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The Tulsa Race Massacre of 1921: A Lesson in the Law of Trespass

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Essay

The Tulsa Race Massacre of 1921: A Lesson in the Law of Trespass

KARA W. SWANSON

The Connecticut Law Review Symposium poses the question: “History and the Tulsa Race Massacre: What’s the Law Got to Do With It?” In one sense, the answer to the question is easy. Since 1921, Black Tulsans have been looking to law and lawyers to address the harms inflicted during the Tulsa Race Massacre, albeit with little success. I was asked to consider, however, the startling lack of recognition of the Massacre—that is, the seemingly impossible feat of forgetting the racially motivated wholesale destruction of a community. In this Essay, I focus on one space of non-recognition, law schools, and on property law classrooms in particular. U.S. lawyers learn what property is and how the law defines, shapes, and protects it without any knowledge of the Tulsa Race Massacre.

To explore the costs of such ignorance, I have rewritten the Symposium’s starting question to ask: what might we learn if property law was taught with knowledge of the Massacre? My short answer is that we all, as lawyers, would learn about race and property in ways that would not only better equip us to engage in the crucial ongoing tasks of reevaluation, reparations, and redress with respect to Tulsa, but also to understand how property works in each community in the United States.

As my long answer, I offer a property law lesson on the law of trespass. By incorporating the Tulsa Race Massacre in this lesson, we consider Black Americans as property owners, a role in which they seldom appear in a property course. I consider how, once students have learned the definition and purpose of the trespass doctrine, we could then review the doctrine with attention to the events of the Massacre, asking who committed trespass against whose property and assessing the legal consequences or lack thereof. The revised lesson would encourage us as lawyers to be attentive to our roles in defining and enforcing property rights in racialized ways. By recognizing the conflation of property rights and race in U.S. law, a truth grounded in history, we gain the power to stop repeating history and, instead, to make a different future by disrupting historic relationships that have tied property and power to racial identity.

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The Tulsa Race Massacre of 1921: A Lesson in the Law of Trespass

KARA W. SWANSON*

Thank you to the organizers for convening the *Connecticut Law Review* Symposium on October 22, 2021 for a discussion of the Tulsa Race Massacre and for inviting me to participate. I join the discussion as a learner, along my ongoing journey as a lawyer, historian, and law professor.

INTRODUCTION

In this Essay, I focus on the Symposium's subtitle: "What's the Law Got to Do With It?" In one sense, the answer to that question is easy. Since 1921, Black Tulsans have been looking to law and lawyers to address the harms inflicted during the Tulsa Race Massacre, with little success.¹ Lawyers can translate experiences into the language of law to seek remedies in court. I was asked, however, to address the startling lack of recognition of the Massacre—that is, the seemingly impossible feat of forgetting the racially motivated wholesale destruction of a community. Scott Ellsworth, my fellow

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¹ See Larry O'Dell, *Riot Property Loss*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 143, 144–45 (2001) (reviewing \$1.8 million in damage claims filed against the city in the 1920s, all of which were dismissed except for one by a white resident for guns taken from his shop by white rioters); ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, RACE, REPARATIONS, AND RECONCILIATION 96–101 (2002) (citing evidence that claims totaling \$5 million were filed with the City and denied, followed by unsuccessful state and federal lawsuits); Charles J. Ogletree, Jr., *When Law Fails: History, Genius, and Unhealed Wounds after Tulsa's Race Riot*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 50, 55–60 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) (detailing early unmet claims for restitution and an unsuccessful restitution lawsuit filed in 2003, *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004)); see also *Redfeam v. Am. Cent. Ins. Co.*, 243 P. 929 (Okla. 1926) (denying insurance coverage to a white landowner seeking restitution for two buildings destroyed in Massacre under a riot exclusion clause). In September 2020, a new lawsuit was filed on behalf of survivors and descendants of victims based on a state law prohibiting public nuisances. SCOTT ELLSWORTH, THE GROUND BREAKING: AN AMERICAN CITY AND ITS SEARCH FOR JUSTICE 251–53 (2021) [hereinafter ELLSWORTH, THE GROUND BREAKING]; Maria Cramer, *Tulsa Massacre Survivors Sue City Nearly 100 Years After Attack*, N.Y. TIMES, <https://www.nytimes.com/2020/09/01/us/tulsa-race-massacre-lawsuit.html> (May 20, 2021); DeNeen L. Brown, *Judge Allows Lawsuit by Tulsa Race Massacre Survivors to Proceed*, WASH. POST (May 3, 2022) (reporting on partial denial of motion to dismiss plaintiffs' claims).

panelist and author of the first scholarly history of the Massacre, has described the ways in which that forgetting was encouraged and perpetuated.²

There have been many layers to this forgetting over the last 100 years. As a historian, I am particularly struck by the deliberate efforts of white Tulsa to destroy and lose the documentary evidence of the event—efforts that Ellsworth encountered in his research. He found pages sliced out of surviving copies of a local white-owned newspaper to hide its editorial incitement of anti-Black violence, missing files, and rumors of disappearing boxes of photographs.³ The silence may have begun in Tulsa, but it has spread throughout Oklahoma and other states. In social studies classes, in history textbooks, and in popular books, the Tulsa Race Massacre—perhaps the most extensive racially motivated destruction of a community in the twentieth-century United States—has been simply absent, even as the survivors and their descendants remembered.⁴

² SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921* 104–07 (1982) [hereinafter ELLSWORTH, *DEATH IN A PROMISED LAND*] (describing a “segregation of memory” in which white Tulsans were much more reluctant to discuss the Massacre than Black Tulsans); ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, 42–47; *see also* Sara Bronin, Remarks at the University of Connecticut Law Review Symposium: “The Tulsa Race Massacre: What’s the Law Got to Do With It?” (Oct. 22, 2021) (explaining the role of historic preservation law in our collective remembering and suggesting how it might be shifted to reclaim spaces that give meaning and materiality to memories of the Massacre and what was destroyed); Jamila Jefferson-Jones, *Using Historic Preservation Law to Halt the Destruction of “Porch Culture” in the Lower Ninth Ward of New Orleans*, 2 SAVANNAH L. REV. 211, 212 (2015) (arguing for the role of historic preservation law in preserving “the history of a community” in the context of a Black neighborhood in post-Katrina New Orleans).

³ ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 5–9, 70–72, 84–88 (detailing missing materials).

