

# NORMS, LAW, AND REPARATIONS: THE CASE OF THE KU KLUX KLAN IN 1920s OKLAHOMA

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## I. INTRODUCTION

In his posthumously published novel *Juneteenth*, Ralph Ellison explored life in the Oklahoma of his youth during the 1910s and 1920s. The novel reflects on the life of Bliss, a young boy of ambiguous racial heritage, and his foster-parent, Alonzo Hickman, an African American minister. Bliss is the son of a white woman, who accuses the minister's brother of rape. That man is lynched for the alleged crime. Hickman then raises Bliss as his child, in hopes that Bliss might teach the white community the values of the black community. Bliss, however, crosses the race line and becomes a race-baiting Senator. Then, he is shot (by his black son!) while delivering a speech on the Senate floor.

*Juneteenth*, which derives its name from the celebration of the arrival of emancipation in the Southwest, delves the conflict between Hickman's religion and the world of "law"—of law enforcement officers, prosecutors, judges, and legislators. The world of Oklahoma in the 1920s, the period of Bliss's youth, was aligned against the religion of Hickman. It was a place where the African American world of religion and jazz music was frequently at odds with the white conception of "law." Hickman had asked God what "Juneteenth" meant; he wondered about the value of emancipation. For, yet, that world of emancipation offered only an illusion of freedom. Was Juneteenth only the celebration of a gaudy illusion?<sup>1</sup> At least for

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1. RALPH ELLISON, *JUNETEENTH* 115, 137 (John F. Callahan ed., Random House 1999). See generally Barry Shank, *Bliss or Blackface Sentiment*, 30 *BOUNDARY* 2, 47 (2003).

white Oklahomans, Juneteenth was merely an excuse for African Americans to not work. In the 1930s, a leading Oklahoma newspaper alerted its affluent white readers that their African American employees might not show up for work the following Saturday, June 19. The *Daily Oklahoman* referred to the slaves' emancipation on June 19, 1863 as the day "they were given a legal right to do no work."<sup>2</sup>

And still Hickman wondered about

those mean little towns, and on beyond the towns there's the city, with police power and big buildings and factories and courts and the National Guard; and newspapers and telephones and telegraphs and all those folks who act like they've never heard of your Word. All that while we here are so small and weak . . .<sup>3</sup>

In his notes on the book, Ellison elaborated on the conflict between religion and law:

Don't get the truth confused with law. The law deals with facts, and down here the facts are that we are weak and inferior. But while it looks like we are what the law says we are, don't ever forget that we've been put in this position by the power of numbers, and the readiness of those numbers to use brutality to keep us within the law. Ah, but the truth is something else. We are not what the law, yes and custom, says we are and to protect our truth we have to protect ourselves from the definition of the law. Because the law's facts have made us *outlaws*. Yes, that's the truth, but only part of it; for . . . we're outlaws in Christ and Christ is the higher truth.<sup>4</sup>

Ellison's paragraph contains the elements of insight that law has the ability to define and create relationships; it also recognizes that people can exist outside those legal definitions. And so there is an independent truth, freed from the definitions made by white Oklahomans. Law might provide a basis for classifying people, but there was another reality. Despite the illusions of law, there was yet another way of ordering society. *Juneteenth* illustrates the competing visions of American society—of "law" and of "justice." That was just another example of the conflict between myth and reality that occupied Ellison's thought.<sup>5</sup>

The Oklahoma of the 1920s, where Ellison lived, contained those conflicts between the African American ideas of religion and justice and those of white law. Many members of the white community sought to use law, as well as community norms, to control the African American community.<sup>6</sup>

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2. *Negroes Here Prepare for June'Teenth,* DAILY OKLAHOMAN, June 18, 1937, at 5. The newspaper's characterization of emancipation calls up images of shiftless, lazy people, and harks back to an era in which whites thought that blacks should be required to work without compensation. The article began as follows: "If you happen to have a negro working in your home, hotel or café, don't be surprised if he informs you that he wants off Saturday, because Saturday is June 19."

3. *Id.*

4. ELLISON, *supra* note 1, at 354.

5. See Ralph Ellison, *Going to the Territory*, in THE COLLECTED ESSAYS OF RALPH ELLISON 591, 594–95 (John Callahan ed., 1995).

6. See ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921—RACE, REPARATIONS, RECONCILIATION (2002) (discussing the violence that the African

The law and norms of segregation were enforced by law enforcement, as well as private citizens. Yet critics of reparations have asked how a government can be liable for the acts of its citizens that occurred long ago,<sup>7</sup> or even how a government can be liable today for the acts of its predecessors.<sup>8</sup>

An exploration of Oklahoma's domination by the Ku Klux Klan in the early 1920s illustrates how closely the citizens of Oklahoma were connected to the government. This Article mines the rich records left by the military tribunal that investigated the Klan in the wake of Governor Jack Walton's declaration of martial law in August 1923, when he concluded that the Klan controlled the state. It uses those records to propose a way of looking at the connections between the community and the local government. The detailed records permit a closer look than we usually have of how Jim Crow functioned and the ways that the entire system of government regulation combined with local sentiments to maintain a system of segregation.

## II. QUESTIONING THE HISTORIOGRAPHY OF JIM CROW

In recent years, many historians have emphasized the ways that African Americans negotiated the Jim Crow system. They have written against several traditions. One found that Jim Crow was a period of oppression; another, older one, found that Jim Crow was a period in which blacks needed to be controlled. The former tradition is represented by C. Vann Woodward's *Strange Career of Jim Crow* and W. E. B. DuBois's *Negro Reconstruction*; the later and older tradition is perhaps best represented by Thomas Dixon's *Clansman*.<sup>9</sup> Those traditions provided caricatures of Jim

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American community was subject to in Progressive-era Oklahoma; see also Nigel Anthony Sellars, *Treasonous Tenant Farmers and Seditious Sharecroppers: The 1917 Green Corn Rebellion Trials*, 27 OKLA. CITY U. L. REV. 1097 (2002).

7. See, e.g., Eric Posner & Adrian Vermuele, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).
8. The opposition to reparations has come in primarily two forms. First, in very general form from journalists like David Horowitz. See DAVID HOROWITZ, *UNCIVIL WARS* (2002). Second, in very specific refutation of specific legal points. See, e.g., Keith Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L. J. 31 (2004); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L. J. 157 (2004); Motion in Support of Defendants' Joint Motion to Dismiss, In Re African American Slave Descendants Litigation MDL Docket Number 1491 (detailing legal barriers to recovery, primarily standing, statute of limitations, political question, and lack of substantive basis for recovery).
9. There were other works, which purported to be historical truth, rather than historical fiction, written by people who should have known better. See, e.g., WILLIAM A. DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC 1865-1877* (1907). An egregious example of these inaccurate historical portrayals is E. Merton Coulter's 1947 book, *The South During Reconstruction*, which appeared in the LSU Press series entitled *A History of the South*. Coulter's work is particularly inexcusable because it was published at a time when there was little justification for having such an incorrect (arguably racist) interpretation of Reconstruction. For further discussion of historians' biased and incorrect portrayals of history, see Alfred L. Brophy, *The Rule of Law in Antebellum College Lectures: The Case of William Greene*, 26 CUMB. L. REV. 231-85 (2001-02) (discussing the duty of college educators to encourage students to rethink old assumptions, rather than confirm their prejudices). See also Alfred L. Brophy, *Slavery and the University of Alabama: Memory, Apology, Redemption* (unpublished paper, 2004) (discussing the University of Alabama's use of slaves, punishment of slaves by the faculty, and the faculty's proslavery thought, as well as the ways that the era of slav-

Crow, and against those caricatures, a new scholarship emerged. It drew upon Ralph Ellison's insight that African Americans had a life independent of the strictures imposed by law and custom. As his notes on *Juneteenth* pointed out, Ellison saw two worlds, a world of law and a world of life. That latter world was lived independent of the strictures of law. Drawing upon such insight, historians like Glenda Gilmore have recovered the rich world that African Americans were able to carve out around Jim Crow.

*A. Recovering the World of African American Life*

One of the leading observations of historians in the 1970s and 1980s was the richness of African American life. Eugene Genovese's *Roll, Jordan, Roll*, with its chapter on the hegemonic function of the law, illustrated the rich lives that slaves led. Genovese suggested some of the reasons that slaves might follow and become part of the slave system—why people will follow the dictates of law, even if doing so is not seemingly in their best interest.

Others have brought those insights into the world of Jim Crow. Glenda Gilmore's *Gender and Jim Crow*, which some consider the modern descendant of C. Vann Woodward's *Strange Career of Jim Crow*, presents a stark contrast to Woodward. The assessment of intellectual connection and descent is fostered by Gilmore's succession to Woodward's position in the Yale history department. Where Woodward emphasized the ways that segregation sentiment grew in the white South, and implicitly how life became worse, Gilmore presents a different world in which African American middle- and upper-class women live a life independent of the confines of southern segregation laws and norms. Looking at Gilmore's politicized subjects, one sees sophisticated women writing and thinking in ways rarely understood before.<sup>10</sup> Yet that recent writing, which demolishes the previously two-dimensional characterization of Jim Crow, itself suffers from the failure to take account of the whole system of Jim Crow. In her efforts to recover the rich world of Jim Crow, Gilmore failed to provide a three-dimensional account of the harms of Jim Crow. Still, Woodward's book, with its emphasis on the harms of Jim Crow is still in print. It has withstood nearly fifty years of shifting historical interpretation. It is enlightening to return to it now, on the other side of the civil rights movement it helped support, and reconsider its themes.

Where Woodward focused on institutional racism, the denial of the right to vote and segregation in railroad cars, one who sought to write *The Strange Career of Jim Crow* today would likely emphasize the ways that Jim

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ery and Civil War is remembered on the campus and by recent Southern historians). One can measure the changes in southern history by comparing Coulter's 1947 book to others published more recently by LSU Press, one of the leading and most prestigious historical presses in the county. See, e.g., SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RIOT OF 1921* (1982); JAMES G. HOLLANDSWORTH, *AN ABSOLUTE MASSACRE THE NEW ORLEANS RACE RIOT OF JULY 30, 1866* (2002); JUDITH KELLEHER SCHAFFER, *BECOMING FREE, REMAINING FREE MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846–1862* (2003). Or one might note that C. Vann Woodward's *Origins of the New South* appeared in 1951 as the next volume in the LSU series.

10. See also LAURA EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997).

Crow's institutions affected the lives of individual African Americans adversely. It would likely be a story of institutions—but one that looks to the effect of institutions on individuals. In addition, a novel might examine the old legal system and its interplay with the world of white-imposed norms. It would likely show not only how African Americans lived independently of whites, but also how they interacted with whites.

Even as we see the sophisticated ideas that actors held, we are getting a new generation of scholarship that does not mistake those rich lives for equality. That scholarship reminds us that those lives were constrained in important ways. It carefully balances the competing considerations of understanding the constraints of segregation and the lives of people within segregation, and is able to meet the detail of Gilmore's work, though it tells an entirely different story. Leon Litwack's 1996 *Trouble in Mind* provides the fullest exploration of the entire world of African Americans in the era of Jim Crow. It portrays the vibrant lives lived within Jim Crow, as well as the constraints, the fear, of that era.<sup>11</sup> Lisa Cardyn's book-length article on the Ku Klux Klan, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, is the richest response to Gilmore's positive world of gender in the segregated South. Cardyn meticulously details in over several hundred pages the patriarchal system of Klan violence. It is a macabre world in which middle class white men use terror to put African American men and women in subordinate roles.<sup>12</sup> Often the white men enlist the assistance of white women, with allegations that black men behaved inappropriately toward white women. But Cardyn's world is no simple set of white men exercising power over African Americans; it subtly details how white men manipulated white women as well with threats against them for behaving improperly. Cardyn decodes that language; it frequently meant that women were not as compliant as men wanted them to be. What remains is a picture of the use of violence, often with thinly veiled sexual connotations, that reestablished a dark world of social relations.

