIES, Winter 2021, <https://www.neh.gov/preview-link/node/29441/20e3c6b7-ad28-49d6-9207-ee810e3c2357> [<https://perma.cc/5LWW-FA8J>].

²⁴ *Id.*; JAMES S. HIRSCH, RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY 42 (2002).

²⁵ RANDY KREHBIEL, TULSA, 1921: REPORTING A MASSACRE 6 (2019).

²⁶ SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921, at 25–45 (1982) (recounting three incidents of mob violence in the years leading up the massacre, including the lynching of a white man named Roy Belton in 1920). The Ku Klux Klan was also particularly active in the Southwest in the 1920s, including Tulsa’s chapter, which had a membership of 3,200 by the end of 1921. *Id.* at 20.

²⁷ *Id.* at 22.

²⁸ See *id.* at 45–50.

²⁹ Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 153, 153 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/GNC9-6SDL>].

neighborhood to the ground, destroying homes, rendering residents homeless, and killing as many as three hundred people.³⁰

Accounts of the massacre are gruesome, as the depraved mob acted with impunity—including murdering an elderly couple on their way home from church, killing the accomplished Dr. A.C. Jackson in cold blood after promising him protection, and dragging a corpse across downtown.³¹ One survivor of the massacre, Mary E. Jones Parrish, describes watching families flee from their burning homes with babies and children in tow, and recalls instructing her young daughter to lie down and take cover while machine-gun fire rained around them.³² Many survivors recall seeing airplanes firebomb Greenwood from the air.³³ An excavation in October 2020 uncovered twelve unmarked coffins at Oaklawn Cemetery, corroborating long-standing rumors of mass graves containing the remains of massacre victims.³⁴ In addition to the human toll, a recent study estimated that, adjusted for inflation, the modern equivalent of more than \$200 million of Black-owned property was destroyed in the massacre.³⁵

In 2001, the Oklahoma Commission to Study the Tulsa Race Riot of 1921 issued a report that, among other things, found that the city of Tulsa and actions of its public officials and law enforcement officers substantially contributed to the carnage that occurred from May 31 to June 1, 1921.³⁶ The report also raised questions about the culpability of local units of the State of Oklahoma's National Guard.³⁷ Adding insult to injury, the city actively took measures in the days, years, and decades following the massacre to prevent any chance of a sustained recovery in

³⁰ HIRSCH, *supra* note 24, at 77–113; KREHBIEL, *supra* note 25, at 43–94; ELLSWORTH, *supra* note 26, at 45–70.

³¹ ELLSWORTH, *supra* note 26, at 59–61.

³² *Id.* at 63.

³³ HIRSCH, *supra* note 24, at 106.

³⁴ Tonya Simpson & Jenny Wagnon Courts, *Mass Grave Discovered in Search for 1921 Tulsa Race Massacre Victims*, ABC NEWS (Oct. 22, 2020, 8:40 PM), <https://abcnews.go.com/US/mass-grave-discovered-search-1921-tulsa-race-massacre/story?id=73771538> [https://perma.cc/AN5B-RT6J].

³⁵ See Chris M. Messer, Thomas E. Shriver & Alison E. Adams, *The Destruction of Black Wall Street: Tulsa's 1921 Riot and the Eradication of Accumulated Wealth*, 77 AM. J. ECON. & SOCIO. 789, 807 (2018).

³⁶ See Brophy, *supra* note 29, at 157–59 (“The Oklahoma Supreme Court’s opinion in *Redfearn*, written by Commissioner Ray, acknowledges the city’s involvement in the riot. The court wrote 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.’ . . . Whatever interpretation one places on the origin of the riot, there seems to be a consensus emerging from historians that the riot was much worse because of the actions of Tulsa officials.”).

³⁷ See *id.* at 160–61.

Greenwood. To begin with, the city created the all-white Executive Welfare Committee (its successor was known as the Reconstruction Committee), which ostensibly sought to lead relief efforts in Greenwood, but immediately decided to refuse any outside aid for its reconstruction.³⁸ The Committee then put a plan in place to appraise and buy back the destroyed area in Greenwood in order to convert it into an industrial district, betraying any notion that it actually sought to help Black residents of Greenwood resettle in the neighborhood.³⁹ The City Commission then passed an ordinance creating burdensome new requirements for any new structures built in Greenwood to be two stories tall and made of expensive fireproof materials, making it all but impossible for residents to recover.⁴⁰ Incredibly, despite these measures, the Greenwood community initially managed to successfully re-create much of its former prosperity.⁴¹ In the years following the massacre, Greenwood rebuilt virtually all of the area's homes by 1922.⁴² More than two hundred Black-owned businesses were operating in the district by 1942.⁴³ Yet, despite all that the community had been through in the massacre itself, and notwithstanding its improbable resurgence following the massacre, the city's efforts to crush a successful Greenwood district were not finished: urban renewal programs and policies that began in the 1960s with the creation of the Urban Renewal Authority served as a fatal blow to Greenwood.⁴⁴ The most visible vestige of these devastating programs remaining today is a highway constructed through the heart of Greenwood.⁴⁵

³⁸ ELLSWORTH, *supra* note 26, at 83–84.

³⁹ *See id.*

⁴⁰ *See id.* at 85. A subsequent lawsuit by a Black law firm succeeded in enjoining the city from enforcing the ordinance on the grounds that it amounted to a taking of private property without due process of law. *See id.* at 87–88.

⁴¹ Victor Luckerson, *Black Wall Street: The African American Haven that Burned and then Rose from the Ashes*, RINGER (June 28, 2018, 6:30 AM), <https://www.theringer.com/2018/6/28/17511818/black-wall-street-oklahoma-greenwood-destruction-tulsa> [https://perma.cc/3UQ8-HL38].

⁴² *Id.*

⁴³ HANNIBAL B. JOHNSON, BLACK WALL STREET: FROM RIOT TO RENAISSANCE IN TULSA'S HISTORIC GREENWOOD DISTRICT (1998); Hannibal Johnson, *Tulsa's Historic Greenwood District: Black Wall Street Revisited*, 1921 TULSA RACE MASSACRE CENTENNIAL COMM'N, <https://www.tulsa2021.org/history> [https://perma.cc/A2J6-N6PN].

⁴⁴ *See* Kendrick Marshall, "Signs of Gentrification": Greenwood Community Worries Residents Being Pushed Out, History Disrespected, TULSA WORLD (June 16, 2019), https://tulsaworld.com/news/local/racemassacre/signs-of-gentrification-greenwood-community-worries-residents-being-pushed-out-history-disrespected/article_267776fe-ac92-57ef-a048-5e1e0c72ae80.html [https://perma.cc/3YJP-LSHM].

⁴⁵ *See* Dreisen Heath, *The Case for Reparations in Tulsa, Oklahoma*, HUM. RTS. WATCH (May 29, 2020, 8:00 AM), <https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma#> [https://perma.cc/8VLA-2ZZ2].

A recent Human Rights Watch report documented the ways in which the legacy of the massacre and the discriminatory policies that followed have left an ongoing chasm between Black Tulsans—particularly those living in North Tulsa, near the historical Greenwood district—and their white counterparts.⁴⁶ Another study linked the massacre to drops in economic status and educational attainment, and even found some spillover effects beyond Tulsa to include Black people throughout the State of Oklahoma.⁴⁷ Of course, Tulsa is not the only community that endured “race riots,” and the harm in all cases is devastating and enduring.⁴⁸ Because Greenwood stands out due to the unprecedented scale of destruction of what was then one of the most successful and bustling Black communities, it represents a logical focal point from which to build a replicable model of reparations.⁴⁹

There have been a number of efforts to hold perpetrators of the massacre accountable and to compensate victims, but so far, none have

⁴⁶ See *id.* These ongoing harms are reflected in poverty rates (33.5% of residents in the predominantly Black area of Tulsa today live in poverty versus 13.4% in the very white and homogenous South Tulsa); unemployment (2.4 times the unemployment rate for Black Tulsans compared with white Tulsans); substantial disparities in life expectancy (an eleven-year difference); and infant mortality rates that are almost triple that of white people. See *id.* A comparison to national statistics indicates a disproportionate harm on Black Tulsans compared with the Black population more broadly. See *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity> [<https://perma.cc/7BYT-7XJT>] (finding 21.2% of Black people nationally live in poverty as of 2019); Jonnelle Marte, *Gap in U.S. Black and White Unemployment Rates Is Widest in Five Years*, REUTERS (July 2, 2020, 9:06 AM), <https://www.reuters.com/article/us-usa-economy-unemployment-race/gap-in-u-s-black-and-white-unemployment-rates-is-widest-in-five-years-idUSKBN2431X7> [<https://perma.cc/MA7H-2WK5>] (showing the national unemployment rate for Black people is about 1.5 times that of white people); Joel Achenbach, *Life Expectancy Improves for Blacks, and the Racial Gap Is Closing*, CDC Reports, WASH. POST (May 2, 2017), <https://www.washingtonpost.com/news/to-your-health/wp/2017/05/02/cdc-life-expectancy-up-for-blacks-and-the-racial-gap-is-closing> [<https://perma.cc/X57Y-KY3Z>] (finding the life expectancy gap nationally is about 3.5 years); Danielle M. Ely & Anne K. Driscoll, *Infant Mortality in the United States, 2019: Data from the Period Linked Birth/Infant Death File*, NAT'L VITAL STAT. REPS., Dec. 8, 2021 (finding the national infant mortality rate for Black people is about 2.3 times that of white people).

⁴⁷ Alex Albright et al., *After the Burning: The Economic Effects of the 1921 Tulsa Race Massacre* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28985, 2021), <https://www.nber.org/papers/w28985> [<https://perma.cc/67W2-9WUZ>].

⁴⁸ One author found substantial suppression of economic activity caused by racial violence, as measured in patents from Black inventors, based on thirty-eight “race riots,” including the Tulsa Race Massacre, in which major loss of life and property took place. See Lisa D. Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870–1940*, 19 J. ECON. GROWTH 221 (2014).