⁴ *See, e.g., Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, in *TULSA RACE RIOT*, *supra* note 1, at 6 (describing the Massacre as the “most important least known event in the state’s entire history”); John Hope Franklin, *Foreword* to ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at xv–xvii (recounting his memories of the event as a six-year-old boy living in Oklahoma and how it was discussed afterwards in Tulsa); Don Ross, *Prologue* to *TULSA RACE RIOT*, *supra* note 1, at iv–vii (remembering when he first learned about the Massacre and how the silence had been perpetuated). Note that Black and white Tulsans have not only different oral histories of the Massacre, but different reasons for being reticent to speak. ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 104–07. Fortunately, since the Commission report, information about the Massacre is being distributed to many audiences, from children to adults, including in graphic and video forms. In addition to other books cited in this Essay, *see, e.g.,* MARY E. JONES PARRISH, *THE NATION MUST AWAKE: MY WITNESS TO THE TULSA RACE MASSACRE OF 1921* (Trinity Univ. Press 2021) (1923); CAROLE BOSTON WEATHERFORD, *UNSPEAKABLE: THE TULSA RACE MASSACRE* (2021); BRANDY COLBERT, *BLACK BIRDS IN THE SKY: THE STORY AND LEGACY OF THE 1921 TULSA RACE MASSACRE* (2021); ALVERNE BALL & STACEY ROBINSON, *ACROSS THE TRACKS: REMEMBERING GREENWOOD, BLACK WALL STREET, AND THE TULSA RACE MASSACRE* (2021); TULSA: THE FIRE AND THE FORGOTTEN (PBS 2021); KARA L. LAUGHLIN, *THE TULSA RACE MASSACRE* (2021); TIM MADIGAN, *THE BURNING: BLACK WALL STREET AND THE TULSA RACE MASSACRE OF 1921* (2001); TIM MADIGAN, *THE BURNING: BLACK WALL STREET AND THE TULSA RACE MASSACRE OF 1921* (Hilary Beard ed., Young Readers ed. 2021) (adapting Madigan’s work for a younger audience); JERROLYN S. EULINBERG, *A LYNCHED BLACK WALL STREET: A WOMANIST PERSPECTIVE ON TERRORISM, RELIGION, AND BLACK RESILIENCE IN THE 1921 TULSA RACE MASSACRE* (2021); KRIS ROSE, *WHITE RIOT/BLACK MASSACRE: A BRIEF HISTORY OF THE 1921 TULSA RACE MASSACRE* (2021); RANDY KREHBIEL, *TULSA, 1921: REPORTING A MASSACRE* (2019); JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* (2002).

In this Essay, I focus on one space of non-recognition of the Massacre, law schools, and on property law classrooms in particular, as they are a near-universal aspect of U.S. legal education. Due to this general forgetting, U.S. lawyers learn what property is and how the law defines, shapes, and protects it without any knowledge of the Massacre. As the Symposium's organizers have acknowledged, this ignorance has costs. Without knowledge of the Massacre, lawyers are ill-equipped to answer the question, "What's the law got to do with it?" We cannot use law to change injustices that we cannot see.

The costs of such ignorance on the part of lawyers reach beyond the bounds of Tulsa, as important as localized discussions of the Massacre are. To explore these deeper costs, I have rewritten the Symposium's starting question to ask: what might we learn if property law was taught with knowledge of the Tulsa Race Massacre? My short answer is that we all, as lawyers, would learn about race and property in ways that would not only better equip us to engage in the crucial ongoing tasks of reevaluation, reparations, and redress with respect to Tulsa, but also to understand how property works in each community in the United States. The events in Tulsa from May 31, 1921 to June 1, 1921 offer new insights into what Professor Cheryl I. Harris, another Symposium participant, demonstrated decades ago: "rights in property are contingent on, intertwined with, and conflated with race."⁵

For my long answer to the Symposium's question, I invite you to join me in reconsidering a lesson that is included early in most property courses: a lesson in the law of trespass. By incorporating the Tulsa Race Massacre in this lesson, we consider Black Americans as successful property owners, a role in which they seldom appear in a property course. I consider how, once students have learned the definition and purpose of the trespass doctrine, often considered foundational to the very meaning of property, we could then review the doctrine with attention to the events of the Massacre, asking who committed trespass against whose property and assessing the legal consequences or lack thereof. The revised lesson would encourage lawyers to be attentive to their roles in defining and enforcing property rights in racialized ways. By recognizing the conflation of property rights and race in U.S. law, a truth grounded in history, we gain the power not just to address history, as important as that task is, but also to avoid repeating it. With that power comes the ability to make a different future by disrupting historic relationships that have tied property and power to racial identity.⁶

Before getting to the lesson itself, I offer a précis of the Massacre that could serve to introduce it to students. Like many teachers, I rely heavily on resources prepared by others. The précis is prepared from my reading of the

⁵ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).

⁶ This brief Essay, like this Symposium, is a contribution to the ongoing project within the legal academy of "describing our common history, how we came not to know it, and its significance for the study and practice of law." K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1983 (2020).

historiography. Just as there has been a recent effort to reconstitute a shared knowledge of the Tulsa Race Massacre, there has also been an ongoing effort to educate lawyers who are familiar with the interactions between racial identity and property law. I briefly review the existing scholarship and teaching materials on race and property that have formed part of my own journey from student to lawyer to teacher in the property law classroom and that undergird my efforts to rethink my pedagogy in response to the challenge raised by this Symposium.

THE MASSACRE

Historian and property law professor Alfred Brophy has been researching and writing about the Tulsa Race Massacre since he worked with the Tulsa Race Riot Commission on the question of reparations starting in 1997.⁷ He reminds us that the Massacre was a “complex” event that merits much more discussion than I offer in this Essay.⁸ I rely on Brophy’s scholarship, as well as the work of Ellsworth and others, to provide a brief summary of the Massacre that could serve as the background for a discussion of the law of trespass.⁹

In 1921, the Greenwood District of Tulsa, Oklahoma was home to over 10,000 Black Americans, most of whom had moved there in recent decades as Tulsa rapidly changed from a sleepy small town to a prosperous oil-boom city.¹⁰ In addition to its residents, Greenwood boasted one of the most flourishing Black business districts in the United States, sometimes referred to as the “Black Wall Street,” with hotels, speakeasies, stores, an automobile repair business, a theater, and pharmacies.¹¹ It had a newspaper, a hospital, and Black lawyers’ and doctors’ offices.¹² It included the city’s all-Black high school.¹³ It had everything that a bustling community, whose residents

⁷ BROPHY, *supra* note 1, at xiii, 153.

⁸ Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 333 (2005).

⁹ *See id.*; BROPHY, *supra* note 1; ELLSWORTH, THE GROUND BREAKING, *supra* note 1; ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2; *see also* Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67 (2001); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17 (2004); Alfred L. Brophy, *When More Than Property Is Lost: The Dignity Losses and Restoration of the Tulsa Riot of 1921*, 41 LAW & SOC. INQUIRY 824 (2016) [hereinafter Brophy, *More Than Property*]; Scott Ellsworth, *The Tulsa Race Riot*, in TULSA RACE RIOT, *supra* note 1, at 37; KARLOS K. HILL, THE 1921 TULSA RACE MASSACRE: A PHOTOGRAPHIC HISTORY (2021).

¹⁰ ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 8–14.

¹¹ KREHBIEL, *supra* note 4, at 5 (tracing the nickname back to Booker T. Washington in 1913).

¹² ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 15–16.