Between the worlds of Gilmore and Cardyn lies Kenneth Mack's depiction of middle- and upper-class African American lawyers and businesspeople. Mack is concerned specifically with the role of law in creating a segregated world and how his actors negotiate that world. He portrays both the constraints that Louisiana's railroad segregation statute has on individuals,<sup>13</sup> as well as the ways that brilliant, sophisticated corporate lawyers negotiated the world of segregation in the North.<sup>14</sup> Mack shows that legally mandated segregation came to the South in the years after Reconstruction as part of a whole series of changes, including a desire to use law to

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11. See LEON LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE ERA OF JIM CROW* (1998).

12. There are, of course, many studies that explore the use of legal doctrine to build a world of white control. See, e.g., J. Allen Douglas, *The "Most Valuable Sort of Property": Constructing White Identity in American Law, 1880–1940*, 40 *SAN DIEGO L. REV.* 881 (2003).

13. Kenneth W. Mack, *Law, Society, and Identity in the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 *LAW & SOC. INQUIRY* 377 (1999).

14. See Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1950*, 87 *CORNELL L. REV.* 1405 (2002).

create separate identities of white and black. As various groups asserted power, they shaped the development of Jim Crow segregation. That construct can be used to explain much of the violent world that was Oklahoma in the 1920s, where a vicious riot ripped through the African American section of Tulsa, partly as a response to assertions of equality by members of that community.

I use Mack's and Cardyn's insights, along with a close reading of the military tribunal's investigation of the Klan in 1923, for three main purposes. First, the comparison reveals a better understanding of the Klan's functions and its role in establishing and maintaining a world of segregation. It is here that Cardyn provides the framework for understanding what happened. While her subject is the first Klan (the Klan during Reconstruction), and mine is the second Klan, which started in the 1910s, the story is eerily similar. The second Klan members harnessed modern technology to effectuate terror, but otherwise the story is similar. They both used a combination of violence and threats to control African Americans and other "non-whites" (Native Americans, Jews, and Greeks in the case of Oklahoma). In one well-documented attack, for instance, a white woman and a Greek immigrant are both viciously punished because the woman broke off a relationship with a powerful Klan figure and the Greek man was successful in the oil business.

The second purpose has more to do with contemporary reparations than with historical knowledge: the histories of the Jim Crow era, together with the Klan trials, are helpful in making an argument for reparations for racial crimes in Progressive-era Oklahoma. The Klan investigations demonstrate that there was little chance of obtaining justice in the Oklahoma courts. They also illustrate the close connections between the government and private citizens. The final purpose is for insight into contemporary discussions of the nature of law and social behavior. The Klan trials provide evidence of the Klan's connection to the local government. Thus, I offer a preliminary case for understanding the ways that Klan members reflected community values and enforced those values. In short, the Klan offers a case study in the interplay between social norms and law enforcement.<sup>15</sup>

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15. While much writing on social norms addresses the ways that norms control behavior independently of law, *see, e.g.*, Arthur G. LeFrancois, *On Our Chosen Frequencies: Norms, Race, and Transcendence in Cadillac Flambe*, 26 OKLA. CITY U. L. REV. (2001), the Oklahoma Klan offers insight into ways that the social norms, announced by the Klan, were enforced in conjunction with action (or inaction) by local officials. We see an overlap between the formal Oklahoma law, the norms of behavior expected by the Klan, the local law enforcement, and the community, and the Klan's enforcement activities. Legal historians are also focusing on the importance of norms, as well as on the overlaps between norms and formal law. *See, e.g.*, Rosemary Hunter, *Australian Legal Histories in Context*, 21 LAW & HIST. REV. 607, 612 (2003); Ron Harris, *The Encounters of Economic History and Legal History*, 21 LAW & HIST. REV. 297, 311 (2003); Richard Pildes, *Keeping Legal History Meaningful*, 18 CONST. COMMENT. (2002) (observing that Jim Crow era segregation involved a complex set of accommodations and that Supreme Court doctrine was part of the ways that believers in white supremacy promulgated the norm of supremacy).

A sophisticated picture emerges, then, from the records of the Klan's extra-legal conduct. They helped promulgate and enforce norms of behavior, but they also functioned as a parallel, shadow government. The Oklahoma Klan, thus, was part of establishing standards of behavior for Oklahomans, as well as actually imposing those

### B. *The Klan in the 1920s*

There is another group of writing that explores the Klan in the 1920s. That literature focuses on the Klan itself, rather than their victims. We now know a great deal about Klan members, that they were largely middle class men who sought refuge from the social upheaval of the 1920s in the Klan.

Nancy MacLean's 1994 book *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* explored in depth the Athens, Georgia, Klan.<sup>16</sup> Utilizing rare membership records, MacLean was able to find out that the members were middle class men, often moderately prosperous. The Klan frequently used violence to reestablish the social boundaries between whites and blacks, and violence became more frequent and vicious as social tensions increased in the late 1910s. In keeping with other recent studies of the Klan, MacLean found that Klan members were men who were insecure about their status, who sought stability in a world spinning out of control. Consequently, they established an almost parallel government, which established norms of behavior and then policed that social line. Discussions of the lynchings in the South often turned to the "social dead line"—the line separating blacks and whites. When people crossed that line, lynchers and the shadow government of the Klan was there to enforce those norms. Often the shadow government worked in close conjunction with the local authorities and became, in essence, an arm of the state. What MacLean and other writers on the Klan did not have, however, was detailed evidence of the victims and how the Klan picked their targets of violence. Determining the Klan's method for targeting victims and how it treated victims is important in decoding the meaning of Klan violence.

Moreover, once we understand the connections of the Klan to the rest of Oklahoma society (particularly law enforcement), we can more fully appreciate the need to charge Oklahoma government (at least from a moral standpoint) with the crimes committed by the Klan. This has two important implications for reparations debate. First, it suggests the appropri-

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standards. When Oklahomans were faced with a breakdown of their world order, many turned to violence to protect their world. The Klan trials show us how norms are taught to others and enforced—as well as the ways that others break free from the norms and remake them.

Much of what legal historians have to say about social norms is similar to what they have to say about "law in action"—a look at how people behave within the legal system, how the legal system functions, and how the legal system's functioning creates peoples' understanding of norms of acceptable behavior. See, e.g., Margot Canaday, "Who Is a Homosexual?": *The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law*, 28 *LAW & SOC. INQUIRY* 351 (2003). The social norm literature raises an additional question, how are norms promulgated and enforced? See, e.g., Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1679 (2003); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 *N.Y.U. L. REV.* 239 (2003). In that regard, the Klan may look more like an autonomous law-making body. Cf. Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 *YALE L.J.* 323 (1993).

16. NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN* (1994).

ateness of legislative reparations, for it suggests that the state is morally liable for the acts of violence. Second, it suggests that in extreme circumstances we should impose municipal liability for the acts of private individuals because they are acting in such close concert with the local authorities. These are probably the kinds of cases designed to be protected by the Anti-Ku Klux Klan Act of 1871, now codified as 28 U.S.C. § 1985.<sup>17</sup>

Kenneth Jackson's 1969 book, *The Klan in the City*, demonstrates that the Klan was largely an urban phenomenon, designed to establish white control in places where anonymity made it easy to avoid the social norms that constrained people in smaller communities.<sup>18</sup> Other recent writing suggests that they turned to violence in the service of a world that was rapidly changing and becoming, at least to them, incomprehensible. Such recent Klan studies as Gary Feldman's *Politics, Society, and the Klan in Alabama, 1915–1949*, have emphasized historians' disputes over the Klan's agenda.<sup>19</sup> Where some have seen the Klan as focusing attention on blacks, Feldman points out that recent research points to a wider agenda, more akin to modest reform movements, like temperance. He also emphasizes the various interpretations of the Klan. Thus, there is now support for interpreting the Klan as either an urban or rural phenomenon, as focused on race or moral reform issues (like temperance and sex), or as supported by the elite or common people.<sup>20</sup> One part of the interpretation of the Klan that has not received as much attention, however, is the connections between the Klan and the local government.

#### B. *Seeking a New History of the Klan*

We can now try to meld those diverse histories, to take account of the Klan and the legal system. Together we can use those strands to understand how the whole system fit together, how the Klan's members functioned in conjunction with local law enforcement to create a macabre landscape that subjected African Americans, white women, immigrants, and even white men to threats of violence and supported their vision of how the state should be ordered. Some legal scholars, such as Emma Coleman Jordan, emphasized the connections between the Klan and local government in their discussions of reparations.<sup>21</sup> Others, like Randall Kennedy, have em-

17. See George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925 (2003).

18. See KENNETH JACKSON, *THE KU KLUX KLAN IN THE CITY 1915–1930* (1967). That is certainly the impression that some Oklahomans had of the Klan in the 1920s. *Harlow's Weekly*, a weekly collection of newspaper stories and editorials throughout the state, reported on December 1, 1923 that "Wilbur F. Varnum of Seminole County, one of their leaders in the house, declared that it is becoming more than ever a fight between the small towns and the country, with the town 'klan,' and the country opposed to them."

19. GLENN FELDMAN, *POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915–1949* 2–6 (1999).

20. See *id.*; Leonard J. Moore, *Historical Interpretations of the 1920s Klan: The Traditional View and Recent Revisions*, in *THE INVISIBLE EMPIRE IN THE WEST: TOWARD A NEW HISTORICAL APPRAISAL OF THE KU KLUX KLAN IN THE 1920s* (Shawn Lay ed. 1992); Christopher N. Cocoltchos, *The Invisible Empire and the Search for the Orderly Community: The Ku Klux Klan in Anaheim, California*, in *id.*

21. See Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURVEY AM. L. 557, 586 (2003).



phasized Klan membership and similar organizations as signifiers of judges' political attitudes, as well as the dominance of a later Klan in opposing the Civil Rights Movement.<sup>22</sup> Together, that system functioned to make Oklahoma in the 1920s a place of violence and conformity to accepted norms of behavior.<sup>23</sup>

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22. See Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1635 (1986) (discussing the importance of the Klan and a similar organization, the White League Commanders, to understanding the White Court); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1016 (1989) (discussing the dominance of the Klan in boycott-era Montgomery).
23. This Article is derived from research I conducted for *Alexander v. Oklahoma*, filed in February 2003 on behalf of Tulsa riot victims. For purposes of that litigation it is important to explore the connections between the Klan and the local government. Where other historians have divided over questions about the urban or rural nature of the Klan and the Klan's goals, I have been concerned with another important aspect: how closely they were related to local government officials? Sometimes other historians have addressed this issue tangentially—for it is related to the question of whether Klan members were outsiders or whether those in control feared a loss of power. See, e.g., MacLean, *supra* note 16, at 18 (discussing various interpretations of the Klan). Because I entered the debate for a different purpose—to understand how the Klan functioned in relation to the government—I was able to mine the sources for answers to questions that others have not asked. This work, therefore, seeks to emulate J. Morgan Kousser's *Colorblind Justice: Minority Voting Rights and the Undoing of the Second Reconstruction* (1999). Kousser's recent scholarship has aimed at exploring both *how* events happened and their implications today. See *esp. id.* at 317–65 (exploring “intent and effect in law and history”). The work aspires to be rigorous history, which understands the context of the times, even as it grapples with the current meaning of that history.