⁴⁹ See *supra* text accompanying notes 23–24.

succeeded.⁵⁰ In the weeks, months, and years immediately following the massacre, more than one hundred individual lawsuits were filed against the city and insurance companies by people who lost property; but these efforts were entirely unsuccessful.⁵¹ In *Alexander v. Oklahoma*, in 2003, a lawsuit in federal court was barred by the statute of limitations, failing to reach the merits.⁵² Finally, plaintiffs, including living survivors and descendants of victims, have most recently filed suit in state court, based on a theory of public nuisance.⁵³ The outcome remains to be seen, but if successful, it could represent a vehicle through which to enforce what the Supreme Court suggested might be “otherwise perfectly valid claims” but for the statute of limitations,⁵⁴ and possibly even create a replicable tort framework for obtaining redress for historical and ongoing racial violence in other communities across the country.⁵⁵

B. *History and Evolution of Public Nuisance as a Tort*

The foundation of public nuisance doctrine dates back to twelfth-century English common law.⁵⁶ At that time, the king invoked public nuisance to bring suit against anyone who infringed on the rights of the Crown in order to stop the infringement, and he required the offending party to repair the damage.⁵⁷ The doctrine evolved in the fourteenth century to provide a right of action for infringements on “rights

⁵⁰ See, e.g., KREHBIEL, *supra* note 25, at 184, 205–06; David Harper, *Tulsa Race Riot’s Lawsuit Denied*, TULSA WORLD (May 1, 2020), https://tulsaworld.com/archive/tulsa-race-riots-lawsuit-denied/article_4f2ee864-da51-53bf-a083-8458c25f3af9.html [<https://perma.cc/EK6L-GSG8>].

⁵¹ See Brophy, *supra* note 29, at 166–67; see also KREHBIEL, *supra* note 25, at 205–06. In *Redfearn v. American Central Insurance Co.*, a case brought by a white hotel and movie theater owner in Greenwood, the Oklahoma Supreme Court found that a riot exclusion clause immunized insurance companies from liability. Though other states, such as Illinois, created a cause of action for damages done in a “race riot” where government failed to protect against rioters, there was no such cause of action in Oklahoma. Brophy, *supra* note 29, at 166–67 (citing *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929 (Okla. 1926)).

⁵² See *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004) (affirming the district court’s holding that, though exceptional circumstances existed to toll the statute of limitations for some short, undefined period immediately after the massacre, the statute had long since been triggered and run prior to the filing of this lawsuit in 2001).

⁵³ See First Amended Petition, *supra* note 6, at 64–66. The complaint also brings a claim based on unjust enrichment, but this Note will focus on the public nuisance claim. *Id.* at 67.

⁵⁴ See *Alexander*, 382 F.3d at 1220 (quoting *United States v. Kubrick*, 444 U.S. 111, 125 (1979)).

⁵⁵ See *infra* Section II.C.

⁵⁶ See Schwartz & Goldberg, *supra* note 3, at 543.

⁵⁷ *Id.*

common to the public.”⁵⁸ American law adopted public nuisance as a common law crime, covered by state criminal statutes to varying degrees, but typically defined so generally therein as to be practically meaningless.⁵⁹ Indeed, courts and legal practitioners historically regarded public nuisance not as a tort, but rather as a prosecutorial tool for government officials to abate harm to the public.⁶⁰ While public authorities historically have, and still do, principally employ criminal prosecutions to abate ongoing public nuisances,⁶¹ following a 1536 decision by Judge Fitzherbert, a body of case law emerged extending the *crime* of public nuisance to also recognize a public nuisance *tort* with a private right of action if the plaintiff could show particularized harm not shared with the general public.⁶² The common law around public nuisance grew to cover various minor criminal offenses by individuals that interfered with the public health, safety, morals, convenience, or other public rights of the broader community.⁶³

Today, public nuisance doctrine has expanded well beyond its original scope, which had prototypically only involved such actions as obstructions to public highways. Now, the doctrine even includes mass products liability in some states.⁶⁴ Manufacturers of such products as tobacco, firearms, lead paint, the gasoline additive methyl tertiary-butyl ether (MTBE), and more have been sued under public nuisance theory in recent decades.⁶⁵ Public nuisance as a tort has also been invoked, to varying degrees of success, against electric power producers for their carbon dioxide (CO₂) emissions contributing to global warming⁶⁶ and

⁵⁸ *Id.* at 543–44 (for example, “the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases” (quoting Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002))).

⁵⁹ William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

⁶⁰ Gifford, *supra* note 2, at 745–46.

⁶¹ *Id.* at 781.

⁶² Prosser, *supra* note 59, at 1005.

⁶³ RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979).

⁶⁴ See Gifford, *supra* note 2; see also Schwartz & Goldberg, *supra* note 3, at 542–43.

⁶⁵ Gifford, *supra* note 2; Schwartz & Goldberg, *supra* note 3, at 543; *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013) (affirming lower court’s holding that evidence supported public nuisance finding in MTBE case); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610 (W.D. Pa. 1999), *aff’d*, 228 F.3d 429 (3d Cir. 2000) (unsuccessful public nuisance claim against tobacco company); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004) (public nuisance lawsuit by the City of New York against firearm manufacturer, importers, and distributors).

⁶⁶ See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV’T L. 293, 293–94 (2005); Mandy Garrells, *Raising Environmental Justice Claims Through the Law of Public Nuisance*, 20 VILL. ENV’T. L.J. 163, 167 (2009).

against banks involved in subprime lending practices that led to the economic crisis in 2008.⁶⁷ These wide-ranging uses of public nuisance have led to no small amount of criticism from scholars who argue that the use of the tort has strayed too far from its original purpose and breached rational boundaries.⁶⁸ Notwithstanding these critiques, numerous lawsuits have been filed in state and federal courts recently against opioid manufacturers under a novel theory of public nuisance.⁶⁹ Ultimately, the scope of public nuisance doctrine remains an open legal question as litigants in Tulsa have advanced yet another novel public nuisance theory, this time seeking redress for harm resulting from the 1921 Tulsa Race Massacre.

C. *Defining Public Nuisance at Common Law Today*

The Restatement (Second) of Torts defines public nuisance at common law as “an unreasonable interference with a right common to the general public.”⁷⁰ Circumstances that constitute an “unreasonable interference,” according to the Restatement, include significant interference with public health, safety, peace, comfort, or convenience; conduct that is forbidden by law; or conduct that the actor knows, or should know, creates a continuing or lasting harmful effect.⁷¹ However, unlike private nuisance, the unreasonable interference need not necessarily be connected to real property or use of land.⁷² To recover damages for public nuisance in an individual action, the Restatement requires particularized harm to the individual bringing suit.⁷³ In other words, particularized harm—otherwise known as “special injury”—is required in order for a private party to recover damages.⁷⁴ An injury is sufficiently “special” if it is different in kind, not just in degree, from the injury to the general public.⁷⁵ To seek an injunction to abate a public

⁶⁷ See, e.g., Maag, *supra* note 3.

⁶⁸ See Schwartz & Goldberg, *supra* note 3; Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629 (2010).

⁶⁹ Nathan R. Hamons, Note, *Addicted to Hope: Abating the Opioid Epidemic and Seeking Redress from Opioid Distributors for Creating a Public Nuisance*, 121 W. VA. L. REV. 257 (2018).

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

⁷¹ *Id.* § 821B(2).

⁷² *Id.* § 821B cmt. h.

⁷³ *Id.* § 821(C)(1) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

⁷⁴ See Antolini, *supra* note 5, at 759–61.

⁷⁵ *Id.* at 766.

nuisance, one must have suffered particularized harm, must bring the action under authority of the state, or must otherwise have standing to sue, such as in a class action.⁷⁶

D. *Public Nuisance in Oklahoma*

Some states, including Oklahoma, have adopted statutes that define public nuisance quite broadly.⁷⁷ Notably, Oklahoma's statute, like public nuisance at common law, at least on its face, does not require interference with property.⁷⁸ This apparent breadth of coverage was integral to the August 2019 district court decision by Judge Balkman (later overturned by the Oklahoma Supreme Court) against Johnson & Johnson for its role in the opioid crisis within the state.⁷⁹ Specifically, Judge Balkman in *State v. Purdue Pharma LP* found the pharmaceutical company liable for public nuisance due to the harm it caused through misleading and deceptive marketing that led to increased addiction, neonatal abstinence syndrome, and overdose deaths.⁸⁰ This decision, which resulted in a judgment ordering Johnson & Johnson to pay \$572

⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 821(C)(2) (AM. L. INST. 1979).

⁷⁷ See OKLA. STAT. ANN. tit. 50, § 1 (West 2022) (defining nuisance as “consist[ing] in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities”); *id.* § 2 (defining public nuisance as “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal”); see also CAL. CIV. CODE § 3479 (West 2022) (defining a nuisance in California as “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway”).

⁷⁸ See OKLA. STAT. ANN. tit. 50, § 1.

⁷⁹ See *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *11 (Okla. Dist. Ct. Aug. 26, 2019) (“The plain text of the statute does not limit public nuisances to those that affect property. Unlike other states’ statutes that limit nuisances to the ‘habitual use or the threatened or contemplated habitual use of any place,’ Oklahoma’s statute simply says ‘unlawfully doing an act, or omitting to perform a duty.’ There is nothing in this text that suggests an actionable nuisance requires the use of or a connection to real or personal property.”); see also Debra Cassens Weiss, *\$572M Verdict Against Johnson & Johnson in Opioid Suit Is Based on Oklahoma’s Unusual Public Nuisance Law*, ABA J. (Aug. 27, 2019, 10:37 AM), <https://www.abajournal.com/news/article/572m-verdict-against-jj-in-opioid-suit-is-based-on-oklahomas-unusual-public-nuisance-law> [https://perma.cc/PGF7-YXS3].

⁸⁰ See *Purdue Pharma LP*, 2019 WL 4019929, at *12.

million in damages,⁸¹ is part of a wave of litigation against pharmaceutical manufacturers responsible for the opioid crisis.⁸² Johnson & Johnson appealed the judgment (which the judge reduced to \$465 million after adjusting the math from his initial order),⁸³ arguing in its opening brief at the Oklahoma Supreme Court that the decision was a dangerous overreach of the public nuisance doctrine that would create a slippery slope for circumventing “traditional tort rules” in the state.⁸⁴ On November 25, 2020, thirty state attorneys general filed an amicus brief calling on the Oklahoma Supreme Court to reject Johnson & Johnson’s appeal, arguing that public nuisance doctrine encompasses harm to community health.⁸⁵

In November 2021, the Oklahoma Supreme Court rejected the district court’s application of the state’s public nuisance law in the opioid context as impermissible.⁸⁶ In a 5–1 decision written by Justice James R. Winchester, the state’s high court characterized the issue at the center of the lawsuit as a policy matter that should be left to the legislative and executive branches to deal with, rather than the kind of “discrete, localized problem[.]” more traditionally in keeping with Oklahoma public nuisance doctrine.⁸⁷ The court also expressed concern that application of the public nuisance law to lawful products such as opioids would result in excessive and unpredictable liability for product manufacturers.⁸⁸ Ultimately, the court held that public nuisance liability

⁸¹ *Id.* at *20; see also Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [<https://perma.cc/4Z3E-EQSW>].