¹³ KREHBIEL, *supra* note 4, at 5.

were unable to buy homes in white-only neighborhoods, could want for necessities and amusements.¹⁴

On the evening of May 31, a rumor spread that a young Black bootblack, Dick Rowland, who worked in Tulsa's white downtown, had attacked a seventeen-year-old white elevator operator named Sarah Page the day before.¹⁵ The rumor was fueled by an inflammatory news report in the afternoon edition of the *Tulsa Tribune*.¹⁶ While the truth of their encounter will never be known—in some accounts, Rowland tripped when entering the elevator and grabbed Page's arm to catch himself—what is clear is that the white-owned newspaper insinuated that Rowland had attempted to rape Page, and it possibly published an editorial calling for a lynching.¹⁷ Rowland was arrested and jailed in the top story of the courthouse.¹⁸ White men milled around the courthouse that night, while Black men from Greenwood, some dressed in their World War I uniforms, took up arms and went to the courthouse, volunteering their services to the white sheriff to help him protect Rowland from a mob killing.¹⁹ The sheriff sent them away, and, as they were leaving, shots were fired, resulting in the death of both Black and white men in the crowd.²⁰ Greatly outnumbered, the Black men fled in cars back to Greenwood.²¹ That night, there were more firefights in the streets of Greenwood, as white men looted shops for weapons and were deputized by the sheriff and given guns.²² The residents of Greenwood spent a nervous night.²³

In the early morning of June 1, a siren sounded, and an invasion began.²⁴ Airplanes flew low over the district, with white men firing weapons from the air at Black people caught outdoors.²⁵ A machine gun positioned on a hill fired down a main street.²⁶ Unhindered by the Tulsa police or the local National Guard, which had arrived during the night, white men piled across the railroad tracks that bordered the community, shooting anyone who did

¹⁴ For descriptions of pre-Massacre Greenwood, see ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 14–17; ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 14–16. For photographs of Greenwood before the Massacre, see HILL, *supra* note 9, at 23–29.

¹⁵ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 45–49.

¹⁶ *Id.*; ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 17–19; BROPHY, *supra* note 1, at 24.

¹⁷ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 48; BROPHY, *supra* note 1, at 24–25; KREHBIEL, *supra* note 4, at 30–36 (reviewing the reporting of the Rowland/Page incident, noting that Rowland is described as a “delivery boy,” and reviewing differing accounts of the editorial missing from the surviving microfilm copy of the newspaper).

¹⁸ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 49.

¹⁹ *Id.*

²⁰ *Id.* at 50–52.

²¹ *Id.*

²² *Id.* at 54–55.

²³ *Id.*; ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 20–26; BROPHY, *supra* note 1, at 26–43; PARRISH, *supra* note 4, at 9–11 (recounting her own thoughts and actions).

²⁴ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 55.

²⁵ *Id.* at 63.

²⁶ *Id.*

not immediately surrender and pulling people from their homes.²⁷ As some Black residents fought back in building-to-building urban warfare, others fled north out of the city to escape the mob.²⁸ Throughout the day, white Tulsans systematically removed remaining Black residents at gunpoint and marched them to internment sites in white Tulsa, including the baseball stadium.²⁹ Then, crowds looted the empty businesses and houses before setting them on fire.³⁰ At midday, martial law was declared and more National Guard troops arrived from Oklahoma City, assisting in the process of taking Black residents into custody and disarming and sending white civilians home, thus bringing a gradual end to the killing, destruction, and thieving.³¹

By the time the Massacre ended, “Greenwood [was] gone,” its residents killed, interned, or fled and its business district and more than 1,000 residences destroyed.³² The number of those killed is uncertain, with estimates ranging from twenty-nine to over 300.³³ Some Black Tulsans spent a week in internment, needing a white guarantor to be released.³⁴ More than \$2 million (\$26 million in today’s currency) in property was destroyed.³⁵ The American Red Cross organized disaster relief in the form of secondhand clothes, food, and tents, and many residents spent the long, cold winter camping on their burned-over lots.³⁶ While not all the survivors returned to Tulsa, most did, and the rebuilding began immediately.³⁷ By the start of World War II, Greenwood was once again a thriving Black community.³⁸

RACE AND PROPERTY LAW

It is unsurprising that the Massacre is not part of the property law curriculum, not only because it has been so widely forgotten but also because multiple efforts by survivors and lawyers have failed to translate any of its events into a significant legal opinion, the raw material of most first-year

²⁷ *Id.* at 55, 59.

²⁸ *Id.* at 61, 63.

²⁹ *Id.* at 59.

³⁰ *Id.* at 57.

³¹ *Id.* at 61.

³² ELLSWORTH, THE GROUND BREAKING, *supra* note 1, at 37–38; ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 7.

³³ ELLSWORTH, THE GROUND BREAKING, *supra* note 1, at 123–24 (reviewing lack of information about the dead and the source of estimates).

³⁴ *Id.* at 38.

³⁵ HILL, *supra* note 9, at 6.

³⁶ ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 79–82, 89–94 (noting that aid was also provided by other local and national groups, including the NAACP).

³⁷ BROPHY, *supra* note 1, at 88–93. For photographs, see HILL, *supra* note 9, at 202–13.

³⁸ ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 108–09. For photographs of the rebuilt neighborhood, see HILL, *supra* note 9, at 213–20. To learn more about Greenwood, present and past, see *About Us*, GREENWOOD CULTURAL CTR., <https://www.greenwoodculturalcenter.org/about-us> (last visited Feb. 13, 2022).

classes.³⁹ There are numerous judicial decisions from throughout U.S. history, however, which lay bare the connections between race and property forged and maintained by law. Due to decades of work by legal scholars and historians considering these opinions, including their historical context and their present effect, it should be no secret that property and property law in the U.S. are inextricably bound to the construction of race.⁴⁰ By “bound to the construction of race,” I mean that property and property law have contributed to the ordering of our society and our thinking such that race has seemed like a set of biologically defined categories that should and do influence the ways in which Americans treat each other and the distribution of resources among us, a contribution that is both historical and ongoing. Law—including, but not limited to, the law of slavery and the laws mandating Jim Crow racial segregation—has been a part of our society, politics, and culture since the Founding in ways that have kept racial categories significant, even though scientific claims to define race have been debunked.⁴¹

History illuminates this relationship.⁴² If we look back, clearly and steadily, at the history of North America since the European conquest—considering, with attention to the racial identification of all participants, who owned property, who was considered property, who took property, who lost property, who started out with property, and who has ended up with property—we can only conclude that racial identity is significant to questions of property. A legal education is not needed to understand this overall picture. A legal education is, however, useful to understand the workings of *law* in the racialized allocation of property and power. The law is the framework for the uses of more material forms of power, such as the gun and the lash. It determines which uses of force are permitted and which are punished, as explored by other participants in the Symposium.⁴³ The law also shapes the

³⁹ For past legal efforts and the resulting opinions, see *supra* note 1.

⁴⁰ See K-Sue Park, *Race and Property Law*, in THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Khiara Bridges & Emily Houh eds., Oxford University Press) (forthcoming) (manuscript at 2–3), <https://ssrn.com/abstract=3908102> (tracing the connections across U.S. history, citing earlier scholarship, and documenting the extent to which property law scholarship has ignored this legal history). There is, however, as Park also notes, more work to be done. Park, *This Land is Not Our Land*, *supra* note 6, at 1983, 2001–04 (noting that while “[m]any people in and outside the legal academy already understand that law played a key role in facilitating the conquest of Indigenous lands and the trade of human beings,” there remain missing histories and failures to find relevant source materials).

