

NOTES

DEAD MEN BRING NO CLAIMS: HOW TAKINGS CLAIMS CAN PROVIDE REDRESS FOR REAL PROPERTY OWNING VICTIMS OF JIM CROW RACE RIOTS

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INTRODUCTION

For years now I have heard the word “Wait!” It rings in the ear of every Negro with piercing familiarity. This “Wait” has almost always meant “Never.” We must come to see, with one of our distinguished jurists, that “justice too long delayed is justice denied.”¹

—Martin Luther King, Jr., *Letter from Birmingham Jail*

July Perry, a black citizen, was hanged on Election Day in 1920 in Ocoee, Florida.² Rumor had it he tried to vote—hanging was the penalty—but some members of the black community in Ocoee whispered that he and his family were targeted because of their wealth.³ July Perry and his family were not the only victims in Ocoee; census records show that after the year 1920, almost 500 black residents disappeared.⁴ Over 100 of these residents owned their own land.⁵ The series of events that unfolded has been termed “the Ocoee Riot.”⁶ As Election Day darkened into night, black residents were given a choice: they could either leave the town or die.⁷ A deputized mob that was partially composed of government officials made good

1. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 85, 91 (Beacon Press 2010) (1963).

2. See Death Certificate of July Perry (Fla. Bureau of Vital Records, File No. 12160) (on file with author); Katherine K. Parry, Constructing African American Histories in Central Florida 26 (2008) (unpublished M.A. thesis, University of Central Florida), http://etd.fcla.edu/CF/CFE0002271/PARRY_KATHERINE_K_200808_MA.pdf [<https://perma.cc/TG4U-VZ6J>]; Edward Ericson, Jr., *Dead Wrong*, ORLANDO WKLY. (Oct. 1, 1998), <http://www.orlandoweekly.com/orlando/deadwrong/Content?oid=2258296> [<https://perma.cc/F4J2-8P6Y>].

3. See Parry, *supra* note 2, at 26; Ericson, *supra* note 2.

4. See Ericson, *supra* note 2; see also *Further Trouble in Florida Unexpected: Area Around Orlando and Ocoee, Where Race Riot Started Tuesday, Now Quiet*, MONTGOMERY ADVERTISER, Nov. 5, 1920, at 3 [hereinafter *Further Trouble*] (explaining that a “general exodus of negroes ... has taken place”); Roger Thurow, *Ocoee Is Now Integrated, yet Push for Memorial Puts Some on Edge*, WALL ST. J. (Oct. 30, 1998, 12:01 AM), <http://www.wsj.com/articles/SB909643177259261000> [<https://perma.cc/8E62-857D>].

5. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, FOURTEENTH CENSUS OF THE UNITED STATES: 1920—POPULATION (Florida, Orange County, Precinct 10: Ocoee, Sheet Nos. 1A-9A); Parry, *supra* note 2, at 12-13.

6. See, e.g., Parry, *supra* note 2, at 26-27 (citing Zora Neale Hurston, *The Ocoee Riot*, ESSENCE, Feb. 1989); Joy Wallace Dickinson, *Film Airs Ocoee's Riot and Its Legacy*, ORLANDO SENTINEL (Nov. 10, 2002), http://articles.orlandosentinel.com/2002-11-10/news/0211080440_1_ocoee-salisbury-perry [<https://perma.cc/XF4N-CBF7>].

7. See Parry, *supra* note 2, at 22.

on the death threats.⁸ A committee of white Ocoee residents, together with the local court, distributed black residents' property to white citizens in the aftermath; the victims were uncompensated for the most part, although some received a few dollars.⁹ Congress endorsed the actions of the Ocoee government and white citizens after the fact, commending them for upholding "law and order."¹⁰ Cruelly, the black cemetery in Ocoee—abandoned for eighty years after the riot—is located in a subdivision off Bluford Avenue, named for Captain Sims, who took ownership of Perry's land.¹¹ Adding insult to injury, every year the Ocoee government throws a festival celebrating the town's founders: former slave owners J.D. Starke and Captain Sims himself.¹² In 2014, the city of Ocoee paid \$302,000 to celebrate the founders.¹³