⁸² Laura Strickler, *Purdue Pharma Offers \$10–12 Billion to Settle Opioid Claims*, NBC NEWS (Aug. 27, 2019, 2:32 PM), <https://www.nbcnews.com/news/us-news/purdue-pharma-offers-10-12-billion-settle-opioid-claims-n1046526> [<https://perma.cc/22BR-UYUJ>].

⁸³ See Jeff Overley, *J&J’s \$572M Opioid Loss Cut to \$465M as Judge Fixes Math*, LAW360 (Nov. 15, 2019, 8:36 PM), <https://www.law360.com/articles/1220204> (last visited Mar. 27, 2022).

⁸⁴ Jeff Overley, *J&J Opens Appeal by Assailing “Radical” \$465M Opioid Verdict*, LAW360 (Oct. 9, 2020, 11:05 PM), <https://www.law360.com/articles/1318666/j-j-opens-appeal-by-assailing-radical-465m-opioid-verdict> (last visited Mar. 27, 2022) (claiming that this decision, if upheld, would allow for such wide-ranging tort claims as obesity against Coca-Cola or lung damage from tail pipe emissions against General Motors).

⁸⁵ Jeff Overley, *30 AGs Back \$465M J&J Verdict in Landmark Opioid Trial*, LAW360 (Nov. 30, 2020, 9:14 PM), <https://www.law360.com/delaware/articles/1332992/30-ags-back-465m-j-j-verdict-in-landmark-opioid-trial> (last visited Mar. 27, 2022).

⁸⁶ *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).

⁸⁷ See *id.* at 731; see, e.g., *Pilgrim Plywood Corp. v. Melendy*, 1 A.2d 700 (Vt. 1938) (bringing public nuisance claim for construction of a dam that would allegedly render the public highway relied upon by plaintiff-corporation unusable); *Seigle v. Bromley*, 124 P. 191 (Colo. App. 1912) (bringing public nuisance claim against owner of adjoining land for establishing and maintaining a hog ranch that would allegedly have the effect of depreciating value of plaintiff’s land and would render it uninhabitable).

⁸⁸ *Johnson & Johnson*, 499 P.3d at 725.

in the state is limited to defendants “(1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable.”⁸⁹ Despite the court’s rejection of public nuisance as to products liability, a public nuisance may still be recognized in any number of contexts so long as a defendant causes harm that “[a]nnoys, injures or endangers the comfort, repose, health, or safety of others,” or “[i]n any way renders other persons insecure in life, or in the use of property,” and such harm affects “an entire community or neighborhood, or any considerable number of persons.”⁹⁰

E. *Tulsa Race Massacre Lawsuit*

Encouraged in part by the State’s initially successful invocation of Oklahoma’s broad public nuisance statute against Johnson & Johnson, three living survivors, six descendants of deceased victims and survivors, the Historic Vernon A.M.E. Church, and the Tulsa African Ancestral Society filed suit in 2020 against the City of Tulsa, Tulsa Regional Chamber, Tulsa Development Authority, Tulsa Metropolitan Area Planning Commission, Board of County Commissioners for Tulsa County, the Sheriff of Tulsa County, and the Oklahoma Military Department, for their role in the Tulsa Race Massacre of 1921 and to abate the ongoing public nuisance in the Greenwood neighborhood.⁹¹ In their petition, two of the living survivors provide remarkable accounts of their memories of the massacre in October 2020 depositions.⁹² Lessie E. Benningfield Randle (Mother Randle), who is now 106 years old, recalls being very scared as a little girl and seeing dead bodies stacked up on a flat-bed truck.⁹³ Viola Fletcher (Mother Fletcher), now 107 years old, remembers being woken up in the middle of the night to the sounds of gunfire, people screaming, and the smell of smoke in the air.⁹⁴ She also testifies to watching white men shoot Black men and burn Black businesses and homes; hearing a big airplane

⁸⁹ *Id.* at 724.

⁹⁰ OKLA. STAT. ANN. tit. 50, §§ 1–2 (West 2022); *see also* Justin Kaufman, Note, Oklahoma v. Purdue Pharma: *Public Nuisance in Your Medicine Cabinet*, 42 CARDOZO L. REV. 429 (2020) (analyzing the opioid case against Johnson & Johnson and concluding that Judge Balkman correctly decided the matter on the law, and that public policy concerns about overly expansive public nuisance doctrine constituting judicial overreach did not apply in this case because the court conducted its analysis within the existing expansive statutory framework).

⁹¹ *See* First Amended Petition, *supra* note 6.

⁹² *See id.* at exhibits 1–2.

⁹³ *Id.* at exhibit 1.

⁹⁴ *Id.* at exhibit 2.

pass over Greenwood during the massacre; seeing piles of dead Black bodies in the streets; and fleeing Tulsa with her family to the town of Claremore, Oklahoma, where they did not have a house or any financial resources and had to sleep under a tent.⁹⁵ The third living survivor, Hughes Van Ellis, Sr. (Ellis), also fled Tulsa with his family, and has continued to face financial, emotional, and social challenges for his entire life.⁹⁶ The ancestors of the other named plaintiffs include: Attorney J.B. Stradford, one of Greenwood's most successful businessmen, whose property was destroyed in the massacre; Clarence Rowland, who was kidnapped, beaten, and tortured by white men for two weeks immediately after the massacre; Wess Young, who was detained against his will and whose property was destroyed in the massacre; Dr. A.C. Jackson, who was murdered and whose property was destroyed during the massacre; Attorney H.A. Guess, whose property was looted and destroyed; and Attorney A.J. Smitherman, a nationally known journalist whose property was looted and destroyed during the massacre and who was forced into exile.⁹⁷

While the *Johnson & Johnson* litigation was brought by the State, one important feature of this new lawsuit in Tulsa is that it is brought by private individuals, and thus, is subject to the "special injury rule."⁹⁸ The complaint, in Section V, thus outlines "Special Injury to the Plaintiffs," claiming that such injury to plaintiffs includes a range of financial and social insecurity, physical and emotional distress, poor health, loss of status and family wealth that resulted from destruction of their properties, and unlawful detention during the massacre.⁹⁹ The lawsuit alleges that a range of public rights were violated during and following the 1921 event.¹⁰⁰ Because under Oklahoma law there is no statute of limitations for a public nuisance where "an actual obstruction of [a] public right" occurred,¹⁰¹ the plaintiffs argue that the city and

⁹⁵ *Id.*

⁹⁶ *Id.* at 9–10.

⁹⁷ *Id.* at 10–12.

⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979) ("In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."); OKLA. STAT. ANN. tit. 50, § 10 (West 2022); see also Antolini, *supra* note 5, at 762.

⁹⁹ First Amended Petition, *supra* note 6, at 8–13.

¹⁰⁰ *Id.* at 65 (naming public rights including "the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of one's own industry, the right of equal protection under the law, the right not to be placed in harm's way by Defendants' affirmative actions, the right to security in health, the right to access public roads and thoroughfares, the right to familial relationships, and the right to enjoy reasonable use of property as guaranteed under the Oklahoma Constitution").

¹⁰¹ OKLA. STAT. ANN. tit. 50, § 7.

other named defendants are still liable for the public nuisance that began in 1921, notwithstanding that a century has passed since the massacre.¹⁰² Further, state law explicitly leaves open the right to recover damages, even where a nuisance is abated.¹⁰³ Therefore, the plaintiffs in this case seek both abatement of the nuisance and damages.¹⁰⁴ More than a year after the litigation commenced, Judge Caroline Wall of the Tulsa County District Court held a hearing on Tuesday, September 28, 2021, on the defendants' motion to dismiss, and will soon decide whether or not to allow the case to proceed to trial.¹⁰⁵ On Thursday, December 30, 2021, Judge Wall also granted a request by plaintiffs to brief her on the recent Oklahoma Supreme Court decision in *Johnson & Johnson* due to its significant impact on the public nuisance claims they raise in their own lawsuit.¹⁰⁶ Plaintiffs and defendants subsequently filed memoranda addressing *Johnson & Johnson's* implications for the Tulsa Lawsuit.¹⁰⁷

F. *Race Reparations for America's History of Slavery and Racial Violence: Brief History of Forms, Theory, and Practice*

Before evaluating the viability of public nuisance doctrine to address harm resulting from mass racial violence, it is helpful to understand the broader history of reparations. There are a number of instances of reparations efforts for mass racial violence throughout history,¹⁰⁸ but these examples are still strikingly few, often fail to result

¹⁰² See First Amended Petition, *supra* note 6, at 65.

¹⁰³ OKLA. STAT. ANN. tit. 50 § 6.

¹⁰⁴ See First Amended Petition, *supra* note 6, at 67–73.

¹⁰⁵ See Caldwell, *supra* note 10.

¹⁰⁶ Order, *Randle v. City of Tulsa*, No. CV-20-1179 (Okla. Dist. Ct. Dec. 30, 2021).

¹⁰⁷ Plaintiffs' Supplemental Memorandum of Law, *Randle v. City of Tulsa*, No. CV-20-1179 (Okla. D.C. Jan. 31, 2022); Joint Response of All Defendants to Plaintiffs' Supplemental Memorandum of Law, *Randle v. City of Tulsa*, No. CV-20-1179 (Okla. D.C. Mar. 7, 2022); Plaintiffs' Reply Memorandum of Law, *Randle v. City of Tulsa*, No. CV-20-1179 (Okla. D.C. Apr. 6, 2022).