The Tulsa litigation has spurred important additional insights into the nature of the Klan, despite recent criticism of the role of historians' affidavits and testimony in litigation. See Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1523–31 (2003). Far from presenting the dangers that Martin hypothesizes, the adversarial process allows historians to present research into past actions in a context that sharpens the issues in dispute. *Contra id.* at 1542 (suggesting that historians will depart from impartiality after becoming infected with a lawyers desire to “win”). What historian, I wonder, would make statements that are defensible, knowing that she will be subject to cross-examination based on them? See, e.g., Peyton McCrary & J. Garland Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101, 101–28 (1989). While Martin makes much of differences between the “historical method” and advocacy, I am not persuaded that there is much of a difference. Historians marshal evidence all the time and have to face sharp attacks when they fail to provide a convincing case. The controversy over the nature of slavery in the antebellum era raised by Robert Fogel and Stanley Engerman's *Time on the Cross*, which has wracked the historical profession for nearly three decades, is only one of the most prominent examples of the ways that the adversarial process has revealed a mix of advocacy and historical research—even if the court is the scholarly journal. See PAUL DAVID, ET AL., *RECKONING WITH SLAVERY: A CRITICAL STUDY OF THE QUANTITATIVE HISTORY OF AMERICAN NEGRO SLAVERY* (1976); ROBERT W. FOGEL, *THE SLAVERY DEBATES, 1952–1990* (2003). One example of advocacy mixing with and drawing upon historical research comes from the internment of Japanese Americans during World War II. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* (1986).

It is surprising to find a lawyer arguing against the adversarial system as a way of divining truth. But Martin's argument seems to be that historians are unable to produce truthful testimony that is useful in court. See, e.g., Martin, *supra*, at 1543 (“History that is true to the historical method simply cannot produce the testimony that

The Klan's image of itself was established in Thomas Dixon's 1905 novel *The Clansman*. Later made into the movie *Birth of a Nation*, Dixon's story told of the Klan as a group of virtuous white men who redeem a state from corrupt Northern and African American politicians. In the novel the Klan wrested back control of the state from corrupt politicians, as well as protected a white woman from an attack by a former slave. Such was the Klan's self-image: that they were an alternative government, who acted to protect virtue.

The image of the Klan by many others was different. The 1930 dime store novel *The Whipping* provides a very different picture.<sup>24</sup> It is a narrative of a nineteen-year old woman, Marigold Tate, who moves to the small Southern town of Timkenville. Marigold is a free spirit—a pretty, self-described “modern woman”—who shakes up sleepy Timkenville. She attracts the attention of the young men in the town. At the local barbecue, she provides one rogue, Joey Carnes, with gin and he becomes drunk. The young man's sister blames not Joey, but Marigold, for his misbehavior. The leaders of the town, most of whom belong to Knights of the Red Circle (an obvious fictional stand-in for the Klan), blamed her as well. Marigold's aunt, also a free spirit, warned her about the Knights. “This is a cracker town. You can get by if you're careful, but it ain't like Burksburg or any other city. Why, they even got after June Flippen last year cause she went to the movies with Walter Maiden. Everyone said she was a fallen woman and went after her for six weeks.”<sup>25</sup>

The Knights members in Timkenville were hypocrites, and they were easily stirred to attack Marigold. Joey's sister, who motivates the whole attack, “wasn't” herself “much better'n a call woman.”<sup>26</sup> The Knights visited Marigold's house one evening and viciously attacked her. The novel describes the brutal attack in salacious terms: drunk klansmen break into her bedroom as she was sleeping, then tear her clothes off and whip her.<sup>27</sup> The remainder of the novel explores Marigold's dealings with the Knights,

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lawyers desire, such as that women throughout American history have or have not sought out nontraditional jobs on par with men, or that the health risks of smoking have or have not always been common knowledge in the United States.”). Without conceding Martin's point—because I believe that in many instances we can draw reasonably strong inferences about what the general public knew about health risks in the twentieth century—to the extent that historians are unable to arrive at reasonable conclusions, that can and should be pointed out to the fact-finder. Moreover, each side has the opportunity to present opposing expert witnesses. I fear that experts appointed by the court run the risk of presenting only a biased side of the case and, because they are seen as “impartial,” will be given undue credibility.

Perhaps other historians will find my evidence of the Klan's many and intimate connections to power unpersuasive. But I look forward to others examining the same evidence—thousands of pages of testimony taken the Oklahoma National Guard military tribunals—and seeing if they can construct a coherent claim that that the Klan did *not* dominate the lives of many Oklahomans.

24. ROY FLANNAGAN, *THE WHIPPING* (1930) (Bantam ed. 1950). I am enormously indebted to Lisa Cardyn, whose work on the first Klan alerted me to Flannagan's book. Weak as *The Whipping* is as literature, it is of importance in framing the contemporary understanding of the second Klan, even though it likely over-emphasizes the role of hypocrisy and sex in the Klan.

25. *Id.* at 20.

26. *Id.* at 19.

27. *Id.* at 23–25.

whom she recognizes around town, and her friendship with a young man who opposes the Knights' attacks on Timkenville women.

At the center of the Knights' motivation was control over women; African Americans occupied limited roles in *The Whipping*. *The Whipping* serves as an interpretation of what others thought about the Klan at the time—as a group of bumbling, hypocritical, and violent men who wrested control from the local authorities. They purported to police morality in the town, but they were, in fact, morally degenerate and their power made it difficult, if not impossible, to stop their violent attacks. For us, *The Whipping* presents a framework to judge how the Klan behaved and to interpret their behavior. Perhaps we think the Klan had more sincerity than *The Whipping* credits them with (or perhaps not). But the novel and other evidence suggests that when we think about municipal liability and reparations, we need to consider the role that extra-legal groups played in creating a macabre world of violence and subordination. The remainder of this Article explores ways that courts have limited municipal liability and then the ways that the Klan's dominance and intimidation of law enforcement officials and the courts in Oklahoma suggests that we should hold the government morally culpable for the harm imposed by the Klan.

### III. THE RETREAT FROM LIABILITY

The legal framework for considering claims against a municipality was set by the Oklahoma territorial court in 1901 by the case of *Wallace v. Norman*.<sup>28</sup> Wallace was a white man who employed black construction workers

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28. *Wallace v. City of Norman*, 60 P. 109 (Okla. 1900). According to Wallace's complaint, the following happened:

Among the first inhabitants of the lands embraced within the limits of the said town were, and from that time until the present constantly have been, a large number of lawless and seditious persons. The number and the names of whom are unknown to the plaintiff, except as hereinafter stated, who, soon after the first settlement of said lands, on April 22, 1889, entered into a conspiracy, which has ever since openly and notoriously existed for the purpose of preventing, by means of threats and physical violence, the laboring, living, or lodging, of law abiding colored citizens of the United States within the corporate limits of the defendant town.

In pursuance of said conspiracy, the said conspirators, within the past three years, the specific times being unknown to the plaintiff, and plaintiff being unable to more particularly give the details thereof, have openly and notoriously threatened, assaulted, beaten, and driven from said town certain law-abiding colored citizens of the United States, named Frank Rogan, Robert Green, David Branham, Robert Ely, Morey Lee, and others whose names are unknown to plaintiff, who have endeavored during said time to labor, live, and lodge in said town, and, by reason of said unlawful acts, at no time since the inception of said conspiracy, as aforesaid, has any colored person ever labored, lived, or lodged in said town, or been permitted to do so, although many such persons, including those above named, and others whose names are unknown to plaintiff, have gone to such town for such purposes. The said conspiracy still openly and notoriously exists, and by reason thereof no colored person whomsoever now labors, lives, or lodges in said town, although many such persons, including those above named, and many others whose names are to the plaintiff unknown, who are law-abiding citizens of the United States, are desirous of going to said town, and of laboring, living, and lodging therein. (5) The plaintiff, on or about July 10,

in the city of Norman (where the University of Oklahoma is now located). Norman was already what is known as a “sun down town,” a town where blacks were not allowed to stay out after dark. Wallace alleged in his lawsuit that he was attacked by the mayor and other town officials, severely beaten, and left permanently disabled. He sued the town, citing the actions of Norman officials. Yet the territorial court adopted an extraordinary standard that a municipality was only liable for the acts of the officials if they were adopted by the municipality. Thus, actions by the mayor and other officials could not be the basis for recovery by Wallace. For the next several generations, municipal attorneys needed only to cite the *Wallace* case to foreclose liability. In the aftermath of the Tulsa race riot, *Wallace* was invoked to show that the city was not liable for the acts of its police officers and others who had allegedly looted and then burned the black section known as Greenwood. At the same time, however, other states imposed strict liability on their municipalities in an effort to encourage

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1898, went to the defendant town to perform certain work and labor in the line of his said trade, and took with him, as an assistant in his employ, a law-abiding colored citizen of the United States named George Rogan; and at said time, while engaged in said work in said town, and because of the presence and assistance of said colored person, and for no other reason, the plaintiff was unlawfully and maliciously set upon, threatened, assaulted, and beaten on and about the head, eyes, and body by said conspirators, to the number of twenty-five or thereabouts, each and every one being then unknown to the plaintiff, and whose names the plaintiff has been unable since to ascertain, by the exercise of due diligence, except as hereinafter stated, but which are well known to the defendant town, and all of the officers and agents thereof, including its president, trustees, and marshal . . . .

That the fact of the existence of said conspiracy was notorious and a matter of common knowledge in said town, and the said president and trustees, with knowledge of the imminent danger of the plaintiff, at the time and place and in the manner aforesaid, acquiesced in the unlawful, malicious, and violent acts herein complained of, and refused and neglected to take any steps to prevent or suppress the same or protect the plaintiff, although with ample means and opportunity so to do, and the said town marshal, whose name, as plaintiff is informed and believes, is J. S. Davidson (otherwise called “Long Jim”), with the consent and by the authority of the said town, and all the inhabitants thereof, tacitly given, and particularly with the consent and by the authority of the president and trustees of said town, tacitly and verbally given to said marshal, said officers acting in their official capacity, and the said Davidson acting in his official capacity, as town marshal, was present at the time and place aforesaid, when said injuries were inflicted upon the plaintiff, and openly and audibly encouraged the commission of said injuries by words and acts, and wholly neglected and refused to make any effort to prevent said injuries, or to arrest said conspirators, or to suppress said conspiracy, or to protect the plaintiff, although said injuries could have been prevented by said marshal, and said conspirators by him arrested, and the plaintiff protected by the exercise of ordinary care on his part or on the part of said president and trustees and said town; that since the commission of said injuries the said president and trustees have indicated, tacitly and verbally, their approval and ratification of, and acquiescence in, said acts of said marshal, having full knowledge thereof, acting in their official capacity for and on behalf of the defendant town, for its local and corporate benefit, as hereinafter stated.

their officers to vigilantly protect against mob violence.<sup>29</sup> These states recognized the connections between mob violence and municipal authorities and used statutory liability to discourage those connections and, indeed, to spur local officials to discourage the violence. The victims of the Tulsa riot who made feeble attempts at seeking relief in the Tulsa courts had little chance for success given precedents like *Wallace*. The Oklahoma Supreme Court went even further and contorted insurance law to deny victims even the chance of recovering against their insurance companies for fire insurance policies.<sup>30</sup>

#### IV. THE KLAN AND THE LAW

##### A. *The Klan's Influence on Law Enforcement*

Victims of the 1921 Tulsa riot were discouraged from pursuing claims by the courts' narrow construction of their rights. Those who asserted their rights, in court or at the ballot box, however, were also subject to violence. For example, in March 1922, John Smitherman, brother of former *Tulsa Star* editor A. J. Smitherman, was kidnapped, beaten, and mutilated by a mob from the Klan. The mob told him his crime was registering black voters.<sup>31</sup> The Klan is central to understanding the violence and terror that made Oklahoma a gothic landscape for blacks in the 1920s.

Klan membership grew so dramatically in Oklahoma in the aftermath of the riot and the Klan's violence posed such a threat to Oklahoma that in 1923 Governor Jack Walton declared martial law in Tulsa in an effort to curb the Klan's power.<sup>32</sup> He subsequently expanded martial law to the entire state and then convened military tribunals to investigate the Klan's violence and the ways it used its power to stop prosecutions. Governor Walton's actions are susceptible to several interpretations. Many at the time believed that he over-stepped the boundaries of appropriate authority in declaring martial law.<sup>33</sup> However, despite Walton's excesses, there is

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29. See, e.g., Susan S. Kuo, *Bringing in the State: Toward A Constitutional Duty to Protect from Mob Violence*, IND. L. REV. (forthcoming 2004) (discussing the history of legislation to protect against mob violence).