The Fifth Amendment forbids the taking of private property by the government without just compensation.¹⁴ The Supreme Court has held that outright seizure of property is unnecessary to support a takings claim for compensation; it is enough if "the government authorizes a compelled physical invasion of property."¹⁵ When government actors require the property owner to submit to such an invasion, a taking has occurred, and the Constitution requires that

8. See, e.g., *No Indictments in Florida Case: Special Grand Jury Investigates Riot at Ocoee on Election Day*, STATE (Columbia, S.C.), Dec. 2, 1920, at 1 [hereinafter *No Indictments*]; *Probe Ordered of Ocoee Riot: Florida District Attorney Instructed to Investigate*, MACON DAILY TELEGRAPH, Dec. 18, 1920, at 3 [hereinafter *Probe Ordered of Ocoee Riot*].

9. See Parry, *supra* note 2, at 36-37; Dolores Barclay et al., *Landownership Made Blacks Targets of Violence and Murder*, MAMIWATA (2006), <http://www.mamiwata.com/murder.html> [<https://perma.cc/Q2Y4-5HVF>].

10. *The Ku-Klux Klan: Hearings Before the H. Comm. on Rules*, 67th Cong. 65 (1921) [hereinafter *KKK Hearings*].

11. See Gabrielle Finley, *Task Force Remembers 1920 Riot in Ocoee*, ORLANDO SENTINEL (Nov. 1, 2007), http://articles.orlandosentinel.com/2007-11-01/news/orremember01_1_ocoee-riot-task-force [<https://perma.cc/W685-9LDP>].

12. See *Bluford M. Sims*, CITY OCOEE (2008), <https://web.archive.org/web/20130104001904/http://www.ocoee.org/General/History/BlufordSims.htm> [<https://perma.cc/M82U-3KRH>]; *Ocoee History*, CITY OF OCOEE, <https://web.archive.org/web/20130109030338/http://www.ocoee.org/General/History> [<https://perma.cc/LS9Q-HYY7>] (last visited Mar. 30, 2016). See generally OCOEE FOUNDERS' DAY FESTIVAL, <http://ocoeefoundersfestival.org/> [<https://perma.cc/9R5V-PE98>] (last visited Mar. 30, 2016).

13. E-mail from Diana Turner, Mun. Records Coordinator, City of Ocoee, to Melissa Fusesell (Feb. 4, 2015, 15:43 EST) (on file with author).

14. U.S. CONST. amend. V.

15. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

the property owner be awarded just compensation.¹⁶ The victims of the Ocoee Riot and their families have been deprived of their property for nearly one hundred years, and even during the hopeful time of Florida's Rosewood Reparations Claim Bill's success, lawmakers and attorneys alike maintained that the State of Florida had no similar reparations obligation to the victims of the Ocoee Riot.¹⁷

Though the lack of reparations for the Ocoee Riot victims is tragic, it need not be the end of the story. Remedies for racial injustice are not limited to civil rights actions or reparations claims bills. Alternatively, takings claims can offer a means of redress to descendants of victims who lost real property during American race riots.¹⁸ This Note explores the possibility of such claims through the example of the little-known Ocoee Riot's most prominent victim, July Perry, the taking of his property by government officials after his lynching, and the kangaroo court proceedings¹⁹ constructed to mislead his family members who attempted to seek redress in probate proceedings. Part I of this Note addresses real property claims as a means of redress for descendants of race riot victims. Part II outlines and applies the takings claim solution to the Ocoee Riot. Finally, Part III explains why courts should allow equitable defenses in order to decide these cases on the merits.

This specific race riot illuminates one potential path to redress, but this narrow focus should not be taken to mean that this example is a rare one. There were hundreds of race riots with very similar facts,²⁰ and perhaps this frequency is in part responsible for the miniscule attention that most of them received; a common

16. *See id.*

17. Jerry Fallstrom, *Victims of Ocoee Violence Have Little Hope of Payment*, ORLANDO SENTINEL (Mar. 27, 1994), http://articles.orlandosentinel.com/1994-03-27/news/9403270240_1_rosewood-massacre-ocoe-e-violence [<https://perma.cc/HNT4-VZWD>].