¹⁰⁸ Field Order 15, signed by General William Sherman, allocated 400,000 acres of formerly Confederate land for Black families (commonly known as forty acres and a mule); the order was then reversed by President Johnson after President Lincoln's assassination. Rashawn Ray & Andre M. Perry, *Why We Need Reparations for Black Americans*, BROOKINGS (Apr. 15, 2020), <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans> [<https://perma.cc/G299-2KRN>]. 1.5 billion dollars were paid to Japanese-Americans interned during World War II. *Id.* Native Americans received \$1.3 billion (equivalent to less than \$1,000 each to Native Americans in the United States at the time) through the Indian Claims Commission, as well as land through an agreement struck with Congress in 1971; however, they did not get full control of the money or direct control of the land. Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, N.Y. TIMES (June 19, 2019),

in any real reparations being paid, and pale in comparison to the vast total amount of harm.¹⁰⁹ Of the few successful examples of reparations, none have been granted to Black Americans for state-sanctioned racial discrimination.¹¹⁰

While the term “reparations” often conjures up the idea of legislation that allocates funds to repay the victims, survivors, and descendants of racial harm,¹¹¹ judicial interventions can also be used to achieve redress.¹¹² A possible legal framework for obtaining reparations through the vehicle of intentional torts and unjust enrichment emerged in the early 2000s following earlier generations of reparations theory that served to open the possibility of group-based, forward-looking remedies for slavery and other forms of racial violence and harm.¹¹³ Of course, there are advantages, disadvantages, and obstacles to both approaches. Legislative reparations are extremely scalable (there is practically no limit to the possible scope), but such legislation faces strong political headwinds.¹¹⁴ Judicial reparations are better suited to achieve redress for acute instances of specific communities being targeted,¹¹⁵ though such remedies can still achieve scale in theory where there is a replicable litigation strategy. However, tort-based litigation

<https://www.nytimes.com/2019/06/19/us/reparations-slavery.html> [https://perma.cc/V5ZN-ZQF6]. Black men infected with syphilis in the Tuskegee Syphilis Study received a legal settlement of \$9 million. Jay Reeves, *Tuskegee Syphilis Study Descendants to Seek Settlement Money*, AP NEWS (July 15, 2017), <https://apnews.com/article/63f76598ce8647f98053e51dc5aad02b> (last visited Mar. 28, 2022). The Florida legislature granted \$2.1 million to victims and survivors of the 1923 Rosewood Massacre (\$150,000 lump sum for each of the nine survivors, \$500,000 pool of funds for descendants, and \$4,000 scholarships for youngest generation). Victor Luckerson, *What a Florida Reparations Case Can Teach Us About Justice in America*, TIME (Sept. 10, 2020, 12:22 AM), <https://time.com/5887247/reparations-america-rosewood-massacre> [https://perma.cc/7MRC-UTXX].

¹⁰⁹ See *supra* notes 12, 46.

¹¹⁰ See Ray & Perry, *supra* note 108, at 2.

¹¹¹ For example, in 1994, the Florida legislature enacted legislation to compensate victims of the Rosewood Massacre and their families. See Luckerson, *supra* note 108.

¹¹² Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 21–22 (2007).

¹¹³ Brophy, *supra* note 11, at 85, 120; ALFRED L. BROPHY, REPARATIONS: PRO & CON 62–74 (2006).

¹¹⁴ Public opinion remains strongly against reparations, rendering it all but impossible to pass large-scale legislation. See Mohamed Younis, *As Redress for Slavery, Americans Oppose Cash Reparations*, GALLUP (July 29, 2019), <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> [https://perma.cc/VS7E-3RLK] (finding sixty-seven percent of Americans are against cash payments by the government to descendants of enslaved people while only twenty-nine percent are in favor).

¹¹⁵ See, e.g., Luckerson, *supra* note 108.

efforts in the past have suffered substantial obstacles and found little success in courts to date.¹¹⁶

II. ANALYSIS

A. *Do the Tulsa Plaintiffs Have a Cognizable Public Nuisance Claim?*

Mass racial violence may not intuitively fit within the traditional concept of public nuisance doctrine.¹¹⁷ Typically, legal practitioners and observers may think of an obstruction to a public road, an oil spill in a large body of water, or a hog farm that depresses the value of the surrounding area and/or renders it unusable as common examples of public nuisance.¹¹⁸ The burning down of a neighborhood, killing of hundreds of residents, and subsequent actions to deny a full and sustainable restoration to its successful economic roots, seem strikingly different from these prototypical examples of public nuisance.¹¹⁹ Further, the recent Oklahoma Supreme Court ruling in the *Johnson & Johnson* case, at least on the surface, indicates a reluctance to recognize nontraditional public nuisance claims.¹²⁰ However, that decision narrowly applied to products manufacturers, which the court distinguished from defendants who commit crimes constituting a nuisance or who “caus[e] physical injury to property or participat[e] in an offensive activity that render[s] the property uninhabitable.”¹²¹ Certainly, there is a strong argument that the extensive physical injury

¹¹⁶ This is due to “statute of limitations, sovereign immunity, identification of victims, identification of plaintiffs, causation, and measurement of harm.” Brophy, *supra* note 11, at 103; see also *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006); Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91 (2004).

¹¹⁷ See RESTATEMENT (SECOND) OF TORTS § 821B reporter’s notes cmt. a (AM. L. INST. 1977) (citing common examples of public nuisance to include ice on a sidewalk; noise frightening horses; golf balls knocked onto a highway; a building obstructing a public square; practicing medicine without a license; holding vicious dogs; storing explosives near a highway; illegal gaming activities; indecent exhibition; noxious odors, dust, and fumes).

¹¹⁸ See, e.g., *County of Erie v. Marjorie’s Grove & Catering Serv., Inc.*, 411 N.Y.S.2d 501 (Sup. Ct. 1978) (public nuisance claim for an advertising sign unlawfully encroaching on public highway); *United States v. Dixie Carriers, Inc.*, 462 F. Supp. 1126 (E.D. La. 1978), *aff’d*, 627 F.2d 736 (5th Cir. 1980) (public nuisance claim for oil spill); *Seigle v. Bromley*, 124 P. 191 (Colo. App. 1912) (public nuisance claim for keeping of hog pen that rendered surrounding land uninhabitable and depressed its value).

¹¹⁹ See *Marjorie’s Grove*, 411 N.Y.S.2d 501; *Dixie Carriers*, 462 F. Supp. 1126; *Seigle*, 124 P. 191.

¹²⁰ See *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).

¹²¹ See *id.* at 724.

to property that took place in the Tulsa Race Massacre, which rendered virtually all of Greenwood uninhabitable as most structures were burned to the ground, is in keeping with the state's precedent for when a public nuisance may be recognized. Putting aside the issue of judicial courage to address racial injustice, it is clear on the law that the harm perpetrated against the Greenwood community should qualify as a public nuisance.

1. Interference with a Public Right

To succeed on a public nuisance claim at common law, the plaintiffs must first demonstrate unreasonable interference with a public right.¹²² Proving this element is often challenging, either because a court may find that the conduct complained of violates a private as opposed to public right, or because of insufficiently unreasonable interference.¹²³ However, the Second Restatement eschews traditional common law conceptions of interference with a public right where a state statute explicitly provides that public nuisance includes “interference with ‘any considerable number of persons.’”¹²⁴ Oklahoma's public nuisance statute includes precisely such language and thus, the “considerable number of persons” standard, rather than establishing interference with a *public right*, applies in making a determination of unreasonable interference.¹²⁵ The massacre and the events that followed in Tulsa affected and continue to affect the entire neighborhood of Greenwood, easily meeting the statutory standard for unreasonable interference in Oklahoma.¹²⁶

¹²² RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

¹²³ *Id.* § 821B cmt. e. According to the Restatement, “[a] public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.” *Id.* § 821B cmt. g; *see also* *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001) (“The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.” (quoting *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943))); *Golden v. Diocese of Buffalo*, 125 N.Y.S.3d 813 (App. Div. 2020) (holding that public nuisance claim for failing to inform Catholic parishioners of multiple reports of child sexual abuse committed by new priest only affected a particular subset of the community and did not constitute substantial interference with a public right); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (denying plaintiffs' public nuisance claim against firearm manufacturer and finding that there is not a *public right* not to be assaulted).

¹²⁴ RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979) (indicating that “under these statutes no public right as such need be involved”).

¹²⁵ *See* OKLA. STAT. ANN. tit. 50, § 2 (West 2022) (“A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.”).

¹²⁶ *See supra* Section I.A.

2. Conduct Constituting Public Nuisance

The plaintiffs in the Tulsa Lawsuit claim that a series of acts and omissions during and arising from the massacre constitute a public nuisance that has affected, and continues to affect, all of Greenwood and the Black population of North Tulsa more broadly.¹²⁷ Such acts begin with direct participation by the police, city officials, and National Guard in the killing, looting, and destruction of property during the massacre itself, as well as deputization of members of the angry white mob.¹²⁸ Then, in the immediate aftermath of the massacre, plaintiffs allege that defendants forcefully detained more than five thousand Greenwood residents at the Ballpark and Convention Center and forced detainees into labor in the clean-up efforts from the destruction caused by defendants.¹²⁹ They further claim that in the years and decades that followed, defendants promulgated a series of policies, including zoning ordinances designed to prevent the rebuilding of Greenwood; misrepresented the massacre as a “riot,” which prevented residents and business owners from collecting on insurance policies; affirmatively rejected monetary aid from around the country meant to help displaced Greenwood residents; convened an all-white jury that indicted Greenwood residents for causing their own destruction; called for more aggressive policing of Greenwood; continued to participate in organized racial terror through direct involvement of city officials in incorporating the Ku Klux Klan locally; instituted “urban renewal” policies under which the city took property, built a highway through the middle of Greenwood, and set into motion a steady decrease in area property values; diverted resources away from the predominantly Black North Tulsa community; and excluded Black people from managerial and leadership positions in appointed public employment with few exceptions.¹³⁰ Beyond these acts, plaintiffs allege a set of unlawful and discriminatory omissions that they claim perpetuated the nuisance caused initially by the massacre.¹³¹

¹²⁷ First Amended Petition, *supra* note 6, at 64.

¹²⁸ *Id.* at 18–28.

¹²⁹ *Id.* at 29–31.

¹³⁰ *Id.* at 32–48.

¹³¹ Such omissions include a breach of defendants’ duty to protect all Tulsa residents and duty of care to mitigate damage in the course of the massacre; failure to include any Black people or Greenwood residents on the Public Welfare Board, which was formed by the Chamber of Commerce and tasked with leading recovery efforts; neglect of duty to provide basic public services, utilities, and amenities to Greenwood in the decades after the massacre; refusal by the city to enforce housing codes in Greenwood, making homes there more prone to rapid deterioration, substandard conditions, and blight; and failure of the city’s duty to help rebuild

By actively participating in Greenwood's destruction, omitting to perform its duty in protecting the residents of Greenwood from a murderous mob, and taking no substantial actions to help Greenwood recover, the City of Tulsa and other named defendants rendered Greenwood's residents "insecure in life, or in the use of property" under the state's definition of nuisance.¹³² The *Johnson & Johnson* decision is instructive.¹³³ There, Judge Balkman found that a pharmaceutical company's predatory and deceitful marketing of addictive substances harmed a considerable number of Oklahoma residents, and constituted a public nuisance that "annoys, injures, or endangers the comfort, repose, health, or safety of others" under the state's public nuisance statute and must be abated.¹³⁴ So too should the ongoing harm in Greenwood that has resulted from the massacre and the actions and omissions that followed.¹³⁵ Like a private company knowingly causing large swaths of individuals to become addicted to opioids that they were led to believe were safe, here, the city and public officials knowingly allowed a murderous mob to run rampant and murder, loot, steal, and set fire to an entire neighborhood.¹³⁶ Where Johnson & Johnson tapped "high-opioid-prescribing physicians" in the state to drive up sales of an addictive substance that subsequently and predictably led to an increase in opioid addiction and overdose deaths,¹³⁷ Tulsa police deputized and armed white male members of a mob that had assembled outside the courthouse, who unsurprisingly became, according to a report by Captain Bell of the National Guard, "the most dangerous part of the mob."¹³⁸

Courts have held cities liable for nuisance for far less, such as failing to monitor and repair leaky sewage and causing water mains to

the neighborhood that it destroyed, even turning down federal funding, programs, and services that it had access to. *Id.* at 25–53.