⁴¹ KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 123–28 (2019).

⁴² In addition to the historical summary in Park, *Race and Property Law*, *supra* note 40, at 2–3, see Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1, 42 (1991) (challenging us to begin our analysis of American property by “asking how the law treats the original possessors of land in the United States”); Harris, *supra* note 5, at 1714 (using history to analyze how whiteness acts as property in ways that shifted over time with changing laws).

⁴³ The history and present-day ramifications of the law of force, with respect to the Tulsa Race Massacre, were explored in the second panel of the symposium, “Lack of Protection,” featuring Nicholas Johnson, Robert Cottrol, Norrinda Hayat, and John McMahon; see also Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 654–55 (2012) (exploring the “nastiness, anger, and pain” involved in property conflicts and the historic relationship between atrocities and property).

definition of property and the means by which it is owned and transferred. Thus, although a legal education may not be necessary to grasp that law is a part of history, in order to understand property law—one goal of legal education—it must be taught in the context of history.⁴⁴ Yet, the historically grounded link between property and race is generally absent from legal education.⁴⁵

I, like so many other lawyers, was educated under what Professor K-Sue Park recently called the “norm of erasure” in legal education—a norm that perpetuates the continuing failure to consider “histories of racial violence,” such as the Massacre, and, through that erasure, fails to address how property and property law in the United States are inextricably bound to the construction of race.⁴⁶ I, therefore, entered the legal profession with little appreciation of the relationship between property and race, and, in my ignorance, I returned to the property classroom prepared to inflict similar ignorance upon my students. Fortunately, I have had the luxury of relying on members of the legal academy who have made the connections between race and property law ever more visible during their years of teaching, scholarship, and advocacy.⁴⁷ I have the aid of materials that others have prepared, including a coursebook on property law and race, co-authored by Brophy, and a property law casebook organized by Joseph Singer that helps students begin their analysis of American property by “asking how the law treats the original possessors of land in the United States.”⁴⁸

I use their work to haltingly and incompletely explore the past and present racialized dimensions of property law in the classrooms I lead, taking my own small steps to avoid reproducing the costs of law’s selective memory in this area.⁴⁹ I do not always succeed. I make wincingly bad

⁴⁴ K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 *passim* (2022).

⁴⁵ Park, *This Land is Not Our Land*, *supra* note 6, at 1995–98, 2000–01; Park, *The History Wars and Property Law*, *supra* note 44, at 9.

⁴⁶ Park, *Race and Property Law*, *supra* note 40, at 2; Park, *This Land Is Not Our Land*, *supra* note 6, at 1983; *see also* Kara W. Swanson, *Race and Selective Legal Memory: Reflections on Invention of a Slave*, 120 COLUM. L. REV. 1077, 1081–83 (2020) (arguing that there is a color line in the selective memory of law that excludes African American sites of memory and describing another example of what was erased from my legal training and practice).

⁴⁷ Touchstones of my thinking about property and race include Singer, *supra* note 42, and Harris, *supra* note 5.

⁴⁸ Singer, *supra* note 42, at 42 (setting a challenge to take “the law of American Indian property . . . seriously”); ALFRED L. BROPHY, ALBERTO LOPEZ & KALI N. MURRAY, *INTEGRATING SPACES: PROPERTY LAW & RACE* (2011); JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (7th ed. 2017). I also depend on *Critical Race Theory and Property*, in DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* 275 (2d ed. 2007); *see also* Park, *The History Wars*, *supra* note 44 at 1071–91 (tracing the history of the property casebook to emphasize the rarity and recency of such teaching aids).

⁴⁹ *Cf.* Swanson, *supra* note 46, at 1111–18 (tracing the costs of law’s selective memory and considering ways to mitigate them in patent law).

missteps, and my students teach me about my continued blind spots. This Symposium has confronted me with yet another blind spot: I knew next-to-nothing about the Tulsa Race Massacre, and I had not spared one moment to think about what that event tells me and could tell future lawyers about property law.

Thanks to the invitation to participate in this Symposium, I have had the privilege of reading the historiography of the Massacre while also preparing to teach and teaching property law, thus correcting my ignorance about the events in Tulsa while also thinking about how best to help future lawyers learn about property. In doing so, I have noticed that the scholarship and teaching aids that I have relied upon focus on conquest and slavery as the twin racialized origins of property law in the United States—with good reason.⁵⁰ Conquest references the history of dispossession of the original inhabitants of North America by European settlers and their descendants. This history focuses on real property and the peculiarities of “Indian title,” which Singer has used to great effect to argue that the protection of property under U.S. law depends on the legally recognized racial identification of its claimant.⁵¹ Slavery references racialized chattel slavery, a system in which U.S. law enforced the theft of labor (and much more) from Black Americans who were defined as property. The law of slavery also created a jurisprudence of race, legally defining race in ways that contributed to whiteness as a form of property, reproducing and maintaining white supremacy.⁵² These careful and important explications provide rich resources for the property classroom.

Sometimes lost between the theft of land from Native people and the theft of labor and personhood from Black Americans is the theft of land from Black Americans. Recent work has linked the history of racial slavery to the twentieth-century history of racialized zoning, redlining, and urban renewal—all practices in which property law has inhibited Black Americans from acquiring real property or from owning real property that has appreciated significantly, contributing to persistent racial wealth gaps in the twenty-first century.⁵³ Yet, Black Americans who succeeded in acquiring

⁵⁰ Harris, *supra* note 5, at 1715 (describing “racialized conception of property” as “undergirding both” the “seizure and appropriation of labor” from Black Americans and the “seizure and appropriation of land” from Native Americans); Park, *This Land Is Not Our Land*, *supra* note 6, at 1983 (making the erasure of histories of conquest and slavery the centerpiece of her analysis); Park, *The History Wars*, *supra* note 44 (analyzing the same); see also BROPHY, LOPEZ & MURRAY, *supra* note 48, at xii–xv (beginning with conquest and slavery to understand “race in the making of property law,” and then considering the “racial regulation of public spaces,” “discrimination and the sale or occupancy of real property,” as well as numerous contemporary topics).

⁵¹ Singer, *supra* note 42, at 43.

⁵² Harris, *supra* note 5, at 1739–41.

⁵³ See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* vii–x (2017) (recounting history of government involvement in racial segregation of land occupancy and ownership and related wealth disparities); BROPHY, LOPEZ &

land are often overlooked.⁵⁴ The history of the Tulsa Race Massacre offers an opportunity to add another perspective to the complex historic relationship of race and property in the United States by focusing our attention on a place and time in which Black Americans had accumulated significant wealth in the form of real and personal property.⁵⁵

It is with this background and with reliance on the expertise of others that I offer a rethinking of a lesson on trespass.