30. See Alfred L. Brophy, *The Tulsa Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67 (2001).

31. Testimony of John Smitherman, The J. H. Smitherman Case, Walton Papers, Box 14, Folder 14-21. Smitherman testified that he was told, "[y]ou are registering them damn niggers as Democrats and telling them to vote against this present city administration which is for good government." He was also told "[y]ou have been uncouth and ungentlemanly to a white lady . . . ."

Yet the story behind Smitherman's attack is quite complex. There is some evidence that O. W. Gurley and Mary Parish, two of the leaders of the Greenwood community, made up the story as a joke and sent it to the *Tulsa Tribune*. Thus, what may have begun as a prank ended up encouraging a brutal attack.

32. Sheldon Neuringer, *Governor Walton's War on the Ku Klux Klan: An Episode in Oklahoma History*, 45 CHRON. OKLA. 153 (1967); Brad L. Duren, "Klanspiracy" or Despotism? *The Rise and Fall of Governor Jack Walton, featuring W. D. McBee*, 80 CHRON. OKLA. 463 (2002-03).

33. See *Sanford v. Markham*, 221 P. 36 (Okla. 1923) (dismissing challenge to suspension of *habeas corpus* as moot); *Johnson v. State*, 230 P. 525 (Okla. Crim. 1924) (discussing the Klan's animosity towards blacks and the need to examine one juror's membership); *Hunt v. State*, 233 P. 506 (Okla. Crim. 1925) (prosecution for Klan terrorizing); Mene-

ample reason to believe that the Klan was, indeed, a threat to the rule of law in Tulsa.<sup>34</sup> During the summer of 1923, there were a growing number of stories about Klan lawlessness in Oklahoma. The *Literary Digest*, one of the nation's leading weekly periodicals and an important bellwether of conservative consciousness, ran an article entitled *The Klan Defies a State*.<sup>35</sup>

Walton first sent troops to Okmulgee County in March 1923 to investigate vigilantism. In August his staff took testimony from Nathan Hantaman, who had been kidnapped outside the Wonderland Theater in Tulsa and beaten for his alleged role in bootlegging and narcotics peddling. The circumstances surrounding Hantaman's beating suggested collusion with Tulsa authorities, because his attackers knew the reasons he was arrested.<sup>36</sup> Walton then declared martial law in Tulsa County on August 13, 1923. He convened a military court of inquiry to investigate the connections between the Klan and law enforcement.<sup>37</sup>

That military court took testimony from dozens of witnesses and investigated a series of high-profile Klan activities, including multiple burnings of buildings and frequent kidnappings and whippings—especially in Tulsa County. In almost all incidents, the kidnappings and whippings were accompanied by threats against using the legal process. Many of the threats first arose because people tried to invoke the legal process. In short, the Invisible Empire (a common name for the Klan) was inextricably linked with law enforcement in riot-era Oklahoma. There were rumors—apparently well-founded—that the entire bench of the Tulsa district court, the

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fee v. State, 236 P. 439 (Okla. Crim. 1925) (counsel asking “[d]o you believe in the teachings, beliefs and practices of the Ku Klux Klan, and do you believe such organization is necessary to assist and aid the legally elected and qualified authorities in this state in enforcing the law?”); Raymer v. State, 241 P. 499 (Okla. Crim. 1925); Mathews v. State, 244 P. 56 (Okla. Crim. 1926) (attorney's sentence for carrying concealed weapon reduced after “defendant admitted that he carried the pistol as alleged, and in justification testified that some time previous to the occasion he had become active in a fight against the Ku Klux Klan; that shortly before that time he had been attacked, taken two miles east, there suspended by a rope around his neck until breathless, and had been severely whipped; that numerous threats had been made against him; and that he carried the pistol for his protection.”); Turnage v. State, 267 P. 1038 (Okla. Crim. 1928) (finding it was reversible error to refuse to allow inquiry into whether prospective juror was Klan member); Hodo v. State, 274 P. 688 (Okla. Crim. 1929) (mention of membership in Klan by man accused of deception); Haynes v. State, 284 P. 74 (Okla. Crim. 1929) (finding it was not reversible error to fail to allow inquiry of whether prospective juror was member of Klan).

34. See Suzanne H. Schrens, *The Ultimate Patriots? Oklahoma Women of the Ku Klux Klan*, 79 CHRON. OKLA. 182 (2001) for a discussion of the Klan in Oklahoma in the 1920s. See also Lowell L. Blaisdell, *Anatomy of an Oklahoma Lynching: Bryan County, August 12–13, 1911*, 79 CHRON. OKLA. 298 (2001); Michael M. Jessup, *Consorting with Blood and Violence: The Decline of the Oklahoma Ku Klux Klan*, 78 CHRON. OKLA. 296 (2000). In addition, much of the basic history of the Klan is detailed in CHARLES ALEXANDER, *THE KU KLUX KLAN IN THE SOUTHWEST* (1965).

35. *The Klan Defies a State*, 77 LITERARY DIG. (June 9, 1923).

36. TULSA TRIB., Aug. 14, 1923, at 3 (cited in Nueringer, *supra* note 32); HARLOW'S WKLY., Aug. 25, 1923, at 5.

37. See Walton Papers, Western History Collection, University of Oklahoma; HOWARD TUCKER, *HISTORY OF GOVERNOR WALTON'S WAR ON THE KU KLUX KLAN* (1924).

court clerk, the county sheriff, and all jury commissioners were Klan members.<sup>38</sup>

Thousands of pages of testimony before the military tribunal paint a bleak picture of vigilantism run rampant around Tulsa and, indeed, throughout Oklahoma. In many instances, law enforcement officers worked in conjunction with Klan members, and often they were Klan members. That cooperation between law enforcement and the Klan most frequently took the form of administering extra-legal punishments, such as whippings. It also included turning prisoners over to the Klan and refusing to intervene when Klan members were administering extra-legal punishment, as well as refusing to arrest or prosecute Klan members. The Invisible Empire, which claimed 100,000 Oklahoma members at its height, and the ideas it stood for, exercised substantial control over the state. While it is inaccurate and inappropriate to conclude as some have that the Klan brought the riot to Tulsa, the ideas supporting the Klan (what it euphemistically called “100 percent Americanism”) were present during the riot. The Klan did not create the riot. Yet, in important ways, the passions that the riot unleashed created and fed the post-1921 Klan.<sup>39</sup>

#### *B. The Military Tribunal Investigations*

The military tribunals investigating the Klan in the fall of 1923 collected testimony on nearly 100 Klan attacks. They illustrate that the Klan operated in many locations as a parallel government, administering punishment to people it feared or did not like. In some instances, the government was not even parallel; it was coterminous with the Klan. At the same time, the Klan was so closely connected to law enforcement that victims of Klan attack could not turn to the police or the courts for protection or justice. The records illustrate, as did a cartoonist in the fall of 1923 who showed a crowd of hooded Klansmen marching while an Oklahoma family cowered under a table, the fear of common Oklahomans of the Klan.

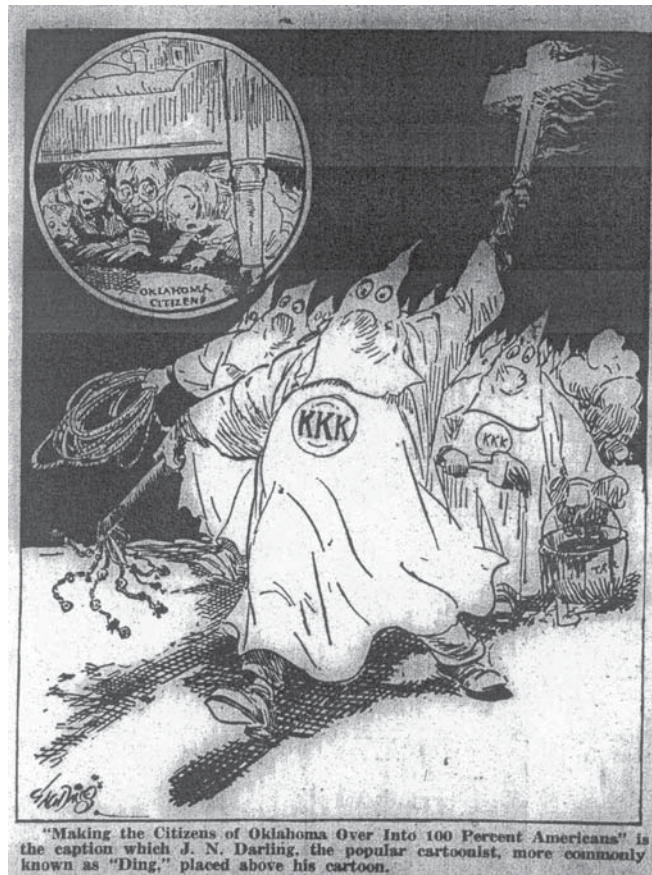
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38. Charles Daley to George Short (Jan. 26, 1923), Short File, State Archives, cited in Carter B. Clark, *A History of the Ku Klux Klan in Oklahoma* 47 (Ph.D. dissertation, University of Oklahoma, 1976).

39. Blue Clark, the leading authority on the Klan in Oklahoma, phrases it similarly:

In the Tulsa region, Kleages were active before the June, 1921, race riot, but that catastrophe greatly assisted their organizational efforts among fearful and angry whites. The Klan could not be credited with precipitating the riot, but some of its members had an intimate relationship with the events. Some policemen were Klansmen while other officers were sympathetic. The Tulsa police encouraged the white rioters and even assisted them in assaulting Little Africa. The savagery unleashed in white rage led to the reenactment of the First World War with ex-servicemen in the front ranks fighting through the avenues of Tulsa which left a charred black ghetto.

Clark, *supra* note 38, at 45–46.



One of the most thoroughly investigated cases was the kidnapping and beating of Nathan Hantaman as discussed earlier. Although Hantaman's case was not the worst of abuse, it was one of the most thoroughly investigated. Hantaman was arrested on the evening of August 10, 1923, held for several hours at the Tulsa jail, and then released. Shortly thereafter, he was kidnapped from the front of the Wonderland Theater, taken outside town and whipped severely.<sup>40</sup> The Hantaman investigation disclosed the unrestrained violence in Tulsa and the connections of the Tulsa police to the Klan.

Many other cases illustrate those same themes. In a town near Tulsa, Homer Grisson was kidnapped, stripped, beaten, and threatened with castration unless he confessed to arson.<sup>41</sup> O. E. Arnold was kidnapped by a band, including a night law enforcement officer at Beggs, Leonard James, and beaten.<sup>42</sup> He was taken to a "whipping pasture" in Okmulgee County—what he described as the "usual pasture," which was owned by the deputy sheriff, George Bowman. They then tied him up to the electric power line that led to Tulsa. Arnold walked home, put on shoes (he had been

40. Testimony of Nathan Hantaman, Nathan Hantaman Case, Oklahoma University Western History Archive, Walton Papers, Box 13, folder 9.