18. For a better description of race riots generally, see ELLIOT JASPIN, *BURIED IN THE BITTER WATERS: THE HIDDEN HISTORY OF RACIAL CLEANSING IN AMERICA* (2007).

19. *Cf.* George B. Lockwood, Editorial, *An Open Letter to the Florida Governor*, TOPEKA PLAINDEALER, Nov. 26, 1920, at 1 (discussing the Florida government's lack of punishment after the Ocoee Riots).

20. *See* JASPIN, *supra* note 18, at 6 (estimating that around 1800 of these incidents likely occurred across the country); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 70-71 (2005) ("The Tulsa case is not unique. Unfortunately, this pattern of racial violence, and the concomitant denial of a legal remedy, has repeated itself in communities throughout the United States.") (footnote omitted).

occurrence does not merit as much media attention as a rare one.²¹ It is not the goal of this Note to describe every such tragedy, but rather to use one riot to show how justice has been blatantly denied. The Ocoee Riot, also known as the Ocoee Massacre,²² is but one in which hundreds of black citizens²³ disappeared in a matter of days. The takings claim analysis is well-suited to the particular facts of the Ocoee Riot, but it is applicable to other race riots as well. Admittedly, the takings claim solution is underinclusive compared to reparations avenues. However, racial injustice reparations cases have been largely unsuccessful thus far. This Note takes the position that providing some victims with a remedy is preferable to providing no victims with a remedy.

I. A REAL PROPERTY REMEDY FOR RACE RIOT VICTIMS

*The people on the south of town are being threatened that they must sell out and leave or they will be shot and burned as the others have been.*²⁴

A. Race Riots as a Source of Real Property Claims

While incidents of racial cleansing were very common, most of them are relatively unknown to the American public.²⁵ The Tulsa

21. See Parry, *supra* note 2, at 18-19 (“This approach was common through the South where lynching did not need to be explained or investigated.”); see also Lester Dabbs, Jr., A Report of the Circumstances and Events of the Race Riot on November 2, 1920 in Ocoee, Florida 11 (July 1969) (unpublished M.A. thesis, Stetson University) (recognizing seven other race riots) (on file with author).

22. See Ericson, *supra* note 2.

23. This Note refers to “black citizens” for two reasons: first, to highlight the fact that these people were American citizens, and second, to highlight the arbitrary nature of the denial of their rights. The term “African American” has often been misused to signal to whites that black people are not “regular” Americans—white people are. Modifiers are used for Native Americans, Asian Americans, African Americans, and so on, but seldom is the term “European American” or “Caucasian American” used.

24. Letter from Mrs. J.H. Hamiter to Mrs. Huston (Nov. 28, 1920) (Library of Congress Manuscript on file with author) [hereinafter Letter from Mrs. J.H. Hamiter].

25. See JASPIN, *supra* note 18, at 7; Barclay et al., *supra* note 9 (explaining that property owners in locations where race riots occurred were unaware of their land’s violent history, but were disturbed when they learned of it).

Riot²⁶ is one of the most widely recognized, perhaps because of its official, government-endorsed fact-finding commission.²⁷ The victims of the Tulsa Riot brought a suit using the commission's findings, but, ironically, the commission could have been a contributing factor to the survivors' failure to overcome the statute of limitations in court; the dissenting opinion pointed out that the victims were at least aware of the potential cause of action after the commission made its findings.²⁸

For many race riots, there have been no such commissions.²⁹ To uncover the truth, the events must be pieced together from aging sources. The identities of would-be defendants can be unclear due to the passage of time and past deception. Victims' failed attempts at redress thus far have not been unsuccessful for lack of diligence or effort.³⁰ In the case of Ocoee, like in the cases of so many other towns and cities across the United States, great pains have been and continue to be taken to ensure no one with dark skin ever finds out what truly happened.³¹

There were some efforts to uncover the truth of what happened in Ocoee on Election Day, but there were no officially commissioned inquiries.³² Even the well-meaning news reports did not address the economic losses of the victims.³³ Observers did note that there were still no black residents in Ocoee in 1960.³⁴ Zora Neale Hurston wrote an article about it that was published posthumously in *Essence*; at

26. The Tulsa Riot involved the destruction of an entire black community in Oklahoma. For a detailed description, see Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67 (2001).