TRESPASS AND THE MASSACRE

The law defines the intentional intrusion onto the land of another without permission as a trespass, both a crime and a civil wrong—that is, a tort.⁵⁶ I, and many other property professors, teach the concept early in the course as part of a foundational discussion of what property is and how the law protects it. Property includes the right to exclude, and trespass is the translation of that asserted right—“Get off, and stay off!”—into legal language and claims that can be enforced with the power of the state. As I tell my students, anyone who has said, “Mine!,” has a working definition of property.⁵⁷

MURRAY, *supra* note 48, at 98–113, 121–46, 163–86 (addressing racially restrictive covenants, civil rights law, and real estate transactions from the perspective of racial segregation of neighborhoods); Park, *Race and Property Law*, *supra* note 40, at 1 (arguing that race played a key role in producing property values starting with enslavement and colonization and continuing to the present); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855 *passim* (examining real property loss in Black communities related to twenty-first century predatory lending); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 *passim* (1999) (considering racial effects of urban development).

⁵⁴ One conspicuous exception is the attention to gradual loss of Black-owned farmland due to rules of intestate succession. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 *passim* (2001); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WISC. L. REV. 557 *passim*; Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 32 (2014); *see also* Angela P. Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157, 160 (2015) (considering American farms as a site of race-making and the “whitening of American farm ownership”). Also lost in a history that focuses only on whites, Blacks, and Native peoples are Latinx and Asian American peoples. While beyond the scope of these remarks, the dimensions of race and property with respect to other racial identifications are explored in the legal literature. *See, e.g.*, BROPHY, LOPEZ & MURRAY, *supra* note 48, at 89–98, 146–53 (considering laws banning land ownership by noncitizens that were intended to prohibit ownership by Asian immigrants and property ownership in primarily Latinx *colonias* on the Texas border).

⁵⁵ *See* Chris M. Messer, Thomas E. Shriver & Alison E. Adams, *The Destruction of Black Wall Street: Tulsa’s 1921 Riot and the Eradication of Accumulated Wealth*, 77 AM. J. ECON. SOC. 789, 790 (2018) (analyzing the massacre as the eradication of accumulated wealth).

⁵⁶ SINGER ET AL., *supra* note 48, at 3; *see also* BLACK’S LAW DICTIONARY 1–3 (11th ed. 2019) (defining “trespass”).

⁵⁷ I’m not the only property professor who uses that explanatory tactic. *See, e.g.*, MICHAEL HELLER & JAMES SALZMAN, MINE! HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES 1 (2021).

Trespass, especially when explained through a childish shout of “Mine!,” reminiscent of playground disputes, is a seemingly trivial wrong that in no way encompasses the scope of an armed invasion of a community, involving the most serious crimes, including murder, arson, and theft.⁵⁸ The word “massacre” was chosen to encapsulate the Tulsa events to emphasize the violent taking of human life.⁵⁹ The search for and excavation of mass graves continues in Tulsa as an important part of the reckoning with its past.⁶⁰ The deaths require us to consider the Massacre alongside the contemporaneous history of racial lynching, which is also an important history to remember and reclaim.⁶¹ As Brophy has argued, the early twentieth-century practice of lynching in Oklahoma was a contributing factor to the Massacre, and the ongoing violence wreaked on Black bodies throughout the United States by extralegal mobs is part of the way we need to understand what the law has to do with this story and many others.⁶²

Without diminishing those realities, when I consider the Tulsa Race Massacre as a property professor, I see trespass underlying the murder, arson, and theft. The Black community took up arms to defend life, starting with saving Dick Rowland from a lynch mob, then continued to act in defense of their community in the most material and spatial sense, seeking to exclude the unwanted intrusion into their property.

Black men created a line of defense around Greenwood, fighting to protect businesses, houses, and the lives of their families, strategically placing themselves inside and around Black-owned buildings, and resisting the burning of structures on Black-owned land in order to protect all that such property offered, including rental income, security, and appreciation of value.⁶³ It was not just “Black Wall Street” that was under attack. In addition to the assault on the business district that was a source of livelihood for so

⁵⁸ As I shared in the slides accompanying my oral presentation at this Symposium, I have inadvertently added to this trivialization in my property classroom by illustrating my slide of the elements of the doctrine with a picture of Winnie the Pooh and Piglet next to a “Trespassers Will” sign outside Piglet’s home.

⁵⁹ HILL, *supra* note 9, at 5. *But see* ELLSWORTH, THE GROUND BREAKING, *supra* note 1, at 123 (recounting how W.D. Williams rejected the term “massacre” because “[w]e got as many of them as they did of us”). Note that in ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 3, W.D. Williams is referred to by his childhood name of Bill.

⁶⁰ ELLSWORTH, THE GROUND BREAKING, *supra* note 1, at 123–24, 235–45, 253–54, 263–68 (describing city-financed excavations in 2020); *see also* Carma Hassan, *A Total of 27 Graves Have Been Found So Far at 1921 Tulsa Massacre Search Site*, CNN, <https://www.cnn.com/2021/06/08/us/tulsa-race-massacre-coffins-found/index.html> (June 8, 2021, 5:01 PM) (detailing continued excavation).

⁶¹ BROPHY, *supra* note 1, at 2–23 (discussing massacre in the context of lynchings in Oklahoma).

⁶² *Id.* at 8–23; *see also* Brophy, *More Than Property*, *supra* note 9, at 831 (2016) (using BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM (2014), to consider the losses in Greenwood as dignity takings and part of the response in following decades as the “preservation or restoration of dignity”).

⁶³ BROPHY, *supra* note 1, at 41–42 (describing defenders taking strategic locations); PARRISH, *supra* note 4, at 11 (“[O]ur men were fighting in vain to hold their dear Greenwood”); ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 55 (describing Black Tulsans in “defensive positions”).

many who had left behind lives as agricultural laborers to become entrepreneurs and professionals, white Tulsans invaded and torched Black residences, both modest and grand.⁶⁴ Black Tulsans also fought to defend personal property, including the well-tailored clothes, jewelry, pianos, furniture, and housewares that represented acquired wealth and status.⁶⁵

Some of the Black women and men in Tulsa were just one generation removed from slavery.⁶⁶ The property they owned, real and personal, represented a transformation from being the object of property to being the subject of property. In the words of United States Supreme Court Justice William O. Douglas, “Enabling a [Black American] to buy and sell real and personal property is a removal of one of many badges of slavery.”⁶⁷ Their property represented independence, self-sufficiency, and a material erasure of the differences in dwellings, furnishings, and clothing that had long distinguished the enslaved from their enslavers in the United States. Greenwood’s Black residents were accumulating and using property just like white residents of Tulsa. Their property offered a means of claiming not whiteness as property but, perhaps, citizenship through property in a country whose laws had long denied both citizenship and property to persons of African descent.⁶⁸ Tulsa had been, in the words of Black Tulsan John Williams, a “promised land” of freedom and opportunity for Black Americans and that freedom and opportunity were defined in part through property ownership.⁶⁹

The Tulsa Race Massacre stands out not just for the number of lives lost, but also for the systematic and utter destruction of property, building by building, block by block. In an organized system, deputized white men disarmed and arrested Black people, herded them into internment camps, and left their homes to the mercy of white mobs who first looted, then burned, turning a thriving business and residential district into smoldering rubble. This was the theft of property, dependent every step of the way on trespass by the white participants.

⁶⁴ BROPHY, *supra* note 1, at 45, 50, 53, 57.