41. Testimony of H. Grisson, Gish Case, Walton Papers, Box 12, folder 14, at 15.

42. Walton Papers, Oklahoma University Western History Archive, Box 12, folder 16.



walking barefoot), and went directly to the deputy sheriff, George Bowman, and reported the incident. But George Bowman “just laughed. He said if [Arnold] could identify them to tell [Bowman] who they were and he would get them. Just as [Bowman] said that this James walked up to see what [Arnold] was talking about and [Arnold] said, ‘There is one of them; get him,’ and George just laughed and said, ‘I can clear him; he was not there.’”<sup>43</sup> Bowman subsequently admitted before the military tribunal that James might not have been there the entire evening.<sup>44</sup>

It was reasonable to suppose that Bowman was a Klan member—as were the Police Commissioner, Bert Martin, the County prosecuting attorney, Jim Hepburn, and the street commissioner, a man named Lovell. Arnold was accused of buying “choc” (native American beer) from a black man. That man had earlier been severely beaten. Lovell, in his capacity as street commissioner, had placed a ball and chain on the man and then: “four masked men on a truck put that nigger, ball and chain and all, on the truck and took him out and beat him up. I don’t know how bad, but pretty bad.”<sup>45</sup> Cases like Arnold’s illustrate that at least in certain parts of Oklahoma, the “law”—meaning law enforcement officers and prosecutors—were members of the Klan. And, as Walton had declared in Tulsa, the rule of law had broken down.

In many cases, the local authorities acted in concert with the Klan. Leslie Goolsby and Mrs. Myrtle Pain were arrested together on June 29, 1922, and held in jail for a few hours in Broken Arrow. A justice of the peace in Broken Arrow, W. W. Walton, had issued a warrant for Goolsby for adultery and two officers, Arthur Finley and George Bradshaw, arrested the couple around 4 P.M.<sup>46</sup> Subsequently, Bradshaw, who was in charge of the jail, took the couple out and turned them over to Finley and Tom H. Mathews. At around 9 P.M. Finley and Mathews began driving towards Tulsa. Somewhere along the road, the officers met up with Klan members—in fact, they had a pre-arranged meeting spot. The officers turned Goolsby and Pain over to a small Klan whipping party. Several of the officers went along with the whipping party.<sup>47</sup>

In other instances, the local authorities refused to intervene when people were attacked and gave implicit license to the Klan members for violence. Testimony from a case of black construction workers who were run out of the all-white town of Skiatook provides detail on the ways that law enforcement failed to protect blacks.<sup>48</sup> White construction workers heard

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43. *Id.* at 1590.

44. *Id.* at 1793.

45. *Id.* at 1592.

46. See W. W. Walton Testimony, Leslie Goolsby Case (Aug. 25, 1923), Box 13, folder 6, Walton Papers, OU Western History Archive.

47. See William Arthur Finley testimony, Leslie Goolsby Case (Aug. 25, 1923); T. H. Mathews testimony. See also Clark, *supra* note 38, at 113. Another Broken Arrow case involved Annie Pike and her husband, who were accused of selling Choc Beer. A whipping party kidnapped them one evening and whipped both Annie and her husband. Annie’s whipping was so severe that she passed out; when she awoke, members of the whipping party were looking at her, asking whether she was alive. See Annie Pike statement, Walton Papers, Oklahoma University History Archive, Box 14, folder 11.

48. Williams-Rives Skiatook Case, Walton Papers, Box 14.

that blacks were working in the town and a number of people in town began discussing the situation. In particularly revealing testimony, Robert Berkeley described how he and three other construction workers ran out the construction workers. One of Berkeley's co-workers went to speak with the city marshal. The marshal said, depending on whom you believe, either "I have nothing to do with that—you go on down and talk to them nice," or "go ahead and run them out of town." However it was phrased, all seemed to agree that the marshal knew that the black workers would be run out of town and he made no effort to intervene.<sup>49</sup> The City Marshal, William Kleckner, clarified his role in the affair: he testified that the night before the men were run off, he had spoken with a councilman, who had advised that they should visit with the foreman "in a peaceful way." The emphasis in both Kleckner's testimony and Berkeley's on "peaceful" action suggests how "running negroes out" could often involve violence.<sup>50</sup> One councilman suggested that if someone would talk with the white supervisor, everything could be easily settled: "Now, I don't mean to go down there and make a riot or anything, but go down in a peaceful way and see the man that has the job."<sup>51</sup> The councilman's statement illustrates the casual and accepted way that people who crossed the color line were dealt with. Then, when the white workers approached Kleckner to ask for assistance in "running them negroes out,"<sup>52</sup> he told them to see the mayor. There was no hint that law enforcement might protect the rights of those workers. Apparently the episode was settled in a peaceful manner—with the black workers leaving town.

The Tulsa Klan's nature is portrayed particularly well by two cases, each involving attacks on couples. The trials provide particularly compelling documentation of the connections between the Klan and law enforcement. Frequently, when Klan victims sought assistance from law enforcement, they were met with indifference. In many instances, the unresponsiveness of the police was because of apparent cooperation between the Klan and law enforcement.

One attack on a couple, Pearl Hayter and her friend George Petropol, took place over the course of several months. Petropol, a Greek immigrant, was attacked in the summer of 1922 and charged by the Klan with multiple offenses largely related to business dealings. But they also charged him with dating a white woman, Pearl Hayter. After they finished beating Petropol, they left him at a hospital. Petropol asked to be taken to the police station immediately, but the Tulsa police made no effort to track down the men who had attacked him. In 1923, in one of the most vicious attacks in Oklahoma Klan history, five Klan members (including one woman) kidnapped Ms. Hayter, cut her hair and then after terrorizing her, began to pull her clothes off and burn various parts of her body with acid.<sup>53</sup> This story

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49. Testimony of Robert H. Berkeley, in Williams-Rives Skiatook Case, Walton Papers, Box 14, at 1833.

50. *Id.* at 1851. Kleckner also testified that he told the men who asked him about running out the black workers to speak with the mayor.

51. Testimony of William Kleckner, Williams-Rives Skiatook Case, Sept. 27, 1923.

52. *Id.*

53. See Pearl Hayter File, Walton Papers, Box 13, Folder 20; George Petropol Case, Testimony of Petropol, Sept. 14, 1923.

evidences the Klan's misogyny, as well as the racially motivated nature of its violence (Hayter was taunted because she dated a Greek man rather than a white man). This is central to understanding the Klan, but it also illustrates how little protection law enforcement offered to a couple that was terrorized over an extended period.

Perhaps the worst case of Klan whippings involved a black couple, George and Zora Cole, and their neighbor, Ora Dunbar, who was Native American. George Cole was kidnapped twice, the first time, around April 1922; one of the men kidnapping him showed him a deputy sheriff's star. The second time, the Klan took both George and Zora Cole from their home. Zora put up a fight by biting the thumb of one of her attackers; that wound was subsequently used to help identify him. The Klan put a sack over George's face, placed a whip in his hand, and ordered him to use it. When he realized what he was doing—after he hit his wife and she screamed—he refused to hit her again. Then they ordered Zora Cole to strike Ora Dunbar, which she refused to do, and then they ordered Ora Dunbar to strike Zora Cole.<sup>54</sup>

Klan activities in northeastern Oklahoma, outside of Tulsa, seemed to have been similarly violent, perhaps even substantially more lethal than around Tulsa. As reported by S. R. Lewis, Minor Merriweather, a Grand Titan of the northeastern Oklahoma province, claimed that there had been six "Mer Rouges" (a reference to a double homicide in Mer Rouge, Louisiana) in his province. Merriweather also discussed a Klan military committee, a committee dedicated to helping enforce the "law." It remains somewhat unclear whose "law" the committee was enforcing; however, at a minimum, it suggests that the Klan was ready to use violence. Merriweather also bragged about his use of violence in a meeting with such leading Tulsans as Tate Brady. According to L.W. Rook, who was present at the meeting, when one person expressed concern about the Klan's activities and the trouble the Klan was getting into, Merriweather laughed and said "[i]t is beyond that point—it is too strong. The Klan is not doing anything to anyone unless they need it . . . . The people approve it."<sup>55</sup> In response to a statement suggesting that an investigation would start if a "Mer Rouge" occurred, Merriweather bragged, "Why, there has been six of these affairs right here in my province. There has been nothing done about it."<sup>56</sup>

The military tribunal took evidence on numerous crimes, mostly in the Tulsa vicinity. For example, it investigated a hotel burned in Beggs, apparently because of prostitution in the area. Richard Brown testified about the hotel fire that he was beaten by a mob that included the deputy chief of police.<sup>57</sup> The Klan often used arson to burn out people they viewed as undesirable, such as those who sold alcohol or those who ran houses of

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54. See George Cole Case, Walton Papers, Box 13; Ora Dunbar Case, Walton Papers, Box 13. Summaries of a number of the other investigations are conveniently available in W. C. WITCHER, *THE REIGN OF TERROR IN OKLAHOMA* (1923).

55. *In the Matter of Activity of the Ku Klux Klan at Tulsa Oklahoma*, L. W. Rook testimony (Sept. 23, 1923), at 10, Box 13, folder 27.

56. *Id.* at 10.

57. Walton Papers, Box 12, file 21.

prostitution.<sup>58</sup> Often, the violence turned to murder. For instance, a man was burned at the stake in the Oswago Hills.<sup>59</sup>

In a separate proceeding, the military tribunal investigated the Klan's dominance of the Tulsa police department. It was commonly believed that the Klan dominated the police and sheriff departments and the special investigation disclosed that Tulsa law enforcement was, indeed, dominated by Klan members.<sup>60</sup> The Mayor and Police Chief commissioned many men as special deputies, but Tulsa's mayor, H. F. Newblock, was unable to tell the military tribunal how many had commissions.<sup>61</sup> The commissions were common; the man who was Police Commissioner in 1923 had received a commission during the Tulsa riot to help disarm people.<sup>62</sup>

One apparent result of that domination was that the police rarely investigated Klan attacks. Ned Gritts, captain of a police raiding squad, testified that he investigated only the Nate Hantaman whipping, despite the fact that he had heard of "quite a few" beatings in his two years on the force.<sup>63</sup> Gritts also gave critical insight into the connections between the Tulsa police and the Klan in the Hantaman whipping. He provided eyes inside the police department, testifying that Hantaman was arrested and then brought to the police department so that he could then be turned over to the Klan.<sup>64</sup> There were routine beatings of black men in custody of the police department.<sup>65</sup> At times, the Klan did not work in conjunction with the authorities but instead directly attacked them. In June 1922, a Klan party kidnapped S. R. Hallman, a justice of the peace, drove him out of Tulsa and then dumped him out of the car, blindfolded. The judge testified that he thought he was being punished for a dispute he had with a county investigator, but he could not be sure.<sup>66</sup> Those investigating the kidnapping met substantial resistance from the police de-

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58. In the Bennett Arson case near Keifer, Oklahoma, there were two fires along the Pole Cat Creek. G. R. Bennett, the owner of the burned hotel and roadhouse incriminated a former police officer, Bridwell. There were other law enforcement officers in the arson party: a marshal at nearby Mounds, Roller, and a deputy sheriff, Ley Neal, as well as "Pistol" Hicks, a state law enforcement officer and a deputy sheriff. Charley Bond testimony at 1660-61; H. R. Crandell testimony, at 1677.

59. J. M. Mason testimony, at 1740, box 13, Walton Papers, University of Oklahoma.

60. *In Matter of Investigation of the Police Department of the City of Tulsa, Oklahoma* 32 (Sept. 7, 1923) (reporting the common belief that the Klan dominated the police department). *Id.* at 107 (testimony of Police Officer Henry Carmichael that he is a member of the Klan); *id.* at 124 (testimony of Police Detective F. M. McMillan in response to a question whether McMillan is a Klan member, "You can take it that way—suit yourself about it."); *id.* at 134 (testimony of Mayor H. F. Newblock, that he was a Klan member).

61. *Id.* at 135-36.

62. *Id.* at 139.

63. *See, e.g., id.* at 4-5. *See also id.* at 25 (testimony of Captain N. J. Moore that Hantaman was the only whipping he investigated); Testimony of V. G. Lipscomb, Hantaman Case, at 33 (Hantaman's was only whipping or beating case Lipscomb "ever paid any attention to").

64. *In Matter of Investigation of the Police Department of the City of Tulsa, Oklahoma* 8 (Sept. 7, 1923).