27. See *Alexander v. Oklahoma*, 391 F.3d 1155, 1159-60 (10th Cir. 2004) (Lucerno, J., dissenting).

28. See *id.* at 1162, 1163-64.

29. See JASPIN, *supra* note 18, at 7 (noting that Rosewood's fact-finding commission made it unique as a racial cleansing investigation).

30. See Barclay et al., *supra* note 9.

31. See, e.g., JASPIN, *supra* note 18, at 9 (explaining that even historians are often secretive and evasive about racial cleansing in their communities); James C. Clark, *Ocoee Has Tales to Tell at Founder's Day*, ORLANDO SENTINEL (May 8, 1994), http://articles.orlando.sentinel.com/1994-05-08/news/9405050256_1_ocoee-founder-day-residents [<https://perma.cc/TCH3-2TW4>] ("One subject that will not be mentioned on Founder's Day is the two-day period in 1920 when a race riot led to lynchings and shootings that left between six and 30 people dead.").

32. See Parry, *supra* note 2, at 36-37.

33. See *id.* at 34.

34. See *id.*

the time of the article's publication, a local county commissioner said that the details were "best left in the past."³⁵

Race riots resulting in real property takings, like race riots themselves, are not as rare as they might seem.³⁶ Quite a few incidents are infamous, but many others are relatively unknown, buried by decades of fear and secrecy.³⁷ Although they occurred in different places, and different events were blamed as triggers, common threads exist among them.³⁸ Generally, the takings happened after there had been substantial accumulation of wealth in the black communities.³⁹ The black citizens typically fled from their communities under threat of death, too afraid to return; their aggressors either seized their property without compensation or gave them insignificant compensation.⁴⁰ As with Ocoee, white representatives were sometimes appointed to execute the estates of those who died in the riot.⁴¹

B. The Ocoee Riot and Real Property Claims

*So night dusted down on Ocoee, with the mobs seeking blood and ashes, and July Perry standing his lone watch over his rights to life and property.*⁴²

35. *Id.* at 35.

36. *See, e.g.*, JASPIN, *supra* note 18, at 5; Malveaux, *supra* note 20, at 70-71 (acknowledging that the Tulsa Race Riot was not unique in either occurrence or lack of legal recourse).

37. *See* Barclay et al., *supra* note 9.

38. *See* JASPIN, *supra* note 18.

39. *See, e.g.*, Brief for Appellants at 4, *Alexander v. Oklahoma*, 391 F.3d 1155 (10th Cir. 2004) (No. 04-5042) (explaining that Greenwood, where the Tulsa Race Riot began, was known as the "Negro Wall Street"); Ramona Lowe, *Jealousy Is Source of Fla. Terror*, CHI. DEFENDER, July 30, 1949, at 1-2 (reporting that jealousy over prosperity of black citizens caused weeklong race riot in Groveland, Florida, and acknowledging that a similar incident happened in Ocoee); Barclay et al., *supra* note 9.

40. *See* Barclay et al., *supra* note 9 ("The attacks on Birmingham and Pierce City were part of a pattern in Southern and border states in the first half of the 20th century: lynchings and mob attacks on blacks, followed by an exodus of black citizens, some of them forced to abandon their property or sell it at cut-rate prices.")

41. *See id.* (explaining that white executors administered lynching victim's estate, including hundreds of acres of cotton land, after his murder during the Abbeville, South Carolina, race riot).