⁶⁵ *Id.* at 57 (citing a white man who went to Greenwood seeking to prevent the burning of his rental properties, who described looting of “pianos, victrolas, clothing, chairs, musical instruments, clothing of all kinds”); ELLSWORTH, THE GROUND BREAKING, *supra* note 1, at 33–34 (describing looting, including by “women with shopping bags”).

⁶⁶ BROPHY, *supra* note 1, at 2 (describing post-Emancipation migration); ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 12 (noting that some Black Oklahomans had arrived involuntarily, enslaved by Cherokees and Creeks); MADIGAN, *supra* note 4, at 242–43 (retelling a story, reported in *Tulsa World* on June 2, 1921, that described a Massacre survivor as formerly enslaved).

⁶⁷ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 444 (1968) (Douglas, J., concurring).

⁶⁸ Harris, *supra* note 5, at 1714, 1718 (analyzing “whiteness as property” and describing laws preventing property ownership); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 413 (1857) (denying citizenship to free and enslaved Black Americans).

⁶⁹ ELLSWORTH, DEATH IN A PROMISED LAND, *supra* note 2, at 1 (quoting John’s son Bill (W.D.), who recounted his father’s explanation of why he had migrated to Tulsa from Mississippi).

As I think of the Black residents first defending their property and then, by the power of the state, being prevented from doing so, I think of Professor Felix Cohen's definition of property, published in 1954:

[T]hat is property to which the following label can be attached:
To the world:

Keep off X unless you have my permission, which I may grant
or withhold.

Signed: Private citizen
Endorsed: The state⁷⁰

My property students and I encounter this definition in *Jacque v. Steenberg Homes, Inc.*, a case decided in 1997 by the supreme court of my home state of Wisconsin, in which the court vindicated the private property rights of an "elderly" white couple retired from farming.⁷¹

The Jacques sued for trespass after a mobile home company, over the Jacques' strenuous objections, dragged a mobile home across their field in order to deliver it to a customer's lakefront lot that was otherwise accessible only by an unplowed and sharply curved private road.⁷² Steenberg Homes did not want to spend the money required to plow seven feet of snow off the private road or to maneuver the mobile home around a hairpin turn. Instead, after a discussion with town officials, neighbors, and Mr. Jacques, during which Jacques reiterated his refusal of access and proved that he owned the land in question, Steenberg employees plowed a path through the Jacques' field and moved the home.⁷³

The jury found that the Jacques suffered no economic harm but awarded punitive damages of \$100,000.⁷⁴ The Supreme Court of Wisconsin affirmed the award, citing cases back to 1814 for the principle that, "in certain cases

⁷⁰ Felix S. Cohen, *Dialogue on Private Property: The Pragmatic Meaning of Private Property*, 9 RUTGERS L. REV. 357, 374 (1954). Cohen was a leading legal realist and an expert on American Indian law who taught legal philosophy, worked in the New Deal federal government, and engaged in the private practice of law. See generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941); DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 4-5 (2007); ALICE BECK KEHOE, A PASSION FOR THE TRUE AND JUST: FELIX AND LUCY KRAMER COHEN AND THE INDIAN NEW DEAL (2014).

⁷¹ *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997). The Jacques' racial identification is confirmed by the records of the 1940 Census and Harvey Jacques' draft registration card. SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION SCHEDULE, State of Wisconsin, County of Ozaukee, S.D. No. 6, E.D. No. 45-17, Sheet No. 3B (enumerating Harvey, under Jacques); SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION SCHEDULE, State of Wisconsin, County of Ozaukee, E.D. No. 45-5, Sheet No. 15A (enumerating Lois, under birthname Barnes) (each identified "W" under "color or race"); Draft Registration Card, Ser. No. 212, June 30, 1942 (identifying Harvey Jacques as "White Race").

⁷² *Jacque*, 563 N.W.2d at 156-57.

⁷³ *Id.* at 157.

⁷⁴ *Id.* at 158.

of trespass, the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property."⁷⁵ My students uniformly and easily agree that the right to exclude others is an important aspect of owning property, and they agree with the court's conclusion that property rights become "hollow if the legal system provides insufficient means to protect" them.⁷⁶ They, like the justices, are offended by the facts indicating that the mobile home company deliberately disregarded the Jacques' wishes in order to maximize its profit when other alternatives were available. A witness testified that Steenberg Homes' assistant manager had ordered his employees to proceed just out of sight of the Jacques' house; when he was told that the mobile home had been moved across the field, he reacted by "giggling and laughing."⁷⁷

The Court quoted Cohen's definition of property in support of its holding that the Jacques suffered "actual harm," even though their frozen field was undamaged by the passage of the mobile home. Steenberg Homes "would not take 'no' for an answer" when the Jacques told them they were withholding permission to be on their land.⁷⁸ It refused to respect the metaphorical label attached to the Jacques' farm, telling the world to keep off. The justices concluded that the Jacques' rights had "no practical meaning" without an ability to obtain a state-enforced damages award when their directive, "No, you cannot cross our land," was ignored.⁷⁹ Their ability to obtain significant damages for trespass was the endorsement by the state of that invisible label, an essential part of the legal definition of property.

In upholding the punitive damages award of \$100,000, the court also referenced "society's interest in protecting private property."⁸⁰ Appropriate punishment of intentional trespassers, the court declared, preserves "the integrity of the legal system."⁸¹ Reviewing the facts, the court found that Steenberg Homes showed "an indifference and a reckless disregard for the law, and for the rights of others."⁸² Punitive damages were appropriate to "remov[e] the profit from illegal activity," to deter Steenberg Homes from repeating its outlaw approach to mobile home delivery, and to deter others from refusing to take no for an answer.⁸³ "When landowners have confidence in the legal system, they are less likely to resort to 'self-help'

⁷⁵ *Id.* at 159 (citing *McWilliams v. Bragg*, 3 Wis. 424 (1854) and *Merest v. Harvey* (1814) 128 Eng. Rep. 761 (CP)).

⁷⁶ *Id.* at 160.

⁷⁷ *Id.* at 157.

⁷⁸ *Jacque v. Steenburg Homes, Inc.*, 548 N.W.2d 80, 81 (Wis. Ct. App. 1996).

⁷⁹ *Jacque*, 563 N.W.2d at 160.

⁸⁰ *Id.* at 160, 165–66.

⁸¹ *Id.* at 160.

⁸² *Id.* at 164.

⁸³ *Id.* at 165.

remedies.”⁸⁴ The conclusion of the court and my students is that enforcement of trespass law is needed to force would-be wrongdoers to refrain from misconduct and to save property owners from the understandable resort to self-help through force.

What happens if we take this opinion, so useful for explaining the law of trespass and so clear in its promise of state defense of private property, and add knowledge of the Tulsa Race Massacre? What was the value of the “loss of the individual’s right to exclude others from his or her property” experienced by every property owner and tenant in Greenwood?