65. *See, e.g., id.* at 19 (quoting Captain Dale as saying "I liked to beat the son-of-a-bitch to death before he would tell anything.").

66. S. R. Hallman testimony, S. R. Hallman Case, Box 13, folder 8, Walton Papers.

partment, although they readily fingered the ringleader, a man named Lloyd Menderhall.<sup>67</sup>

The Oklahoma City Klan was particularly strong in the sheriff and county attorney's office. According to one witness, there was only one member of the County Attorney's office who was *not* a Klan member.<sup>68</sup> That influence extended to the Oklahoma City court system. The Klan sometimes met in the courtroom of Judge Clark,<sup>69</sup> and used their influence to get Klansmen on juries. The Klan had well-established procedures for infiltrating juries, which they told their members. An Oklahoma City lawyer, Guyer, testified that it was the policy of the Klan "to absolutely control [the jury box] and have Klansmen on the jury."<sup>70</sup> When called for jury service, Klan membership was automatically suspended, so that when men were asked whether they were Klan members, they could deny it.<sup>71</sup> Guyer concluded about the sad state of justice in Oklahoma County courts, that "I don't know about the conditions in other counties of the state but I do know that in this county conditions surrounding the administration of justice are utterly damnable."<sup>72</sup> Others spoke in similar terms as Guyer. It seems that the Klan was not just involved in whippings, but they also challenged the system by stacking juries. As one person grimly concluded, "[i]t looked like an insurrection was brewing."<sup>73</sup>

Guyer described the County Attorney, Gill, as "the most dangerous man that I ever came in contact with," for he seemed to take the law into his own hands. As an example, an illiterate farmer was arrested on charges of lunacy, then discharged by a judge. Gill then told him, "You ought to have a rope around your neck and swung to a limb."<sup>74</sup> Instead of turning him over to his family, Gill ordered the man held at the jail for a few more days. Even then the man was required to sign a bond that indicated that the county authorities could arrest him whenever they wanted—or so the poor man was led to believe.<sup>75</sup>

Procedures for getting Klan members on juries were often successful as exemplified in the prosecution of a physician who was alleged to have performed an abortion that resulted in the death of both the mother and her child.<sup>76</sup> The physician faced a jury stacked with Klansmen and a judge

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67. Charles A. Simon testimony, S. R. Hallman Case at 2 (Sept. 3, 1923).

68. 1 Proceedings of the Oklahoma Military Commission, at 75.

69. *Id.* at 561.

70. 11 Proceedings of Oklahoma Military Commission, Box 13, Walton Papers, at 1082.

71. *Id.* at 1082. Guyer reported that in an open Klan meeting, attended by Mit Singleton, who was running for district judge, one person testified that "You are instructed now that the moment you are summoned on a jury, you automatically cease to become Klansmen and so that you may answer truthfully that you are not a Klansman."

72. *Id.* at 1082. Guyer believed that the juries were stacked with Klansmen. "Why shouldn't they be?" he asked. "With the opportunities that they have, why shouldn't they be, the jury commissioners being Klansmen and having access to the Klan records up there and the names of the members of the Klan. Why shouldn't they all be Klansmen? Their policies being what it is, it would be a very weak proposition if they were not." *Id.* at 1085.

73. 1 Proceedings of the Oklahoma Military Commission, at 207.

74. *Id.* at 1087.

75. *Id.* at 1088.

76. See Testimony of John Guyer, 9 Proceedings of Oklahoma Military Commission at Oklahoma City, Walton Papers, Box 13, at 1098-1107.

who was believed to be a Klan member, who refused to admit evidence that the mother had attempted to perform an abortion on herself and was already bleeding when she went to the physician.<sup>77</sup> Moreover, when the defense lawyer attempted to exclude evidence that the physician had performed other abortions by arguing that those witnesses were accomplices with the physician, the judge threatened him with contempt. The lawyer blamed the Klan for the prosecution: "I know that all these plans were laid up there in the Klan." He grimly concluded, "[t]hat was the carrying out of the system."<sup>78</sup>

### C. *The Dominance of the Klan*

The conflict over the Klan had important political overtones and, as members of the legislature opposed him, Walton declared martial law throughout the state, then used the National Guard to prevent the legislature from meeting in special session and drawing impeachment charges against him. Nevertheless, Walton was successfully impeached in November 1923, following a special election that ratified the special session of the legislature.<sup>79</sup>

The Klan was aware of the violent image that it had gained and took efforts to shed that image.<sup>80</sup> In a letter distributed in 1923, the Klan's head, Grand Dragon N.C. Jewett, notified members that he was trying out a new strategy for the first time in Oklahoma of respecting the law. He wrote, "[r]ather than invite the criticism of being cranks, fanatics, or moral reformers, we must accept the responsibility of doing constructive, as well as corrective work in our communities."<sup>81</sup> The leader's letter also emphasized the importance of law enforcement and understanding the causes of crime, claiming that a root cause was "an apathetic and distressed public opinion." Klansmen were instructed to bring public attention to law breakers and thus use shame as well as the legal system (which was by then largely dominated by the Klan) to enforce their law.<sup>82</sup> The letter emphasized that direct action—Klan vigilantism—should not be used.<sup>83</sup> The mere fact that the Klan sought so strenuously to burnish its image testifies

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77. *Id.* at 1104 (charging that eleven of twelve jurors were Klan members); *id.* at 1102 (stating that Judge Wells was probably Klan member).

78. *Id.* at 1103.

79. See Alexander, *supra* note 34, at 152–55.

80. During questioning about why Klan members said that their membership required courage, one former member was asked whether "the only courage required as a member of the Klan is when they violate the law." *Id.* at 568–69.

81. N. C. Jewett to All Hydra, Grand Titans and Furies, Giants, Exalted Cyclops and Terrors, and to all Klansmen, Realm of Oklahoma, August 13, 1923, in Walton Papers, Box 13, OU Western History Archives, at 1122, 1125.

82. *Id.* at 1127 ("Our primary remedy in all cases is the law. Every situation which may come to our attention, should be reached and carried by the law, and with this end in view your Grand Dragon is establishing a legal department for the Realm in order to give you such advice or assistance as you may need.")

83. *Id.* at 1128 ("Because of the accusations and insinuations made against our order your Grand Dragon most emphatically desires to be on record for all time. Neither irregular nor lawless acts of any degree or description form any part of the program or purpose of the Knights of the Ku Klux Klan and any Klan found guilty of such violation will subject their charter to immediate revocation.")

to the Klan's violence and the problems that violence caused in the public mind. Moreover, as the letter made clear, the Klan intended to continue to have an important role in law enforcement, but was simply disavowing (rather disingenuously) extra-legal action. Of course, once the Klan attained a requisite level of influence in the Oklahoma legal system, it had less need for extra-legal action. For the people who were once law-breakers had become "the law." Finally, the document suggested that the Klan should take concerted efforts to remake America in the image of what it thought best, i.e., the maintenance of white supremacy.

Walton's war with the Klan ended in the fall of 1923 when the legislature met over his objections and convened a court of impeachment. The legislature had tried to meet in September to consider articles of impeachment, but Walton prevented their meeting. Subsequently, in a special election in early October, an election which Walton had tried to block using both injunctions and force, Oklahomans voted overwhelmingly to call the legislature into session. Shortly after the legislature met, they issued articles of impeachment and by early November Walton was gone from office.<sup>84</sup>

The attitudes did not change, however, following Walton's removal. If anything, Walton's extreme actions against the Klan made it more powerful. The legislature passed only a weak anti-Klan law in December 1923, which prohibited appearing at night in a mask. Other evidence suggests that there were continuing problems in 1920s Oklahoma. The attitude of law enforcement in Oklahoma towards blacks is illustrated by the attorney general's investigation of the killing of a black man by a deputy sheriff near the town of Meridian in Logan County in 1926. Meridian had a population of about 150, of which three-quarters were black, and it had a reputation as a rough town where alcohol and violence were rampant.<sup>85</sup> Shortly after the shooting, the Black Farmer's Tenant Union met to discuss the situation.<sup>86</sup> According to the testimony of one elderly man there, F.W. Wallace, a speaker urged the group to investigate the killing and then "throw railing," if necessary.<sup>87</sup> At one point another speaker laid a big gun on the table and said, "that's my protection."<sup>88</sup> The Farmer's Union de-

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84. Charles Alexander provides a detailed discussion of the maneuvering around Walton's removal. See ALEXANDER, *supra* note 34, at 144–57. Alexander has a comprehensive study of the Klan—though he did not examine the Klan trials in the Walton papers. See ALEXANDER, *supra* note 34, at 263 (observing that his sources did not know where the Klan trial transcripts were located). Alexander's extensive research and thorough summary of Klan activities makes his book very valuable. However, he, like many other historians, focuses on Walton's political motives in attacking the Klan. As a result, Alexander concludes, as did many early twentieth century historians, that political concerns led to tragic consequences. See ALEXANDER, *supra* note 34, at 158 ("Walton picked up the Klan as the issue to recoup his failing political fortunes. His irresponsible actions brought the state close to civil war.").

85. In re Investigation of Race Riot at Meridian, Oklahoma, in 11 Attorney General Papers, Oklahoma State Archives, at 1 (testimony of Neal Humphrey).

86. *Id.* at 58 (testimony of F. W. Wallace).

87. *Id.* at 60 ("it seems as though they were there to organize; there was someone killed down about Meridian . . . and he wanted to know if we were going to stand for anything like that, and he said if we did, we were cowards . . . well if you want to throw railing we are ready.").

88. *Id.* at 61.

cided to appoint a committee to investigate the shooting, so that “colored people could get justice.”<sup>89</sup> The attorney general’s office interpreted the meeting as one designed “to stir up trouble between the whites and blacks in that community.”<sup>90</sup> Yet the Tenant’s Union merely saw the investigation and themselves as seeking justice.<sup>91</sup> Instead of investigating the killing, the attorney general focused attention on the intent of the Tenant’s Union because of a previous incident where a riot ensued after a meeting of a Tenant’s Union in Arkansas.

There were other, flagrant violations of the law by Oklahoma officials. Governor Alfalfa Bill Murray declared martial law in 1933 when blacks began to integrate Oklahoma City’s white neighborhoods. Murray’s declaration was used to encourage the Oklahoma City Council to pass a racially restrictive zoning ordinance that prohibited people from occupying a residence on a street where more than fifty percent of the residents were of a different race. A substantially similar statute had been struck down in *Buchanan v. Warley* in 1917, and a similar pronouncement made in 1926. Yet, fifteen years later, the city council passed the ordinance. It took the Oklahoma Supreme Court until 1935 to overturn the ordinance.

Well into the 1930s, black Oklahomans received poor treatment in the legal system. For example, the United States Supreme Court overturned Jess Hollins’s conviction for attempted rape after it became apparent that blacks had been excluded from jury service.<sup>92</sup> Hollins had been denied relief by the Oklahoma courts.<sup>93</sup>

## V. THE OKLAHOMA KLAN AND REPARATIONS TALK

As we decode the Klan’s actions in Oklahoma in the early 1920s, it becomes fairly clear that they worked closely in conjunction with local law enforcement to police the behavior of Oklahoma’s citizens. When women or men, whether they were white, native, or black, stepped across the line of acceptable behavior, they were subject to vicious attack. Those victims could not expect protection from local law enforcement, for at many times local authorities worked in conjunction with the Klan. There are several implications of this picture for historians, as well as for “reparations talk.”<sup>94</sup>

89. *Id.* at 66, 68 (testimony of Henry Walter Gaines).

90. *Id.* at 71 (testimony of J. Berry King).