¹³² See OKLA. STAT. ANN. tit. 50, § 1 (West 2022).

¹³³ See *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019).

¹³⁴ *Id.* at *37–38, *44.

¹³⁵ See *supra* notes 127–31 and accompanying text.

¹³⁶ Compare *Purdue Pharma LP*, 2019 WL 4019929, with First Amended Petition, *supra* note 6, at 3.

¹³⁷ *Purdue Pharma LP*, 2019 WL 4019929, at *6, *9.

¹³⁸ HIRSCH, *supra* note 24, at 92–93 (recounting the testimony of a twenty-six-year-old who was among those deputized and "was told to get busy and try to get a n[*****]" and detailing the account of Walter White of the NAACP, a white-passing Black man who had just arrived on the scene and who heard a newly deputized individual comment, "Now you can go out and shoot any n[*****] you see and the law'll be behind you"); *id.* at 102 ("A white judge named John Oliphant, testifying after the riot, offered a similar account of the police force. 'They were the chief fellows setting the fires,' he said."); see also ELLSWORTH, *supra* note 26, at 54.

break or collapse.¹³⁹ In *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, the Wisconsin Supreme Court found that the City of Milwaukee may be liable for nuisance arising from negligence due to its failure to act by not repairing a leaky water main.¹⁴⁰ At best, the City of Tulsa similarly bears liability for acting negligently in its failure to act to prevent the murderous mob from attacking Greenwood, but the facts likely point more toward “intentional conduct”—if not for the purpose of causing the harm, then in spite of knowledge that the harm that followed was substantially certain.¹⁴¹ After all, the nature of a violent, armed mob is significantly more conspicuous and dangerous than a leaky water main.¹⁴² In a decision involving conduct more analogous to the violent mob in Tulsa, the Supreme Court of California found that a public nuisance existed where a street gang occupied a neighborhood and obstructed residents’ ability to move freely about public streets, as well as the use and enjoyment of their property.¹⁴³ If a street gang’s activities qualify as conduct constituting a nuisance because they deprived neighborhood residents of their public right to move about and freely use and enjoy their local streets and homes, it follows that the actions of the Tulsa police, city officials, and National Guardsmen in forcefully holding residents of an entire neighborhood in detention camps—after enabling and contributing to the destruction of their very

¹³⁹ See *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 670 (Wis. 2005). Although this case dealt with a private nuisance, its analysis of the elements required to establish liability applies equally to a public nuisance. See *id.* at 675.

¹⁴⁰ See *id.* at 673–74. The court reserved as a material fact the question of whether the city had notice of the leak and thus a ministerial duty to make the repair. See *id.* at 680.

¹⁴¹ See *id.* at 672 (“[A] nuisance is based on intentional conduct when the defendant, through ill will or malice, intends to cause the interference or if the defendant, without any desire to cause harm, nonetheless has knowledge that his otherwise legal enterprise is causing harm or is substantially certain to cause the invasion at issue.” (citing *Vogel v. Grant-Lafayette Elec. Coop.*, 548 N.W.2d 829 (Wis. 1996))).

¹⁴² See HIRSCH, *supra* note 24, at 96 (“The anticipation of a bloody showdown created a festive, blustering atmosphere, where a dangerous blend of whiskey, guns, and racism roiled. ‘We saw drunks staggering along the streets hanging on to half empty bottles,’ Choc Phillips wrote in his memoirs, ‘and now and then one would face skyward and scream and whoop as loud as possible. Instead of the crowds on the streets diminishing as the hours passed, they grew larger. A great many of those persons lining the sidewalks were holding a rifle or shotgun in one hand and grasping the neck of a liquor bottle with the other. Some had pistols stuck in their belts.’”).

¹⁴³ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 615 (Cal. 1997) (“The hooligan-like atmosphere that prevails night and day in Rocksprings—the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire—easily meet the statutory standard [for public nuisance]. Nor is it difficult to see how threats of violence to individual residents and families in Rocksprings, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes obstruct the free use of property and interfere with the enjoyment of life of an entire community.”).

homes and subsequently taking measures to prevent the rebuilding of their homes—must also be conduct that constitutes a public nuisance.¹⁴⁴

While conduct constituting public nuisance may most typically be recognized in the contexts of interference with property, mass products liability, and environmental harm, the plain language of Oklahoma’s statute, together with the expansion of the doctrine’s use in recent years, indicates that public nuisance can and should be recognized in the case of communities like Greenwood whose public rights have been unreasonably interfered with.¹⁴⁵

3. Standing and the Special Injury Rule

Because the plaintiffs in this case are private individuals bringing an action for public nuisance, in order to have standing to bring the claim for damages, they must show that they have suffered a special injury, different in kind from other members of the public exercising the same public right.¹⁴⁶ Recent Oklahoma case law is unsettled as to whether such injury must be different in kind from that suffered by one’s neighbors, or simply “different in kind from the injuries suffered by those *outside the affected neighborhood*—i.e., by the public at large.”¹⁴⁷ However, if made to decide the issue, precedent suggests it is likely that the Supreme Court of Oklahoma would opt for the broader view of the special injury rule.¹⁴⁸

If the plaintiffs must simply show the latter, broader interpretation of the special injury rule to make a sufficient demonstration of special injury, they will easily succeed.¹⁴⁹ The injuries Greenwood residents suffered during and following the massacre were different in kind from those to the same public rights suffered by other members of the public at large outside of the neighborhood because they were physically harmed and entirely deprived of the use and enjoyment of their streets

¹⁴⁴ See First Amended Petition, *supra* note 6, at 29–36.

¹⁴⁵ See *id.* at 65 (naming the range of public rights interfered with).

¹⁴⁶ See RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

¹⁴⁷ *Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1186 (W.D. Okla. 2019) (emphasis added) (finding it unnecessary to decide this issue).

¹⁴⁸ See *Schlirf v. Loosen*, 232 P.2d 928, 930 (Okla. 1951) (“An action cannot be maintained by a private person for an interference with or an obstruction in a public highway constituting a public nuisance, unless he is thereby specially injured in some way not common to the *public at large*.” (emphasis added) (quoting *McKay v. City of Enid*, 109 P. 520 (Okla. 1910))).

¹⁴⁹ See *id.*

and homes.¹⁵⁰ Even putting aside physical harm and access to land, Greenwood residents suffered a different kind of harm than that suffered by others in the broader community exercising the same public right(s); for example, it is possible that some white Tulsans in South Tulsa suffered interference with their right to enjoy the reasonable use of their property because, perhaps, billowing smoke from the fires in Greenwood drifted in their direction, bringing with it a noxious odor and impairing the air quality in and around their homes.¹⁵¹ Those individuals would have suffered harm to the same public right, but it is harm of a different kind than that of someone in Greenwood, whose interference with the reasonable use of his property was due to the physical burning down of his house and its surroundings during the massacre, before forcefully being kept in a detention camp and subjected to zoning ordinances that then made it prohibitively expensive for him to rebuild.¹⁵²

However, if the court were to take the former, narrower view of special injury, the plaintiffs would have to demonstrate that, even compared to others in Greenwood, the harm they particularly suffered was of a different nature.¹⁵³ The amended petition explains how each individual plaintiff is directly and uniquely affected by the ongoing nuisance.¹⁵⁴ Even under the narrower view of special injury, some of the plaintiffs—such as the nephew of Dr. A.C. Jackson, who was murdered during the massacre—and the daughter of Clarence Rowland, who was kidnapped, beaten, and tortured for two weeks by white men seeking the whereabouts of Dick Rowland—would appear to have suffered a special injury, different in kind even from their neighbors in Greenwood.¹⁵⁵ Others who suffered harms shared by many in Greenwood—such as destruction of property—might only meet the special injury requirement if the court takes the broader view that their

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (AM. L. INST. 1979) (“When the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained.”); see also *id.* § 821C cmt. f (“The right of access to land . . . is itself a property right in the land. If the public nuisance interferes with immediate ingress and egress to the plaintiff’s land . . . the harm suffered by the plaintiff is particular harm differing in kind from that suffered by the general public, so that the plaintiff can recover for the public nuisance.”).

¹⁵¹ See, e.g., *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566 (Neb. 1985) (finding a nuisance existed and had not been abated where a neighboring hog facility emitted a noxious odor).

¹⁵² See *supra* Section I.A; see also ELLSWORTH, *supra* note 26, at 69–71.

¹⁵³ See *McKay*, 109 P. at 522 (defining special injury as one “different in kind, not merely degree, from that suffered by the general public from the act complained of”); see also *Schlirf*, 232 P.2d at 930.

¹⁵⁴ See First Amended Petition, *supra* note 6, at 8–13.

¹⁵⁵ See *id.* at 11–12.

injury must simply be different in kind, as it relates to the public right interfered with, than others in the *broader public* who have suffered the same injury.¹⁵⁶ Because precedent suggests that the court would likely take the broader view, the plaintiffs should succeed in demonstrating special injury.¹⁵⁷

While standing to sue in general may be relatively straightforward for the living centenarians who themselves lived through the massacre,¹⁵⁸ it is more attenuated for the named plaintiffs who are descendants of victims.¹⁵⁹ Scholarship on standing in reparations lawsuits suggests that while victims themselves have stronger claims for standing, descendants may also have standing where their parent was killed by a state-condoned action, or they have suffered pecuniary loss.¹⁶⁰ Nonetheless, the ongoing nature of the nuisance alleged by the Tulsa plaintiffs likely confers on them stronger standing than, say, someone whose ancestor suffered an acute, isolated injury, because at least some of the harm is immediate and current.¹⁶¹

4. Causation

Critical to most analyses of public nuisance claims is the concept of causation.¹⁶² According to one conception of causation in public nuisance claims, “[T]he critical question is whether the defendant

¹⁵⁶ See *Schlirf*, 232 P.2d at 930 (explaining that, in order to maintain a private action for a public nuisance, the plaintiff must have suffered a special injury “different in kind from that suffered by the public at large”).