White Tulsans levelled thirty-five city blocks, rendering over 1,000 families homeless and destroying every business.⁸⁵ The property losses included the Dreamland Theatre, operated by the Williams family in a building that they built and owned.⁸⁶ In a revised lesson, I imagine that sharing a photograph or two of the Massacre’s aftermath would be worth more than a thousand professorial words when considering these questions about trespass and the definition of property.⁸⁷ For example, consider the photograph of the burned Dreamland Theatre, with the marquee sign drooping against a hollow shell.⁸⁸ The income from this property supplemented the confectionary business that Loula Williams operated out of another building that she and her husband, John, also built and owned—a building that additionally housed their apartment and office space for Black professionals.⁸⁹ In yet a third building, John operated his garage. The Williamses were the first residents of Greenwood to own an automobile, and white Tulsans brought their cars to John’s garage, as he was one of the few in the city with expertise in the new machines.⁹⁰ The Williams family lost their home, rental income, and three businesses in the Massacre, after the efforts of John, his son, and other men to defend their properties with firearms failed in the face of overwhelming force, and the Williamses fled for their lives in a hail of bullets.⁹¹

If the Jacques were entitled to \$100,000 in 1997 for having to live with the knowledge that a mobile home was dragged across their field—an outrage they did not witness and which left no trace on their land—what is the appropriate compensation for the “actual harm” suffered by the Black

⁸⁴ *Id.* at 160.

⁸⁵ ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 75–77.

⁸⁶ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 2–3.

⁸⁷ As part of its on-line exhibit on the Massacre, The Tulsa Historical Society and Museum has made numerous photos available for public viewing. *Photos*, TULSA HIST. SOC’Y & MUSEUM, <https://www.tulsaohistory.org/exhibit/1921-tulsa-race-massacre/photos/> (last visited June 8, 2022); *see also* HILL, *supra* note 9 (publishing photos with accompanying context).

⁸⁸ *See, e.g.*, BROPHY, *supra* note 1, at cover; HILL, *supra* note 9, at 74 fig.1.30.

⁸⁹ ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 2–3.

⁹⁰ *Id.* at 1–2.

⁹¹ *Id.* at 5–6; *see also* ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 79–82 (describing details as told to Ellsworth by survivor W.D. Williams in 1975).

residents of Tulsa, who watched armed men enter their homes, light their drapes on fire, and drag their possessions into the street, then were marched away with their hands in the air, fearing being shot at every moment?⁹² What is the appropriate compensation when the noneconomic harm of having their property invaded was compounded by the loss of every possession except the clothing on their backs?

If I shared this history with my students, and then detailed the grand jury investigation that found that the Black community was responsible for its own destruction, the failure of the legal system to convict any white perpetrator, the refusal of white Tulsa to aid its Black neighbors in the aftermath, and the dismissal of each lawsuit seeking recovery for losses, what might we conclude about “the integrity of the legal system?”⁹³

The Wisconsin court noted that “one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser . . . who refuses to heed no trespass warnings.”⁹⁴ No court, policeman, or city official considered the Black Greenwood residents “frustrated landowners” facing “brazen trespassers.” They were, rather, treated as if they had no right to property; that is, they were treated as if they had no power to attach a label telling the world to keep off anything that their earnings had bought. As Brophy has noted, on the morning of June 1, the white men in Tulsa who were authorized to use force—the police and National Guard—lined up facing Greenwood, with their backs to white Tulsa.⁹⁵ The power of the state was defending white-owned property, even as white Tulsans trespassed by invading Black-owned property.

White Tulsans in 1921 acted as if “the black man has no rights which the white man was bound to respect,” their actions echoing the *Dred Scott v. Sandford* decision of 1857, formally overturned by the Reconstruction Amendments.⁹⁶ Rather than property-owning citizens, Black Tulsans were treated like a key character in another foundational property law case I discuss with my students: the fox in *Pierson v. Post*, whose ownership

⁹² The detail about the drapes is from the account of survivor George Monroe, five years old and hiding under a bed with his sister when armed white men led their mother away at gunpoint and set their home on fire. ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 113–14. In addition to the first-hand accounts of Black Tulsans rousted from their homes and interned, *see* ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 27–38; ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 57–63; BROPHY, *supra* note 1, at 44–59, there are photographs of armed whites marching Black men with their hands in the air to internment sites, as well as guarding Black women and children who were also taken into custody, sometimes in family groups and sometimes separated. HILL, *supra* note 9, at 92–130.

⁹³ ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 41 (noting that the grand jury concluded that the riot was “the direct result” of the actions of “colored men” and indicted only Black Tulsans); BROPHY, *supra* note 1, at 74–76 (reviewing the lack of legal accountability). *But see* Brown, *supra* note 1 (reporting on a pending lawsuit that survived a motion to dismiss).

⁹⁴ *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 209 (Wis. 1997).

⁹⁵ BROPHY, *supra* note 1, at 52–53.

⁹⁶ *Scott v. Sandford*, 60 U.S. 393, 407 (1857).

sparked the lawsuit.⁹⁷ One of the judges in *Pierson* described the hunted fox, a wild animal without the ability to own property or to protest its killing in a court of law, as a “pirate” outside “the law of nations,” whom public policy urged should be hunted out of town.⁹⁸ White Tulsans proudly circulated postcard images of the burned Greenwood district with the caption: “RUNING [sic] THE NEGRO OUT OF TULSA.”⁹⁹ Like foxes, Black Tulsans had been hunted from their homes, some captured, and others killed.

On June 1, 1921, Black Tulsans had no state endorsement of their decisions to “grant or withhold” access to their property. In the Massacre, the ability to own property—previously withheld from Black Americans, free and enslaved, by force of law and so recently granted by the Civil Rights Act of 1866—was withdrawn as city and state officials facilitated the burning and looting.¹⁰⁰ In Tulsa, the trespasser, rather than the “frustrated landowner,” was given the endorsement of the state, while the Williamses and their neighbors became the outlaw “pirates,” paraded through town with their hands in the air to the jeers of white Tulsans.¹⁰¹

As Brophy has argued, the Massacre was part of an ongoing dynamic in which Black Tulsans sought in vain for the “rule of law,” which they believed would offer them equal treatment.¹⁰² Even the basic principle of trespass failed to withstand anti-Black racism. White Tulsans “pursued a different law [that allowed] control through terror.”¹⁰³ Instead of respecting the metaphorical labels Black Tulsans thought the law had attached to their property, white Tulsans labeled Black Tulsans. After the Massacre, Black Tulsans could only be released from internment upon obtaining a green identification card or a beige “WORKMAN” tag, each naming the white person who had certified that the wearer would “be kept inside or at their place of work.”¹⁰⁴ Black Tulsans were returned to being the objects of property, bearing another’s name.

⁹⁷ *Pierson v. Post*, 3 Cai. 175, 175 (1805).

⁹⁸ *Id.* at 177, 180 (Livingston, J., dissenting).

⁹⁹ HILL, *supra* note 9, at 59 fig.1.17; *see also* BROPHY, *supra* note 1, at 8, 66 (describing early references by white Oklahomans to “negro drives” as violent means of removing Black residents and reproducing photo with this handwritten caption).

¹⁰⁰ 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

¹⁰¹ Parrish, *supra* note 4, at 42–43 (recording testimony of A.J. Newman that he was “called all kinds of names”); *see also* Hill, *supra* note 9, at 112–13 (interpreting photos to show that “white onlookers seem[ed] to enjoy the public spectacle of Black Tulsans being herded through the streets”).