91. *See, e.g., id.* at 76, 80 (testimony of William Tillman) (“I think it was Mr. Reid’s object to see if this killing that happened down there was lawful and if it was done according to law and to try to figure out who did it, and he wanted a committee appointed to look after that matter.”); *id.* at 93, 94 (testimony of Mary Leahy) (“The only thing that I gave special stress to was that he just wanted justice in some affair. That was the only thing I gave any special thought to was justice in something that had occurred at Meridian sometime before that.”); *id.* at 97, 99 (testimony of Ben Austin) (“One of the boys said, ‘let’s have a meeting and if these boys have violated the law, let’s see if we can’t get justice.’”).

92. *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

93. *See also* *Franklin v. World Pub. Co.*, 83 P.2d 401 (court 1938) (holding that the attribution of use of word “n-r” to attorney B. C. Franklin was not defamatory); *Hemsley v. Sage*, 154 P.2d 577 (Okla. 1944) (upholding racially restrictive covenants).

94. *See* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004); Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003).



The first and perhaps most important implication is that the Klan worked in close conjunction with local law enforcement. Where others have asked whether the Klan was an urban or rural phenomenon, whether they targeted primarily blacks or issues of white “morality,” what meaning Klan attacks had in gender, racial, and sexual terms, and whether they were middle class or of some other social class, the Oklahoma Klan trials highlight another important issue: that the Klan dominated the law enforcement of the state to an extraordinary extent. The Klan became, in important ways, part of the state government. The trials vindicate Walton’s fears of Klan domination, even though Walton likely infringed the rights of Oklahomans by declaring martial law. Oklahomans seemed generally to agree with a cartoonist’s depiction of their frustration with both the Klan and Walton; the cartoon shows a woman washing clothes stained with two black marks—one marked “Klan,” the other marked “King.”

The other two implications have more to do with contemporary legal thought than the first. It was simply not reasonable to expect victims of the Tulsa riot to exercise their right to file lawsuits to pursue legal claims in the riot’s aftermath. A reasonable person would simply conclude that the courts were unavailable, in large part because they were dominated by the Klan and those who chose to exercise their rights were subject to violence. Moreover, even if victims had the courage to assert their rights in court, the legal system was simply unable to recognize those claims. The legal system could not, to borrow a phrase from Ralph Ellison, hear the victims.<sup>95</sup> This was in part because their members were associated with the Klan and in part because the Klan created norms that prohibited equal treatment of blacks.

Statutes of limitations are, indeed, the major obstacle facing plaintiffs in reparations lawsuits. In March 2004, the Tulsa riot victims’ lawsuit was dismissed because of the statute of limitations.<sup>96</sup> The joint motion to dismiss filed in July 2003 in *In re African American Slave Descendants Litigation*, the most comprehensive response ever written to legal claims for slavery

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95. ELLISON, *supra* note 1, at 4 (“‘Constituents?’ Suddenly the old man smiled. ‘No, miss,’ he said, ‘the Senator doesn’t even have anybody like us in his state. We’re from down where we’re among the counted but not among the heard.’”).

96. See *Alexander v. Oklahoma*, 2004 U.S. Dist. Lexis 5131 (Mar. 19, 2004) (dismissing lawsuit on behalf of Tulsa riot victims because of the statute of limitations). Judge James O. Ellison dismissed *Alexander* shortly before this Article went to press. I hope to address his opinion in substantially more depth in another Article. For the present, I would like to note that Judge Ellison—while acknowledging the tragedy of Tulsa—stated in broad terms that the conditions that prevented plaintiffs from obtaining justice (such as Klan domination of the courts) ended at some unspecified time, without making specific findings of when the courts might have become available to people who had been told for so long that the riot was their fault and that they would be subject to violence if they tried to assert their rights.

See also Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 57 N.Y.U. ANN. SURVEY AM. L. 497, 505 (2003) (discussing problems with statutes of limitation); Charles J. Ogletree, *Repairing the Past: New Efforts in Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 297 (2003); Afreda Robinson, *African American Reparations*, 55 RUTGERS L. J. 309, 366–68 (2003); William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 121 (2002-03) (“case law is unkind to reparations litigants seeking to toll statutes of limitations”).

reparations, relies heavily upon problems with the statute of limitations. And that case was dismissed, too, in January 2004.<sup>97</sup> Yet plaintiffs are beginning to develop some powerful and coherent arguments to overcome statute of limitations problems. They invoke equitable tolling defenses, suggesting that courts were unavailable to plaintiffs at the time. As scholars have observed, the lack of availability of courts for relief are a key basis for tolling the statute of limitations.<sup>98</sup>

When we recall that statutes of limitations are based on policies of repose, that they are human creations that stop litigation at arbitrary points, we may see principles of equity that suggest that courts should allow a lawsuit to go forward.<sup>99</sup> There are other, specific doctrines that may allow relief as well. Courts in recent cases have tolled the statute of limitations when relief was effectively unavailable. Thus, in *Rosner v. United States*, victims of the holocaust overcame a statute of limitations defense.<sup>100</sup> The plaintiffs overcame a motion to dismiss when they sought to obtain gold taken from them decades after they were told incorrectly that the gold was not identifiable. In *Bodner v. Banque Paribas*, the Eastern District of New York applied another theory, that of the continuing violation. Descendants of holocaust victims whose assets had been taken by French financial institutions during World War II, and then not returned after the war, overcame a motion to dismiss on statute of limitations grounds. The plaintiffs successfully argued that the failure to return property constituted a continuing violation.<sup>101</sup> There are other cases that present perhaps even more promising avenues for Tulsa riot victims.

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97. In January 2004, the Northern District of Illinois dismissed a lawsuit for slave reparations for, among other reasons, failure to file within the statute of limitations. See *In Re African American Slave Descendants Litigation*, 302 F.Supp.2d 1027, 1065–70 (N.D. Ill. 2004). See also Motion in Support of Defendants' Joint Motion to Dismiss, *In Re African American Slave Descendants Litigation*, Civil Action No. 02-7764 (CRN), MDL No. 1491, at 17–25, available at [http://www.aetna.com/legal\\_issues/suits/reparations.html](http://www.aetna.com/legal_issues/suits/reparations.html). See also Brophy, *supra* note 94, at 84 n.8 (discussing legal claims made in the joint motion to dismiss and their relationship to popular arguments against reparations).

98. See Jacques Delisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL U. L. REV. 473, 539 n.203 (2002) (listing civil cases involving human rights claims—what many would call reparations suits—where the statute of limitations is equitably tolled).

99. Although statutes of limitation are under-theorized, there are frequent discussions hypothesizing that their purpose is repose. See, e.g., *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997) (finding that allowing suits for all acts in a conspiracy based on when the last predicate act occurred extends the statute of limitations dramatically and “thereby conflicts with a basic objective—repose—that underlies limitations periods”). The basis for the repose is an understanding by legislatures and judges that memories of witnesses fade and evidence is lost. See *Klehr*, 521 U.S. 179 (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). Repose is designed to assure fairness for defendants. See, e.g., *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 428 (1965). At base is a sense of justice for when someone should be allowed repose. One may, I think, make a strong argument that certain crimes are so heinous that there should be no repose.

100. 231 F. Supp. 2d 1202, 1208 (S.D. Fla. 2002).

101. 114 F. Supp. 2d 117, 133–34 (E.D.N.Y. 2000) (“the nature of plaintiffs claim is such that the continued denial of their assets, as well as facts and information relating thereto, if proven, constitutes a continuing violation”).

Professor Jacques Delisle has collected a series of cases from the United States federal courts involving human rights abuses in other countries that have tolled the statute of limitations when courts are unavailable or plaintiffs have well-founded fears of persecution if they seek to assert their claims.<sup>102</sup> Thus, when the courts are unavailable because a plaintiff cannot get access to them, federal courts have tolled the statute of limitations. As far back as the American Civil War, a plaintiff who could not file suit because of the war was allowed to file beyond the limitations period. The Supreme Court's rationale was that the plaintiff was prevented from filing because of matters beyond his control.<sup>103</sup> Similarly, just after World War II, a victim of Japanese internment was permitted to file suit against a third party (his pre-internment employer) under the Jones Act because he was unable to file while interned.<sup>104</sup> In both of those cases, the suits went forward against third parties who had no culpability in causing the courts to be unavailable.

The case for tolling is substantially more compelling when the defendant bears culpability for foreclosing suit, as the Northern District of California implicitly recognized in *Forti v. Suarez-Mason*, which relied on those Civil War and World War II era precedents. *Forti* allowed a suit under the Alien Tort Claims Act to go forward in 1987 against the government of Argentina for acts in February 1977.<sup>105</sup> *Forti* has been extended to cases where even if the courts might be open, fears of reprisal and defendant-inspired intimidation tolled the limitations period until the officers creating that fear were removed.<sup>106</sup> And that doctrine applies, in turn, to cases where there is no functioning judiciary in the plaintiffs' home, even if a claim might possibly have been brought in another jurisdiction.<sup>107</sup>

The Tulsa case is somewhat more complex because it deals with the question of when courts might have become available to Tulsa riot victims. The Southern District of Florida dealt with a similar problem in 2002 in *Barrueto v. Larios*, another Alien Tort Claims Act case arising from human rights abuses in Chile in the early 1970s. The court tolled the statute of limitations, concluding that evidence of murder had been hidden by the Chilean government and that the pre-1990 concealment of the cause of death tolled the running of the statute of limitations until 1990. It distinguished claims where a defendant had taken no active role in concealment (known as equitable tolling) and those where the defendant had taken an active role in "preventing the plaintiff from suing in time" (equitable estoppel).<sup>108</sup> The court, importantly, concluded that "the defendant's act of

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102. See Delisle, *supra* note 98, at 539 n.203 (citing, among others, *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (impossibility of relief in Argentine courts basis for tolling), *Doe v. Unocal Corp.*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) (fear of retaliation basis for tolling), and *Barrueto v. Larios*, 205 F. Supp. 1325, 1330-31 (S.D. Fla. 2002) (pre-1990 concealment of body and cause of death by Chilean government tolled running until 1990)).

103. *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867).

104. See *Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947).

105. 672 F. Supp. 1531, 1550 (N.D. Cal. 1987).

106. See *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 779 (9th Cir. 1996).

107. See *Doe*, 963 F. Supp. at 897.

108. See *Barrueto*, 205 F. Supp. at 1330-31. In the case of Tulsa, the term equitable estoppel may not apply. Typically estoppel claims involve a representation and then reliance

concealment postpone[d] the accrual of the limitations period altogether."<sup>109</sup> *Barrueto* may be read for the proposition that when defendants take affirmative action to preclude a lawsuit, by concealing evidence and by making courts unavailable, the statute of limitations is tolled until the defendants take affirmative action to make the courts realistically available again. Tulsa presents a particularly compelling case for such a reading of *Barrueto* because there can be relief in Tulsa without the fear of extending unreasonably the statute of limitations in other cases. There are, fortunately, few if any other tragedies that present such a case for tolling the statute of limitations. There are a series of limiting factors in Tulsa that distinguish it from other cases—the culpability of the government, the efforts made to drive out plaintiffs through prosecution and destruction of their homes, and the capitulation of the government to the Klan. A court can toll the statute of limitations in Tulsa without fear of opening up a never-ending set of lawsuits. And there are reasonable legal arguments, recognized by other contemporary federal courts, that justify tolling. The evidence from the Klan trials in the aftermath of the Tulsa riot suggests a similar lack of effective means for justice. Even if Greenwood residents had the courage, as some did, to file claims, the courts were effectively unavailable to them.

There are at least two other ways of conceptualizing statutes of limitations in the Tulsa riot. A court might build upon the Oklahoma doctrine that claims by public entities to vindicate public rights are never barred by the statute of limitations. The idea behind that ancient doctrine—in existence at the time of the Tulsa riot—is that public officials' inaction should not deprive the public of their rights.<sup>110</sup> As recently as 1995 the Oklahoma town of Cyril successfully recovered damages from Mobil for pollution that began as early as the 1940s.<sup>111</sup> One might then imply a cause of action on behalf of riot victims to vindicate public rights—those of Greenwood as a whole. Alternatively, there may yet be some public entity that expended money as a result of the riot that has a claim against the city of Tulsa—perhaps one of the all-black towns that sheltered riot victims or other

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on that representation. *See* *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 983 (3d ed. 2002). In the case of Tulsa, there was affirmative action to stop plaintiffs from using the courts including threats of prosecution to drive out plaintiffs followed by violence against those who had the audacity to assert rights.