¹⁵⁷ See *McKay*, 109 P. at 522.

¹⁵⁸ Lessie Benningfield Randle, also known as “Mother Randle,” was 105 years old at the time the lawsuit was filed. She lived through the massacre as a young girl. David Williams, *Led by a 105-Year-Old Survivor, Lawsuit Seeks Reparations in 1921 Tulsa Race Massacre*, CNN (Sept. 2, 2020, 10:00 PM), <https://www.cnn.com/2020/09/02/us/tulsa-massacre-lawsuit-trnd/index.html> [<https://perma.cc/HG5V-UF8A>]. Two additional living survivors were added in the first amended petition filed on February 2, 2021. See First Amended Petition, *supra* note 6, at 5.

¹⁵⁹ Other named plaintiffs include children, grandchildren, and great-grandchildren of victims and survivors. See First Amended Petition, *supra* note 6, at 5–6.

¹⁶⁰ Miller, *supra* note 116, at 107 (“[T]he injury—in effect, state-sponsored terrorism—is ideally not asserted by the descendants of the victims, but by the victims themselves. Where such injury is asserted by descendants, it is generally asserted by the victim’s children who can show a pecuniary loss or assert a claim for wrongful death Thus, where descendants sue for Jim Crow violations, the suit should state either that the descendant’s parent has been killed by the state-condoned action (which establishes a claim for wrongful death), or that the plaintiff has suffered a pecuniary loss.”).

¹⁶¹ See *supra* notes 46–47.

¹⁶² See, e.g., *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008); see also Steven Sarno, Comment, *In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance*, 26 PACE ENV’T L. REV. 225 (2009).

created or assisted in the creation of the nuisance.”¹⁶³ At least in the context of products liability, such as lead paint manufacturers, courts have disagreed about whether *control* over a nuisance is necessary in order to hold a defendant liable for abating it.¹⁶⁴ However, the Restatement suggests that a defendant who created a harm that continues, even after the activity that gave rise to it ceases, is still liable for the continuing harm even if he is no longer in a position to abate the harm; this suggests that control is not a necessary element for determining causation.¹⁶⁵ In the context of the massacre, the city was arguably, at least to a substantial degree, in control of the murderous mob since its own officials both participated in the destruction and deputized members of the mob.¹⁶⁶ Thus, even if the court views control as a necessary element to establish causation, there is a strong argument in favor of finding causation at least as it relates to the nuisance of the murderous mob that perpetrated the massacre itself.

Defendants might argue that there are too many intervening variables contributing to ongoing harms related to the insecurity, health, emotional distress, and economic hardship facing Black residents of Greenwood and greater North Tulsa, and that these harms cannot be attributed to the massacre and its aftermath.¹⁶⁷ While it may be the case that other causes aside from the massacre have contributed to these inequities and disparities, under Oklahoma common law, such intervening causes do not necessarily relieve the original perpetrator of harm from liability.¹⁶⁸ For the original actor to be insulated from liability, an intervening cause must exist independently from the

¹⁶³ County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Ct. App. 2006) (emphasis omitted).

¹⁶⁴ Compare *id.* (finding that control is not a determining factor in deciding liability for nuisance), with *In re Lead Paint Litig.*, 924 A.2d 484, 499–501 (N.J. 2007) (finding that defendants must have control over property as a prerequisite to establish causation in a public nuisance claim).

¹⁶⁵ RESTATEMENT (SECOND) OF TORTS § 834 cmt. f (AM. L. INST. 1979).

¹⁶⁶ See Brophy, *supra* note 29.

¹⁶⁷ See, e.g., *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 (App. Div. 2003) (holding defendant–handgun manufacturers were not liable for public nuisance in part because their “lawful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm”). *But see* *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 545–46 (2017) (rejecting defendants’ argument in lead paint case “that their wrongful promotions were too remote from the current hazard to be its ‘legal cause’ [and that] due to the lapse of time, this hazard is more closely attributable to owner neglect, renovations, painters, architects, and repainting” because “the trial court could have reasonably concluded that defendants’ promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role”).

¹⁶⁸ See *Graham v. Keuchel*, 847 P.2d 342, 348 (Okla. 1993).

original act, be capable of causing the harm by itself, and not be reasonably foreseeable.¹⁶⁹ Without doubt, the decades that followed the massacre continued to effectuate discriminatory laws and perpetuate racism that manifested in a myriad of ways, leading to disparate outcomes for Black Americans nationally.¹⁷⁰ Yet, such additional causes are inexorably bound up in the inequities flowing from the massacre and cannot be perceived separate and apart from the enduring impact of that event, as they would have to be to shield the original actors from liability under Oklahoma law.¹⁷¹ Indeed, the uniquely high levels of mortality, morbidity, poverty, and other outcomes among Black Tulsans, even when compared with Black Americans nationally, is evidence that something uniquely endemic took place in Tulsa for which the nation's broader racist sins cannot cut off liability.¹⁷² Further, the city is a continuing entity that lives on beyond the mortal lifespan of its political leaders. In the decades that followed the massacre, the city continued to take actions, such as the construction of a highway through the center of Greenwood, to sustain the ongoing nuisance, and remained a proximate cause of its demise.¹⁷³

The Supreme Court of Oklahoma follows the general tort concept that foreseeability is an important factor in determining causation.¹⁷⁴ When city officials deputized and armed members of an angry mob, the destruction that ultimately resulted was quite foreseeable.¹⁷⁵ Further, the 2001 report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921 documents quite clearly the city's and state's respective

¹⁶⁹ *Id.*

¹⁷⁰ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (documenting how federal, state, and local governments systematically segregated neighborhoods through zoning, restrictive covenants, public housing, tax exemptions, and more, keeping Black Americans at economic and social disadvantages); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (revealing how explicitly racist Jim Crow segregation policies evolved into the mass carceral state in which Black men are disproportionately policed, imprisoned, and effectively disenfranchised); Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities*, 8 DU BOIS REV. 115 (2011) (showing how systemic racism directly and negatively impacts health outcomes and emphasizing the need for more expansive research on racism as a potential cause of health disparities).

¹⁷¹ Racist policies such as urban renewal and the construction of a highway through the heart of Greenwood were part of the same pattern of efforts by local officials to drive Black people out of the district that began in the immediate aftermath of the massacre, when the City Commission and the mayor hatched various plans to prevent Black people from rebuilding on their property and to "[l]et the negro settlement be placed farther to the north and east." See ELLSWORTH, *supra* note 26, at 85.

¹⁷² See *supra* note 46.

¹⁷³ See Heath, *supra* note 45.

¹⁷⁴ See *Atherton v. Devine*, 602 P.2d 634, 636 (Okla. 1979).

¹⁷⁵ See Brophy, *supra* note 29, at 153.

roles in causing harm to Greenwood residents.¹⁷⁶ Because this report was authorized by the state itself in order to investigate the events of 1921 and those that followed in Greenwood, it should be given significant weight as evidence to establish causation.¹⁷⁷

5. Statute of Limitations

One of the primary benefits of bringing a public nuisance claim to redress the harm emanating from a nuisance that began many decades ago, at least under Oklahoma's public nuisance statute, is that it explicitly bars any statutes of limitations from applying.¹⁷⁸ This is significant because timeliness often presents the biggest challenge when it comes to bringing reparation tort claims.¹⁷⁹ Past litigation efforts seeking restitution for harm caused by the Tulsa Massacre in federal court—based on civil rights and constitutional claims, as well as state law claims for negligence and promissory estoppel—were barred by the statute of limitations.¹⁸⁰ Scholars criticized this decision and advocated for a more expansive view of equitable tolling doctrines that would allow the plaintiffs to bring suit against the city and state for their roles in the massacre notwithstanding the many decades that have elapsed.¹⁸¹

¹⁷⁶ *Id.* at 166–67.

¹⁷⁷ The Tenth Circuit in *Alexander v. Oklahoma* reviewed the report at great length, finding that “[a] review of the materials attached to the Report makes clear that at the time of the Riot the victims were powerless against the white majority. Meaningful access to the courts was denied, as was any ability to obtain damages for property losses.” *Alexander v. Oklahoma*, 382 F.3d 1206, 1219 (10th Cir. 2004). Though the court held that the statute of limitations applied because knowledge of the city's and state's involvement was available immediately after the massacre, it did not take issue with any of the findings in the report and, in fact, its insistence that such knowledge was available back then actually corroborates the report's accounting. *Id.* at 1218–20.

¹⁷⁸ OKLA. STAT. ANN. tit. 50, § 7 (West 2022) (“No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right.”); see also *Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1187 (W.D. Okla. 2019) (holding that “public nuisances are not subject to a limitations period” under Oklahoma law); *Siegenthaler v. Newton*, 50 P.2d 192, 197 (Okla. 1935) (per curiam) (“[N]o lapse of time [may prevent a] party from bringing an action to effect . . . abatement.”).

¹⁷⁹ Valorie E. Douglas, Note, *Reparations 4.0: Trading in Older Models for A New Vehicle*, 62 ARIZ. L. REV. 839, 853 (2020).

¹⁸⁰ See *Alexander*, 382 F.3d 1206 (affirming the lower court's holding and denying the plaintiffs' assertion that their claims accrued when the Commission Report was published, as well as their claim for equitable tolling of the applicable limitations period).

¹⁸¹ Suzette M. Malveaux criticized the district court for strictly applying a theory of accrual based on the idea that victims of the massacre had sufficient knowledge of their injuries in 1921 to immediately start the clock for statute of limitations purposes, without considering evidence in the 2001 Commission Report that brought many new material facts to light (including the city's and state's own complicity). Drawing a comparison to Jewish victims and survivors of the

Nonetheless, even putting aside *res judicata*, it is unclear whether courts' views on the permissible scope for equitably tolling the statute of limitations have changed significantly; and in the meantime, an additional quarter of a century has elapsed.¹⁸² Plaintiffs in the present lawsuit in state court avoid this major obstacle due to the state's clear statutory language and case law putting aside any statute of limitations as applied to an unabated public nuisance.¹⁸³ Furthermore, Oklahoma case law is clear that the same doctrine barring the application of any statute of limitations to public nuisance claims applies equally to suits brought by *private* plaintiffs, such as the one at issue here, as those brought by the State.¹⁸⁴

B. *Proper Remedy to Address the Public Nuisance in Tulsa*

There are two possible remedies for addressing public nuisance: damages and abatement.¹⁸⁵ According to the Restatement, individuals seeking to recover damages must meet the special injury rule.¹⁸⁶ If they have made the requisite showing of special injury to qualify for damages, then they may also enjoin to abate a public nuisance.¹⁸⁷ However, if they have failed to show special injury and are unable to maintain an action for damages, then they also lose standing to seek

Holocaust who were granted equitable tolling for their more-than-fifty-year-old claims, Malveaux suggested that the Tulsa plaintiffs' claims should similarly be exempted from the statute of limitations. See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 92–111 (2005).