42. Zora Neale Hurston, *The Ocoee Riot*, ESSENCE, Feb. 1989, at 130.

NAACP investigation records show that Perry lost his life and his property on Election Day after his friend Moses Norman attempted to vote.⁴³ No one ever found Norman's body and no death certificate was issued; he simply disappeared.⁴⁴ Sources show Norman to be a wealthy man, free of debt.⁴⁵ Norman owned a large amount of grove land, his own home, and even a car.⁴⁶ Although Norman never had any run-ins with the law, white citizens disliked him, in large part because he was "too prosperous—'for a n[-----]'"⁴⁷ Perry also owned his "land free and clear"⁴⁸ and had taken steps to manage and protect his property.⁴⁹ Many speculated that the wealth accumulation in the black Ocoee community provoked the white community into "taking them down."⁵⁰

What can be ascertained today from census records is that roughly 450 black citizens disappeared from the town of Ocoee after 1920.⁵¹ No one can know for sure how many died; indeed, the white citizens themselves acknowledged this fact at the time.⁵² However, some individual stories survive and help shed light on the events.⁵³

One man, James Langmead, who owned his land free of any encumbrances,⁵⁴ stayed with his land too long. The mob came for him

43. See Walter F. White, *Election Day in Florida*, in *DISENFRANCHISEMENT OF COLORED AMERICANS IN THE PRESIDENTIAL ELECTION OF 1920*, at 9, 9-10 (NAACP), <http://www.swarthmore.edu/SocSci/rvarell1/docs/NAACPPapers.pdf> [<https://perma.cc/V9EQ-874C>].

44. See Ericson, *supra* note 2.

45. See White, *supra* note 43, at 9-10; see also Parry, *supra* note 2, at 26.

46. White, *supra* note 43, at 9.

47. *Id.* at 10.

48. ORANGE CTY. COMPTROLLER, DEED NO. 19070132155 (Book 132, Page 155) (recorded Mar. 13, 1907); see U.S. CENSUS BUREAU, *supra* note 5 (Florida, Orange County, Precinct 10: Ocoee, Sheet No. 4, Line 19: Perry, Julius P.).

49. See Lockwood, *supra* note 19, at 1.

50. Parry, *supra* note 2, at 26.

51. Compare U.S. CENSUS BUREAU, *supra* note 5 (Florida, Orange County, Precinct 10: Ocoee, Sheet Nos. 1A-9A) (showing 450 black residents in Ocoee in 1920), with U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930—POPULATION, vol. 3, pt. 1, at 436 tbl.21 (reporting two black residents in Ocoee in 1930).

52. See White, *supra* note 43, at 10 (quoting a white man who said: "I don't know exactly but I know fifty-six n[-----]s were killed. I killed seventeen myself."); see also *Shotgun at Polls, Tragedy Results: Florida Negro Starts Battle that Costs Lives of Whites and Colored*, WASH. POST, Nov. 4, 1920, at 3 ("[U]nknown number of negroes killed at the scene of the riot.").

53. See, e.g., *Vivid Story of Ocoee Murders: One of Victims Passes Through City*, SAVANNAH TRIB., Dec. 11, 1920, at 1 [hereinafter *Vivid Story*].

54. See U.S. CENSUS BUREAU, *supra* note 5 (Florida, Orange County, Precinct 10: Ocoee, Sheet No. 5A, Line 4: Langmead, James).

when he did not leave; its members castrated him.⁵⁵ Late on election night, no one attempted to protect their property except for July Perry.⁵⁶ One woman, heavily pregnant, had stayed in her home because she did not think she could run fast enough to escape the deputized whites.⁵⁷ Her mother, unwilling to leave her alone, perished with her in the flames.⁵⁸ One man hiding in a barn tried to escape when the mob set fire to it but ran back inside to his death after the mob shot at him.⁵⁹

The deputized posse surrounded the black community of the town and burned it to the ground; those who tried to escape were shot or “forced back into the flames.”⁶⁰ The mainstream news accounts minced no words in describing the scene: “Armed whites were reported patrolling the region and closing in on negroes who fled to the woods, the pursuit being accompanied by intermittent firing.”⁶¹ Zora Neale Hurston, who personally knew the Perry family, gave a sobering description: “Fire was set to whole rows of Negro houses and the wretches who had thought to hide by crawling under these buildings were shot or shot at as they fled from the flames.”⁶² One white man told NAACP undercover investigator Walter White that he was unsure how many black citizens had died, but he personally knew at least fifty-six were killed and had himself killed seventeen.⁶³ White reported that Ocoee children happily talked of the fun times they had burning the black citizens.⁶⁴ Some white citizens purportedly took home pieces of burned bodies as keepsakes.⁶⁵ None of the Ocoee citizens interviewed by White felt that this series of tragic events was unusual; on the contrary, they seemed proud of it.⁶⁶ Although this is shocking, it is not unbelievable: the taking of

55. Hurston, *supra* note 42, at 130.

56. *See id.*

57. *See id.* at 130-31; *Vivid Story*, *supra* note 53, at 1.