109. 205 F. Supp. 2d at 1331.

110. *See, e.g.*, *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 133 (Okla. 1989); *State ex rel. Shones v. Town of Canute*, 858 P.2d 436, 439 (Okla. 1993). Oklahoma dealt with a series of claims involving public rights around the time of the riot, which would have been barred had they involved private parties. *See, e.g.*, *State ex rel. Gooch v. Drumright*, 212 P. 991 (Okla. 1923); *State ex rel. Schilling v. Oklahoma City*, 168 P. 227 (Okla. 1917), *Territory ex rel. Johnston v. Woolsey*, 130 P. 934 (Okla. 1913).

111. *Town of Cyril v. Mobil Oil Corp.* 11 F.3d 996 (10th Cir. 1993). For further development of this and other arguments regarding tolling, see Alfred L. Brophy, *Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Riot* (2000), available at <http://www.law.ua.edu/abrophy/reparationsdft.pdf>.

For the sake of clarity, I would like to point out that the 2000 report to the Tulsa Riot Commission is different from the book *Reconstructing the Dreamland: The Tulsa Riot of 1921*, which was published in 2002 by Oxford University Press. The title is similar, but the content is quite different. The former is concerned with discussing legal theories; the later is a more general history of the riot and discussion of reparations.

haps one of the all-black towns that sheltered riot victims or other neighboring towns like Muskogee or the state, which spent money to put down the riot and never received payment.

Alternatively, petitioners could draw on the doctrine from breach of trust cases that courts frequently toll the running of the statute of limitations.<sup>112</sup> There is some evidence to suggest an implied trust relationship between riot victims and the city. The city treated riot victims as helpless refugees. If the city's actions in treating Greenwood residents as people who needed special care helped create the problems of the riot, then it is reasonable to make the city into a trustee for them.

There is a corollary implication of these findings for reparations, and those implications are best addressed to legislatures and elected officials. It is a history lesson that uncovers a past that has been hidden for decades. Time has obscured the connections and has let us forget how difficult life was at the time for victims of the Tulsa riot. Not only were they terrorized during the riot, but even afterwards they were subject to violence. A fuller picture including historical information may make the case even stronger for some kind of legislative action that acknowledges and then attempts to make amends. Revisiting the Tulsa riot through the *Alexander* litigation keeps alive the idea of retrying old racial crimes, as is being tried in an increasing number of communities.<sup>113</sup> While the Tulsa riot is considered history in the minds of many, for those victims who are still alive, it is an event that is not yet past. The Oklahoma legislature needs to understand that the context of racial hatred that gripped the state made it impossible for riot victims to get justice. The community's duty to protect its members was not fulfilled and the legislature has a moral duty to repair that damage.<sup>114</sup>

## VI. CONNECTIONS BETWEEN "LAW" AND NORMS IN PROGRESSIVE-ERA OKLAHOMA

There is one other important lesson from the Klan trials, as well. The trials, which demonstrate the close connections between the Klan and local law enforcement, suggest that the Klan was central to establishing and enforcing norms of behavior. They suggest ways that social norms were promulgated and enforced, and that frequently norms were enforced by punishment meted out by extra-legal, as well as legal means. Much of the literature on Jim Crow has addressed ways that blacks lived independently of social norms of segregation. The literature must also acknowledge the ways that rules of segregation and deference were enforced, in short,

112. An example of an egregious breach of trust arises in *Chisholm v. House*, 183 F.2d 698 (10th Cir. 1950), in which the Tenth Circuit suspended the running of the statute of limitations until the death of the trust beneficiary, an aged and non-literate man, although there was evidence that the trust had been mismanaged as early as 1924.

113. See, e.g., Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Martha Minow, *Why Retry? Reviving Dormant Racial Justice Claims*, 101 MICH. L. REV. 1133-40 (2003); Margaret Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225 (2003).

114. See Alfred L. Brophy, *Reparations Models*, UNIV. WINDSOR Y.B. OF JUST. (forthcoming 2004) (discussing numerous cases of legislatures paying money to citizens when they are injured).

how the strict social line separating blacks and whites was policed. And on that score, the Klan trials can give important lessons on the connections between the “law,” which included statutes, dictates of law enforcement officers, prosecutors, and judges, and community expectations. A series of recent scholars studying norms have looked to the connections between “laws” and norms, which are useful in evaluating the Oklahoma Klan. Dov Cohen and Joe Vandello, for instance, argued that southern violence “is a product of a coherent meaning system defining the self, honor, rituals for conflict, and tools that may be used when order is disrupted.”<sup>115</sup> Their elegant, social science language describes the Klan’s use of violence. It marked the boundaries between acceptable behavior and unacceptable behavior (in the minds of its members) and policed those boundaries. The Klan violence was a well-developed and frequently used means of social control. The members were the architects and the policemen of a world of white patriarchy, and a close study of their victims and their methods discloses the boundaries of their world. In the case of Oklahoma, the Klan’s norms reinforced the practice of segregation established by the legislature by statute. The Klan, in essence, filled the interstitial areas between statutes and individuals. Theirs was a world of order, or much sought-after control, with law, to borrow a phrase from Robert Ellickson.<sup>116</sup>

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115. See Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567 (1998); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997) (suggesting ways that criminal prosecutions can control corporate officers).

116. Cf. ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Richard McAdams has decoded the uses of norms to protect status. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Amitzi Etzioni, *Social Norms, Internalization, Persuasion, History*, 34 LAW & SOC’Y REV. 157, 171–75 (2000) (discussing the origins of social norms).

Where Robert Ellickson has subtly criticized law and society theorizing on norms, Ellickson, *Title*, 27 J. LEGAL STUD. 537 (1998), suggesting that it may be difficult to generalize from their findings, cases like the Oklahoma Klan—and numerous other cases involving race in the Progressive-era—provide the opportunity to generalize about the ways that norms were created in popular culture and then enforced. One seeking such a general theory could profitably start by synthesizing studies of the creation of white supremacy. There are an extraordinary parallel of thought in studies of the Tulsa riot. See BROPHY, *supra* note 6; W. E. B. DuBois, *DAVID L. LEWIS, W. E. B. DuBOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963* (2000); and the Klan, see MACLEAN, *supra* note 16. One very sketchy model looks like this: when challenged, white middle class members sought to maintain their positions of control and dominance. As a result, they used a combination of statutory laws—passed using racially charged appeals, drawn from popular culture and supported by intellectuals—which were then enforced using law enforcement officers who believed in those same appeals. Members of the white public were led to believe that they should maintain their positions of power and status, an unfortunately easy sell to all too many people.

Lawrence Friedman’s work provides a series of case studies in how popular opinion and legal doctrine interact to create norms of behavior. See, e.g., LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW IN THE TWENTIETH CENTURY* (2002). All of this is done, as Harriet Beecher Stowe wrote in *Uncle Tom’s Cabin*, under the “shadow of the law.” See Alfred L. Brophy, “Over and above there broods a portentous shadow—the shadow of the law”: Harriet Beecher Stowe’s Critique of Slave Law in *Uncle Tom’s Cabin*, 12 J. L. & RELIGION 457 (1996).

The findings in this Article relate to that part of social norms literature that deals with the interplay between norms and law. Where much literature explores norms that exist independently of statutes, the Klan points to what, I suspect, is substantially more common: norms that reinforce and operate on parallel (not oblique) tracks to statutes. When faced with such mutually reinforcing norms and “laws,” the case for reparative action grows stronger. For victims of the Tulsa riot to have obtained justice in the 1920s, they would have had to overcome the entire system of law, norms, and public opinion, which could not realistically be accomplished. The case for reparations for Tulsa riot victims is strengthened, then, by the realization that justice was not achieved and was unavailable, and that lack of justice is continuing to affect the survivors. We might (I hope) use this newly discovered and understood evidence to recover a language for discussing moral duties. For reparations scholarship talks too much about only part of the case for (or against) reparations. I suspect that reparations talk will move into reparations action only once there are concrete proposals for reparations for specific instances of past crimes, based on thorough investigations of past crimes.<sup>117</sup> Those proposals will have to be balanced plans, which offer some serious hope of repairing past damage and allowing everyone to move forward. In order to imagine what the world might look like if reparations were granted, scholars and petitioners need to consider how best to repair those damages. If they can devise reparations plans that are both feasible in terms of funding and likely to accomplish their goals of repairing past damage and facilitating community healing, then it is possible to achieve them.<sup>118</sup>

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117. A series of recent works are examining reparations in specific contexts. See, e.g., Brophy, *supra* note 97; Sherilyn Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *LAW & INEQ.* 263 (2003). Cf. Kevin Outterson, *Slave Taxes*, in *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 135 (2003) (focusing on money raised by taxes on slaves as part of reparations puzzle); Robinson, *supra* note 96, at 309 (focusing on moral and legal claims against corporations for benefits acquired from slave labor). Moreover, reparations work is now seeking to find methods of accounting and repair. See, e.g., Joseph Jenkins, *Inheritance Law as Constellation in Lieu of Redress: A Detour Through Exceptional Terrain*, 24 *CARDOZO L. REV.* 1043 (2003); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 *ALA. L. REV.* 483 (2003).

118. On the need for financially workable plans and the possibility of community healing, see Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 *DEPAUL L. REV.* (forthcoming 2004); Note, *Bridging the Color Line: the Power of African-American Reparations to Redirect America's Future*, 115 *HARV. L. REV.* 1689 (2002). Professor Jeffries has identified the gap that we see so frequently between the harm and remedy. That gap—chasm, really—appears in discussion of reparations because the harm is so much greater than we are ever likely to be able to finance, at least if there are to be reparations on a large scale. Jeffries states:

In a hypothetical world in which current doctrine existed at the time of Brown, desegregation suits could have been brought as class actions seeking not only injunctive relief, but also money damages. The good-faith belief of officials in the pre-Brown validity of separate-but-equal—or indeed of any other outdated position—would have been no defense. Statutes of limitations would have barred plaintiffs from recovering reparations for all past wrongs, but a fair valuation of the injuries currently caused by racial apartheid, not to mention the gross underfunding of black schools, would have been astronomically high.

## VII. CONCLUSION

Black Oklahomans during Jim Crow faced segregation statutes and ordinances in virtually all aspects of their lives. In the years leading up to the riot, there was an almost total failure of law enforcement to protect black Oklahomans from violence or to prosecute perpetrators of the violence. Law enforcement officers participated in violence against black Oklahomans, along with the systematically singling out of black Oklahomans for prosecution. The courts failed to enforce the principle of equal treatment, and the Ku Klux Klan permeated the Oklahoma government and made it impossible for black Oklahomans to obtain a fair hearing in the Oklahoma courts in the years after the Tulsa riot.

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While it may seem implausible to think that hundreds of billions of dollars in damages would actually have been extracted from local school districts and paid to their black students, such results would have followed from strict enterprise liability for constitutional violations. The challenge is to imagine what the world might have looked like had that regime been in place throughout the desegregation era.

John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 101 (1999). Jeffries identifies an important theme in remedies (and reparations) scholarship, that it is frequently impossible to fully conceive of what a world would be like without past harm. As a result, we often use artificial boundaries on recoveries. See Brophy, *Reparations Talk*, *supra* note 94, 123–25 (discussing the arbitrary boundaries drawn by tort law, which limit recovery). Those boundaries make it possible to conceptualize reparations as something financially plausible.

Those of us who seek reparations through the courts ought to recognize Professor Jeffries's insight and realize that reparations will likely fall short of making us whole, but that they still uphold the promise of making us all better.