¹⁸² See *Barnes v. United States*, 776 F.3d 1134, 1150 (10th Cir. 2015) (reiterating the standard that “a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way” (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005))).

¹⁸³ OKLA. STAT. ANN. tit. 50, § 7; see also *Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1188 (W.D. Okla. 2019) (holding that “public nuisances are not subject to a limitations period” under Oklahoma law); *Siegenthaler v. Newton*, 50 P.2d 192, 197 (Okla. 1935) (“[N]o lapse of time [may prevent a] party from bringing an action to effect . . . abatement.”).

¹⁸⁴ *Revard v. Hunt*, 119 P. 589, 592 (Okla. 1911) (“From this [public nuisance] statute, as well as the common law, it is clear no lapse of time can either legalize a public nuisance . . . and, after much research and full consideration, we have come to the conclusion that the same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance as to a suit brought by the public authorities, for the reason that a public nuisance cannot be unlawful as to the whole public and lawful as to its constituents; that it is absolutely and wholly unlawful.”).

¹⁸⁵ See RESTATEMENT (SECOND) OF TORTS § 821C (AM. L. INST. 1979).

¹⁸⁶ *Id.* § 821C(1) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”); see also Antolini, *supra* note 5.

¹⁸⁷ See RESTATEMENT (SECOND) OF TORTS § 821C(2)(a) (AM. L. INST. 1979).

injunctive relief.¹⁸⁸ Alternatively, an action to enjoin to abate a public nuisance may be brought on behalf of the public by the State, or by a citizen's action or class action.¹⁸⁹ The *Johnson & Johnson* opioid lawsuit brought by the State of Oklahoma is an example of bringing a public nuisance claim on behalf of the public and seeking an injunction to abate the nuisance.¹⁹⁰ Although the headlines coming out of Judge Balkman's decision focus on the order to pay \$465 million,¹⁹¹ it is important to note that this payment is packaged as the cost of one year of an abatement plan designed to provide wraparound treatment and services to help people suffering from opioid addiction.¹⁹² Thus, a public nuisance lawsuit brought on behalf of the public may still yield financial compensation as part of an injunction to abate the nuisance, even though such lawsuits may not directly seek damages.¹⁹³

In the Tulsa Lawsuit, plaintiffs are seeking both damages and abatement.¹⁹⁴ As discussed in Section II.A.3, the court's interpretation of the special injury rule—and whether plaintiffs must show an injury of a different kind than that of the broader community, or of a different kind than that of their immediate neighbors—will be determinative as to whether they can seek damages.¹⁹⁵ And, in turn, because they are bringing a private action, they may only seek an injunction to abate the nuisance if they have shown a special injury sufficient to qualify for damages.¹⁹⁶ Thus, as a qualifying matter, the special injury rule is the threshold issue for plaintiffs to establish eligibility for damages or injunctive relief to abate the nuisance. Though Oklahoma's case law is unsettled on the matter, precedent indicates that the court would likely opt for the broader view of special injury, and thus, plaintiffs would qualify for both damages and abatement.¹⁹⁷ Yet, a question remains as to whether granting damages, abatement, or both is the most

¹⁸⁸ See *id.* § 821C(2) cmt. j.

¹⁸⁹ See *id.* § 821C(2)(b), (c).

¹⁹⁰ See *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019).

¹⁹¹ See Overley, *supra* note 84.

¹⁹² See *Purdue Pharma LP*, 2019 WL 4019929, at *15–20.

¹⁹³ *Id.*

¹⁹⁴ First Amended Petition, *supra* note 6, at 67–73.

¹⁹⁵ See *supra* Section II.A.3.

¹⁹⁶ See RESTATEMENT (SECOND) OF TORTS § 821C(2)(a) (1979).

¹⁹⁷ Compare *Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1186 (W.D. Okla. 2019) (finding it unnecessary to decide which view of the special injury rule to adopt), with *Schlirf v. Loosen*, 232 P.2d 928, 930 (Okla. 1951) (“An action cannot be maintained by a private person for an interference with or an obstruction in a public highway constituting a public nuisance, unless he is thereby specially injured in some way not common to the *public at large*.” (emphasis added) (quoting *McKay v. City of Enid*, 109 P. 520 (Okla. 1910))).

appropriate action for the court to take, should it find the defendants liable for public nuisance.

While damages may be beneficial to the named plaintiffs in the lawsuit, this would not be a proper vehicle for addressing the full scope of harm done to the many thousands of individuals and families directly impacted by the massacre.¹⁹⁸ If justice for Greenwood is the goal—and not just for the impacted individuals named in the suit—injunctive relief is a more appropriate remedy. Like the abatement plan Judge Balkman ordered in the *Johnson & Johnson* opioid case,¹⁹⁹ the court in the Tulsa case could similarly order defendants to pay into a Tulsa Race Massacre abatement plan, which could be used to grant scholarships,²⁰⁰ offer low-or-no-interest loans to start businesses or buy homes,²⁰¹ or even direct special payments to families, victims, and survivors.²⁰² These are just some possibilities of what such a plan might include; the lawsuit itself makes a series of suggestions for actions the court might order defendants to take to abate the nuisance.²⁰³ As advocates for reparations have suggested—and the wide range of harm cited in the Tulsa Lawsuit reflects—the type of relief offered for such complex harms should be similarly multifaceted.²⁰⁴ The remedy of abatement provides a vehicle for just such multifaceted relief.

¹⁹⁸ Only the named plaintiffs would be able to recover damages.

¹⁹⁹ *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *15 (Okla. Dist. Ct. Aug. 26, 2019).

²⁰⁰ Perhaps the scholarship fund offered as reparations for the 1923 Rosewood Massacre could serve as a useful model. See Robert Samuels, *After Reparations*, WASH. POST (Apr. 3, 2020), <https://www.washingtonpost.com/graphics/2020/national/rosewood-reparations/> [<https://perma.cc/7RW4-VHDW>].

²⁰¹ See Molly Solomon & Erin Baldassari, *One Way to Close the Black Homeownership Gap: Housing as Reparations*, KQED (Oct. 12, 2020), <https://www.kqed.org/news/11841801/what-we-owe-housing-as-reparations> [<https://perma.cc/GT4H-GFKC>] (citing to the economist William Darity Jr., who insists on direct payments but also suggests solutions such as low-interest loans and down-payment assistance programs to help increase Black homeownership, and highlighting a model piloted in Evanston, Illinois, to offer \$25,000 for down payments to Black residents).

²⁰² See DARITY & MULLEN, *supra* note 12 (recommending a model of uniform direct payments to all victims rather than a piecemeal approach).

²⁰³ See First Amended Petition, *supra* note 6, at 71–73 (suggesting payment for outstanding claims related to losses sustained in the massacre; property development; mental health, educational and quality-of-life programs; land grants; a hospital prioritizing employment of Greenwood residents and named after Dr. A.C. Jackson who was killed in the massacre; tax immunity for descendants of massacre victims; creation of a scholarship program; and city contract preference for Black Tulsans who live in Greenwood or North Tulsa).

²⁰⁴ Samara Lynn & Catherine Thorbecke, *What America Owes: How Reparations Would Look and Who Would Pay*, ABC NEWS (Sept. 27, 2020, 10:00 AM), <https://abcnews.go.com/Business/america-owes-reparations-pay/story?id=72863094> [<https://perma.cc/K9F2-ER74>].

C. *Value in Bringing Public Nuisance Claim to Redress Harm Caused by Massacre, Regardless of Legal Success*

A legal win at trial is not the only way to “succeed” by bringing a public nuisance claim. For example, when it comes to the opioid crisis, while the *Johnson & Johnson* case in Oklahoma did make it to trial, most similar suits have instead ended up in, or are headed toward, substantial settlements.²⁰⁵ Similarly, public nuisance suits like the one in Tulsa can extract compensation without necessarily winning on the law. Bringing this lawsuit additionally drives increased public attention that not only serves to educate the broader American public about this monumental and despicable event that too few were aware of until recently,²⁰⁶ but also places political pressure on public officials to take bold action to finally compensate the victims, their families, and descendants on the cusp of the massacre’s centennial.²⁰⁷

Furthermore, if other communities that experienced unaddressed incidents of mass racial violence similarly bring public nuisance lawsuits, it may put cities and states around the country on notice that they should actively work to abate ongoing harm from similar incidents of mass racial violence in order to prevent the potentially greater costs of dealing with a public nuisance suit down the road. Like Tulsa, other communities that were ravaged by mass racial violence in the Jim Crow era can similarly view these lawsuits not only as a way to achieve

²⁰⁵ Three major drug manufacturers are now on the cusp of a \$26 billion deal with state and local governments to end thousands of lawsuits. Jan Hoffman, *\$26 Billion Settlement Offer in Opioid Lawsuits Gains Wide Support*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2020/11/05/health/opioids-settlement-distributors.html> [<https://perma.cc/44RG-3VH3>].

²⁰⁶ See Kynala Phillips, *How HBO’s “Watchmen” Brought the 1921 Tulsa Race Massacre to Life*, WSJ MAG. (June 30, 2020, 10:52 AM), <https://www.wsj.com/articles/watchmen-tulsa-1921-trump-interview-11593528595> [<https://perma.cc/59P9-2BMH>] (documenting how the popular HBO series brought the massacre into popular consciousness).