58. Hurston, *supra* note 42, at 130-31.

59. *See id.* at 131.

60. White, *supra* note 43, at 10.

61. *Kill Two Whites and Six Negroes in Florida Riot*, N.Y. TIMES, Nov. 4, 1920, at 1.

62. Hurston, *supra* note 42, at 130.

63. *See* White, *supra* note 43, at 10.

64. *See id.*

65. *See id.*

66. *See id.*

body parts of black victims as souvenirs was not unheard of in Florida.⁶⁷ Neither was castration of the victims.⁶⁸

Government officials who worked on Election Day told black citizens they would be killed for voting.⁶⁹ Poll records showed that July Perry, blamed for the chaos, had paid his poll tax but had not voted.⁷⁰ A newspaper article published prior to the election listed the names of those who had paid their poll taxes; Norman's poll tax was apparently unpaid.⁷¹ The FBI investigation that followed found Norman to be the cause of the riot.⁷²

The group who carried out the slaughter claimed legal authority for doing so, but Orlando lawyer Alexander Akerman denied they had rightful authority.⁷³ For at least four days after the riot, Akerman continued to tell all people of color to remain in hiding because of the bloodthirsty chaos that pervaded the entire area.⁷⁴ Akerman wrote that the events in Ocoee were representative of Florida conditions generally,⁷⁵ claiming that black citizens in Florida held no more rights than "cattle, mules and hogs."⁷⁶ Akerman—a prominent lawyer—believed that there was no chance of redress for victims in the aftermath of the massacre.⁷⁷ He wrote to the Senate only to plead with them to change the representation of the South so that white voters would not benefit from the sheer number of black citizens they oppressed.⁷⁸

After Perry's lynching, his substantial estate should have gone to his wife and children.⁷⁹ The Ocoee government, however, arrested

67. See Isabel Wilkerson, *Trayvon's Killing and Florida's Tragic Past*, CNN (Mar. 26, 2012, 4:21 PM), <http://www.cnn.com/2012/03/26/opinion/wilkerson-trayvon/> [<https://perma.cc/QHG5-QTVC>].

68. See *id.*

69. See White, *supra* note 43, at 10.

70. See Letter from Alexander Akerman to Senator William Kenyon (Nov. 6, 1920) [hereinafter Letter from Akerman] (on file with author); see also *Probe Ordered of Ocoee Riot*, *supra* note 8, at 3.

71. See Parry, *supra* note 2, at 33 n.85.

72. See *id.* at 33.

73. See Letter from Akerman, *supra* note 70, at 2.

74. See *id.*

75. See *id.*

76. *Id.* at 3.

77. See *id.* at 2-3.

78. See *id.* at 3.

79. See Petition for Accounting, *In re Estate of J.P. Perry* (Fla. Orange County Ct. 1923) (No. 2555) [hereinafter Perry Petition].

Mrs. Perry and her daughter; this prevented Mrs. Perry from administering her husband's estate.⁸⁰ Ocoee officials said this detention of mother and child was "for safekeeping," despite recommendations that they be placed in a hospital.⁸¹ Members of the posse had shot Coretha, the Perrys' daughter, as she tried to flee the family home.⁸² The Orange County court, by order of Judge Frank Smith, appointed Captain Bluford Marion Sims as administrator of the estate instead of Mrs. Perry.⁸³ Although Perry's widow was imprisoned many miles away in Tampa,⁸⁴ she mysteriously managed to sign Captain Sims's application for administration of the Perry estate in Orlando, in front of a notary.⁸⁵ Notably, Captain James Leroy Giles, who was charged with organizing the posse that ultimately killed Perry,⁸⁶ also signed the application.⁸⁷ Judge Smith conveyed Perry's property to Captain Sims after Sims claimed, without showing evidence, that Perry owed him money.⁸⁸ Three years later, no doubt at great risk to their lives, the Perry family filed a petition in the local Orange County court requesting a report of Perry's estate from Captain Sims, whose personal business was real estate.⁸⁹