¹⁰² BROPHY, *supra* note 1, at 2.

¹⁰³ *Id.* at 6; *see also id.* at 2 (describing different Black and white views of law in Oklahoma before the Massacre).

¹⁰⁴ *See* Hill, *supra* note 9, at 133–40 figs.2.33–2.37 (showing various versions of identification cards and labels issued after the riot).

CONCLUSION

Thirty years ago, Joseph Singer demonstrated how it can be shocking and effective to show future lawyers that United States Supreme Court cases on American Indian law lead inexorably to the conclusion that:

[I]f we want to help a client determine the extent of its property rights, the first thing we need to know is whether the client is an American Indian nation or, say, a business corporation. The law provides a certain level of protection for the interests of General Motors and quite a different level of protection for the interests of the Yakima Nation. Imagine having to explain this to a client, and being asked why.¹⁰⁵

The Tulsa Race Massacre offers an opportunity to make a similar comparison between the white Wisconsin farmers, Harvey and Lois Jacque, and Black Tulsans, such as the Williamses. The Massacre returns us to a moment in which Black Tulsans acquired both real and personal property, were threatened by trespassers bent on theft and destruction, attempted self-help, and found both self-help and the legal system insufficient to protect their assertion of property ownership. Considering the law of trespass in this historic context “appears to reverse the abstract principles” taught as bedrock property law.¹⁰⁶

Applying the clear terms of *Jacque* can lead only to the conclusion that the property rights of Greenwood residents were “hollow.” During the Massacre, they were hollow as the state defended white property and facilitated the destruction of Black-owned property. After the Massacre, they were hollow as claims for compensation by Greenwood residents were denied by the City and the courts.¹⁰⁷ In 1997, the same year that the Wisconsin Supreme Court approved \$100,000 in damages to repair the “actual harm” to the Jacques, the Tulsa Race Riot Commission began its work and, eventually, in 2001, it recommended reparations to Massacre survivors.¹⁰⁸ The Oklahoma legislature refused, however, and instead passed a bill that gave each a “gold-plated medallion.”¹⁰⁹

The Tulsa Race Massacre offers a lesson that the ownership of real property in the United States is not only racialized through the legal

¹⁰⁵ Singer, *supra* note 42, at 44.

¹⁰⁶ See Park, *The History Wars*, *supra* note 44, at 58–59 (discussing how historical context similarly reverses the property law doctrines of discovery, labor theory, and possession).

¹⁰⁷ Black lawyers won one major victory in the wake of the Massacre. They challenged a city plan to seize the neighborhood for redevelopment through the imposition of a restrictive fire code designed to prevent rebuilding and won a ruling that it was unlawful, even as rebuilding proceeded as fast as Greenwood residents could find money and materials. BROPHY, *supra* note 1, at 93–95; ELLSWORTH, *DEATH IN A PROMISED LAND*, *supra* note 2, at 84–88.

¹⁰⁸ *Final Report of the Oklahoma Commission to Study The Tulsa Race Riot of 1921*, *supra* note 1, at 20 (“Reparations are the right thing to do.”).

¹⁰⁹ ELLSWORTH, *THE GROUND BREAKING*, *supra* note 1, at 176.

ratification of conquest, with racially discriminatory treatment of possessors that systematically dispossessed Native peoples, but also through extralegal means that took property from United States citizens. The survivors of the Massacre had deeds and bills of sale. They had paid dollars for their possessions. In sum, they made property claims through the same activities as white Tulsans. Yet, non-owners were allowed to trespass at will and property owners were denied the state's endorsement of their rights—that is, when the trespassers were white and the property owners were Black.

If I offer my students the classic definition of trespass with knowledge of the Massacre, we are forced to consider what asterisks are missing from the definition: “unprivileged, intentional intrusion onto property owned by another.” Is trespass in the United States, in many times and places, including Tulsa, Oklahoma on May 31 and June 1, 1921, more accurately defined as the unprivileged, intentional intrusion onto property owned *by a white person*? Or does whiteness confer the “privilege” that allows intentional intrusion onto property owned by Black people?¹¹⁰ This revised lesson requires us to wrestle with how, why, and when principles of law are seemingly reversed in ways that link what property is to how property ownership is sustained.

The Tulsa Race Massacre also offers a lesson on the limits of property law by focusing our attention on how much depends on the state endorsement Cohen identified. In Tulsa, that endorsement depended on the action of numerous individuals—sheriffs, police, National Guardsmen, grand jury members, and the mayor—choosing whose property claims to support, deciding what sort of self-help was tolerable, and determining who was allowed to use force.

These lessons are an answer to my starting question of what we gain if property law were taught with full knowledge of the Tulsa Race Massacre. We would gain lawyers with an added understanding of the complex historic relationship of race and property in the United States. Even the most seemingly straightforward rule shifts with the racial identification of the actors. Comparing the experiences of the Jacques and the Williamses prepares future lawyers to be attentive to the ways in which the rules that they learn only have meaning when people (including, but not limited to, those in the legal system) choose to apply them. It challenges those of us who nod our heads approvingly at the reasoning in *Jacque v. Steenberg Homes, Inc.* to consider the frustrations and claims of others whose property rights are ignored with all the sympathy that a Wisconsin jury and supreme court showed the Jacques, and to examine the reasons why that sympathy has often been absent.

¹¹⁰ Here, I use “privilege” in the legal sense to mean a legally cognizable reason that makes an intentional intrusion onto property owned by another not a trespass. Traditionally, students are taught that privilege includes some sort of consent by the owner, necessity, or public policy. SINGER ET AL., *supra* note 48, at 4.

These, of course, are not the only lessons the Tulsa Race Massacre offers property students. Brophy reminds us that the Massacre is worth studying as an example of one of many riots caused, in part, by racial segregation of housing. The same Jim Crow laws that helped the Greenwood business district prosper by providing a captive consumer base for Black businesses also provided a convenient locus for white anger at the growing wealth of the Black community by concentrating Black wealth in one neighborhood.¹¹¹ As we discuss the forgetting, remembering, and reevaluation of the events in Tulsa, we also need to recognize that it is not the only such massacre to be deliberately forgotten.¹¹² Each event like the Tulsa Race Massacre offers lessons to future lawyers, as well as opportunities for lawyers with an understanding of race and property law in United States history to participate in ongoing conversations about redress and reparations.

¹¹¹ BROPHY, *supra* note 1, at 333.

¹¹² *See, e.g.*, LERAE UMFLEET, 1898 WILMINGTON [NC] RACE RIOT COMMISSION, 1898 WILMINGTON RACE RIOT REPORT (2006); MAXINE D. JONES ET AL., A DOCUMENTED HISTORY OF THE INCIDENT WHICH OCCURRED AT ROSEWOOD, FLORIDA IN 1923: A REPORT SUBMITTED TO THE FLORIDA BOARD OF REGENTS (1993); Kyle Whitmire, *Ambushed in Eufaula: Alabama's Forgotten Race Massacre*, ADVANCE LOCAL, <https://www.al.com/news/2022/01/ambushed-in-eufaula-alabamas-forgotten-race-massacre.html> (Feb. 7, 2022, 4:38 PM).