²⁰⁷ The organization behind the lawsuit, Justice for Greenwood, has been particularly critical of Tulsa Mayor G.T. Bynum on social media. See Justice for Greenwood (@Just4Greenwood), TWITTER (Feb. 4, 2021, 12:40 PM), <https://twitter.com/Just4Greenwood/status/1357383451704496137> [<https://perma.cc/57P7-68Y7>] (“Tell City of Tulsa Mayor G.T. Bynum to rebuild & repair Greenwood!”); Justice for Greenwood (@Just4Greenwood), TWITTER (Feb. 10, 2021, 5:25 PM), <https://twitter.com/Just4Greenwood/status/1359629482689253378> [<https://perma.cc/ZAN2-33FR>] (“Be part of the petition... Take 60 seconds to tell @MayorGTBynum that Tulsa Owes! Tell him it’s time to rebuild & repair Greenwood!”). Additionally, news broke in October 2020 of a forthcoming LeBron James-backed CNN Films documentary about Greenwood called *Dreamland: The Rise and Fall of Black Wall Street*. See Brent Lang, *LeBron James’ Springhill Company, CNN Films Team on “Dreamland: The Rise and Fall of Black Wall Street” (EXCLUSIVE)*, VARIETY (Oct. 26, 2020, 5:29 AM), <https://variety.com/2020/film/news/lebron-james-cnn-films-dreamland-black-wall-street-tulsa-race-massacre-1234815439> [<https://perma.cc/2DV6-MS25>].

reparations on the law, but also as vehicles to drive attention and support which serve to hold leaders and public officials accountable.

Finally, there has been much hand wringing about the abuse and misuse of public nuisance by government.²⁰⁸ Bringing a public nuisance lawsuit takes a favorite tool most often used by the government to prosecute bad actors in the private sector—and one that has become ever more expansive in its scope and use—and reclaims it to similarly hold the government itself accountable.

D. *Limitations of Using Public Nuisance Doctrine to Redress Mass Racial Violence*

There are clearly limitations to a tort-based, public nuisance framework for achieving reparations. This Note does not argue that public nuisance can or should be the sole means through which to redress the full impact of racial violence in the United States at scale. To begin with, one scholar, Eric J. Miller, has characterized this type of tort-based litigation strategy to achieve reparations as “confrontational reparations” and argues in favor of a “conversational model” instead.²⁰⁹ However, Miller points specifically to Tulsa and acknowledges that sometimes, when activism and legislation reach a dead-end, litigation becomes necessary.²¹⁰ Though some observers may be concerned that turning to litigation, when the democratic branch of government fails to produce results, amounts to a violation of separation-of-powers principles, the plaintiffs in Greenwood suffered justiciable harm, just as the victims of the opioid crisis in the state did.²¹¹

Beyond such concerns about “confrontational reparations,” even if successful in courts, while a public nuisance strategy could be replicable in many communities beyond Greenwood, it will simply not be capable of achieving reparations at the same scale as reparations through

²⁰⁸ See, e.g., Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517 (2019).

²⁰⁹ Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004).

²¹⁰ *Id.* at 77–78 (“Where activism and legislation have failed, as in Oklahoma, then the only option left, it seems, is litigation. If litigation manages to start a conversation, even though it fails in the short term, it will have succeeded in the long term. The danger, of course, is that by resorting to litigation the only possible conversation is one that is somewhat forced, with all the resentment that engenders.”).

²¹¹ See Kaufman, *supra* note 90, at 452–55.

legislation.²¹² Indeed, the plaintiffs behind the massacre lawsuit appeared to recognize as much when they appeared before Congress on Wednesday, May 19, 2021, to testify about the trauma they suffered in 1921 and how the massacre continued to impact their lives one hundred years later.²¹³ Reparations legislation need not necessarily even be focused on monetary compensation to make a substantial impact as a tool for reckoning and healing.²¹⁴ Even if the Tulsa Lawsuit succeeds in recovering monetary damages for the named plaintiffs, it will hardly make a dent in the harm done to the other thousands of 1921 Greenwood residents and their descendants—many of whom have long since left the Tulsa community—let alone the many Black Americans in other communities who have been terrorized by racial violence.²¹⁵ However, despite its limitations, a novel tort-based theory can add a new and still-useful plank to the set of tools that are available.

CONCLUSION

Ongoing multigenerational harm caused by specific incidents of mass racial violence is within the reach of broad public nuisance statutes, such as the one in Oklahoma.²¹⁶ However, a tort law approach to redressing racial violence cannot achieve reparations at full scale for all of the harm inflicted by the country and its state and local

²¹² See Thomas B. Stoel, Jr., *The Case for a Federal Statute Authorizing Compensation for Legally Imposed Segregation*, 17 HASTINGS RACE & POVERTY L.J. 297 (2020).

²¹³ Daniel Victor, *At 107, 106 and 100, Remaining Tulsa Massacre Survivors Plead for Justice*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/05/20/us/tulsa-massacre-survivors.html> [<https://perma.cc/RJ3Y-R7L5>]. Shortly after their testimony, U.S. Congressman Hank Johnson of Georgia introduced the Tulsa-Greenwood Massacre Claims Accountability Act to create a right of action for survivors and descendants to bring claims in court. DeNeen L. Brown, *Reparations Bill for Tulsa Race Massacre Survivors Introduced in Congress*, WASH. POST (May 21, 2021, 5:50 PM), <https://www.washingtonpost.com/history/2021/05/21/tulsa-massacre-reparations-bill> [<https://perma.cc/U9XX-Q63E>].

²¹⁴ See Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLU: NEWS & COMMENTARY (May 22, 2020), <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice> [<https://perma.cc/2A6G-QBRN>] (“Though critics have argued that the idea of reparations is unworkable politically or financially, their focus on money misses the point of the H.R. 40 commission’s mandate. The goal of these historical investigations is to bring American society to a new reckoning with how our past affects the current conditions of African Americans Consequently, the reparations movement does not focus on payments to individuals, but to remedies that can be created in as many forms necessary to equitably address the many kinds of injuries sustained from chattel slavery and its continuing vestiges. To merely focus on finance is an empty gesture and betrays a lack of understanding of the depth of the unaddressed moral issues that continue to haunt this nation.”).

²¹⁵ See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 1.

²¹⁶ See Section II.A.

governments from slavery to Jim Crow to today.²¹⁷ A legislative solution would offer a pathway to a more comprehensive set of reparations.²¹⁸ Yet, the likelihood of passing substantial federal reparations legislation remains relatively low, even after an uptick in public support for the idea in 2020.²¹⁹ Congress moves slowly, and besides, H.R. 40—a bill that has been introduced in every Congress for over thirty years—itsself seeks only to establish a commission; it is not a bill directly proposing a specific reparations plan.²²⁰ A public nuisance tort strategy is a *replicable* model, and there is no better proof point from which to tip over the first domino than the community that suffered the most notorious and harmful incident of racial violence in Tulsa, Oklahoma. Moreover, the Tulsa plaintiffs' public nuisance claim is meritorious based on Oklahoma statutory and case law, and it should succeed.²²¹ Regardless of its legal success, the lawsuit also serves a valuable purpose to advance public conversation around reparations generally and in Tulsa specifically, and to place increased pressure on local officials to take action to redress the harm still emanating from the massacre.²²²

The harmful legacy of the massacre is a scar on Tulsa that, so long as it continues to be inadequately addressed, will hold back not only Black residents, but the entire community. There are signs that the city is taking some steps towards reconciliation.²²³ In October 2020, an

²¹⁷ See *supra* note 12.

²¹⁸ See DORITY & MULLEN, *supra* note 12.

²¹⁹ See Memorandum from Drew Linzer, Civiqs, to Steve Phillips, Democracy in Color (July 10, 2020), https://static1.squarespace.com/static/57605c788259b50a992a5bf7/t/5f22f63fcbdc4c073cafef8/1596126783526/Civiqs+HR40+survey+results+memo_July2020.pdf [<https://perma.cc/K7XS-H2Y6>] (showing a jump from thirty-one percent in public support for H.R. 40 in 2019 to fifty percent support in 2020).

²²⁰ See Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. (2021); see also Maya King, *Reparations Bill Tests Biden and Harris on Racial Justice*, POLITICO (Feb. 17, 2021, 2:47 PM), <https://www.politico.com/news/2021/02/17/slavery-reparations-bill-469165> [<https://perma.cc/R5AE-JSG9>].

²²¹ See *supra* Section II.A.

²²² See *supra* Section II.C.

²²³ The 1921 Tulsa Race Massacre Centennial Commission seeks to “educate Oklahomans and Americans about the Race Massacre and its impact on the state and Nation; remember its victims and survivors; and create an environment conducive to fostering sustainable entrepreneurship and heritage tourism within the Greenwood District specifically, and North Tulsa generally.” *Home*, 1921 TULSA RACE MASSACRE CENTENNIAL COMM’N, <https://www.tulsa2021.org> [<https://perma.cc/5GQG-KT2T>]. The Commission features a range of projects including the Greenwood Rising History Center, the Greenwood Art Project, education initiatives, various grant programs, and a series of events in Greenwood throughout the year leading up to the May 2021 Commemoration Event. See *Our Work*, 1921 TULSA RACE MASSACRE CENTENNIAL COMMISSION, <https://www.tulsa2021.org/home/work> [<https://perma.cc/4QX3-L27W>]. However, though the lawsuit does not name the Commission as a defendant, it does bring an unjust enrichment claim (in addition to the public nuisance claim) centered around the appropriation of Greenwood as a tourist attraction and citing to the city’s, chamber’s, and

excavation done by the city in an effort to investigate rumors of mass graves from the massacre unearthed eleven coffins in Oaklawn Cemetery.²²⁴ By June 2021, thirty-five coffins were discovered and the remains of nineteen individuals were taken to a lab for forensic analysis.²²⁵ According to a forensic anthropologist working on the investigation, there is evidence consistent with these individuals having likely been massacre victims.²²⁶ However, Tulsa Mayor G.T. Bynum has stated that cash payment reparations would divide the community and thus is not something he would consider.²²⁷ There is no indication that any statewide legislation is likely either. So long as this is the case, a public nuisance suit not only makes a viable legal claim on the merits, but also forces a necessary conversation that it seems the city and state are otherwise unwilling to have.

county's involvement with the Greenwood Rising History Center. See First Amended Petition, *supra* note 6, at 63.

²²⁴ Ben Fenwick, *Mass Grave Unearthed in Tulsa During Search for Massacre Victims*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2020/10/21/us/tulsa-massacre-coffins-grave.html> [<https://perma.cc/P72M-TFZY>].

²²⁵ DeNeen L. Brown, *Scientists Excavating Tulsa Race Massacre Site Unearth Skeleton with Bullet Wounds*, WASH. POST (June 26, 2021, 8:30 AM), <https://www.washingtonpost.com/history/2021/06/26/tulsa-massacre-body-found-bullet> [<https://perma.cc/D8YP-69E5>].

²²⁶ *Id.*

²²⁷ Kimberly Jackson, *Mayor Says Reparations Would Divide the City, Focuses on Development*, KTUL (Feb. 20, 2020), <https://ktul.com/news/local/mayor-says-reparations-would-divide-the-city-focuses-on-development> [<https://perma.cc/WC94-HXQP>].