Judge Smith did not tell them the land had already been sold.⁹⁰ Instead, he told the family that it was unclear what had happened to the property, as Captain Sims had been declared legally insane.⁹¹

80. See *Further Trouble*, *supra* note 4, at 3; *Grand Jury Unable to Fix Blames for Deaths in Ocoee Fights*, Nov. 2, MIAMI HERALD, Dec. 2, 1920, at 1.

81. *No Indictments*, *supra* note 8, at 1.

82. See Bill Bond, *Fiery Battle Smolders in City's Past*, ORLANDO SENTINEL (Sept. 7, 1986), http://articles.orlandosentinel.com/1986-09-07/news/0250220288_1_ochoee-norman-salisbury [<https://perma.cc/MQ7L-6CWY>].

83. See *Perry Petition*, *supra* note 79.

84. See *No Indictments*, *supra* note 8, at 1.

85. Application for Letters of Administration, *In re Estate of J.P. Perry* (Fla. Orange County Ct. Nov. 13, 1920) [hereinafter *Application for Administration*].

86. See *As Negro Houses Burned at Ocoee Great Mass of Ammunition Is Exploded*, ORLANDO MORNING SENTINEL, Nov. 4, 1920 (on file at Library of Congress, Manuscript Division) [hereinafter *As Negro Houses Burned*].

87. See *Application for Administration*, *supra* note 85.

88. See ORANGE CTY. COMPTROLLER, DEED NO. 19220228149 (Book 228, Page 149) (recorded July 10, 1922).

89. See *Order for an Accounting*, *In re Estate of J.P. Perry* (Fla. Orange County Ct. Jan. 7, 1923).

90. See *Perry Petition*, *supra* note 79.

91. See *id.*

The judge ordered Captain Sim's guardian—his daughter-in-law Eva Sims—to provide an accounting, but she did not comply with the order.⁹² The February 1924 deadline for the report came and went.⁹³ Not only had much of the land been sold off at the time of the court's order on the Perry family petition, but it had been sold with the requirement that the land never be conveyed to Negroes; the deed coldly proclaimed: "It is further agreed that the herein named property cannot be sold to or otherwise conveyed to a negro."⁹⁴ Perry's family would not only fail to inherit the land; they would not be allowed to buy it.⁹⁵ This was how the Perry family lost their land to the town of Ocoee in the courts of Orange County, Florida.

Perry's family was not alone in losing their property. The Associated Press reported that 330 acres of land, in addition to 48 "city lots," were taken from the black families of Ocoee during the Ocoee Riot.⁹⁶

C. Standing for Descendants of Property Takings Victims

All reparations claimants must establish standing.⁹⁷ While the standing of plaintiffs in the case would be based on their relationship to the original victims, this does not mean standing is too tenuous to succeed; derivative actions are permitted in wrongful death and loss of consortium claims, for example.⁹⁸ Still, this kind of derivative standing requires more than a mere assertion of a genealogical relationship.⁹⁹ Were black citizens able to pursue claims as estate representatives rather than restitution claimants, they could

92. Compare Perry Petition, *supra* note 79, with Report: *In re J.P. Perry, Deceased* (Fla. Orange County Ct. 1923) (No. 2555).

93. See Order for an Accounting, *supra* note 89.

94. ORANGE CTY. COMPTROLLER, *supra* note 88.

95. See *id.*

96. Barclay et al., *supra* note 9.

97. See Yanessa L. Barnard, Note, *Better Late than Never: A Takings Clause Solution to Reparations*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 109, 115-16 (2005).

98. See Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1180-81 (2004).

99. See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1053 (N.D. Ill. 2004).

more readily overcome standing issues.¹⁰⁰ One proposed way of conceptualizing this has been to characterize descendants of property owners as holders of a constructive trust.¹⁰¹ Analogously, some courts establish constructive trusts in situations where one person kills another in order to wrongfully obtain inheritance.¹⁰² In such cases, a constructive trust remedy prevents the wrongdoer from profiting as a result of his wrong.¹⁰³

Typical reparations plaintiffs would seemingly need to link present damages to past wrongs.¹⁰⁴ Defendants must be legal entities that have existed since the wrong occurred, rather than deceased human individuals, for the necessary causal link to exist.¹⁰⁵ The plaintiff must show a connection between herself in the present and the defendant: the plaintiff must show that her ancestor was harmed by a specific defendant in the past.¹⁰⁶ Past attempts at showing hereditary injury have included showings of enduring social and psychological harm,¹⁰⁷ but real property interests are more easily proven than intangible, noneconomic interests.

The Supreme Court has recognized exceptions to the general requirement that plaintiffs assert their own property injuries.¹⁰⁸ One such exception is that a decedent's survivors are permitted to bring the decedent's property claims.¹⁰⁹ Suing as a representative of a relative instead of as a relative that inherited an injury is a means of getting closer to the actual injury, and some scholars argue it is sufficient to establish standing.¹¹⁰ In *Hodel v. Irving*, the Supreme Court ruled that heirs had standing to assert a takings claim based

100. See Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1159 (2004).

101. See Stephen Kershner, *Reparations for Slavery and Justice*, 33 U. MEM. L. REV. 277, 284 (2003).

102. See *Latham v. Father Divine*, 85 N.E.2d 168, 170-71 (N.Y. 1949).

103. See *id.* at 171.

104. See Martin D. Carcieri, *Rawls and Reparations*, 15 MICH. J. RACE & L. 267, 291 (2010); Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91, 96 (2004).

105. See Miller, *supra* note 104, at 96.

106. See *id.*; see also Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 90, 115-16 (2004) (discussing the constitutional requirements to bring a lawsuit for reparations).

107. See Miller, *supra* note 104, at 100-07.

108. See *Hodel v. Irving*, 481 U.S. 704, 711 (1987).

109. *Id.*

110. See Dagan, *supra* note 100, at 1159.

on the violation of their decedent's right to devise property.¹¹¹ In that case, the heirs were Native Americans, and the Court noted that, by statute, the Secretary of the Interior should have been the administrator of the estate.¹¹² The Court found that the heirs had standing to bring their takings claim because the assertion of the plaintiffs' rights turned on the argument that such administration was itself an unconstitutional taking.¹¹³

Hodel presents an easy point of comparison with the Ocoee heirs. The Ocoee heirs could assert that the appointment of Captain Sims was unconstitutional and without statutory authority. Indeed, some of them attempted to do so, but their pleas fell on deaf ears.¹¹⁴ The appointment of Captain Sims violated the Constitution insofar as it stripped the Ocoee victims of the right to devise their land.¹¹⁵ For those who had wills, they likely did not willingly devise their land to Captain Sims, and for those who did not, the land should have passed to their heirs under intestacy laws.¹¹⁶ The Court in *Hodel* said that permitting heirs to act as representatives of a decedent's property interest in court was "merely an extension of the common law's provision for appointment of a decedent's representative."¹¹⁷ Descendants of property owners have the right to sue for their ancestors' property.¹¹⁸ It thus follows that, particularly when the return of property would be unworkable, descendants should also have the right to sue for compensation.

II. A TAKINGS CLAIM SOLUTION TO THE REAL PROPERTY HARMS OF RACE RIOTS

It seemed to have been a pre-arranged affair to kill and drive the colored people from their homes as they were more prosperous

111. See 481 U.S. at 711-12.

112. See *id.* at 711.

113. See *id.* at 711-12.

114. See Application for Administration, *supra* note 85.

115. See *Hodel*, 481 U.S. at 711-12.

116. See FLA. STAT. § 732.101-.111 (2015).

117. *Hodel*, 481 U.S. at 712.

118. See generally *Lombard v. United States*, 356 F.3d 151 (1st Cir. 2004) (deciding suit by descendants of real property owner on merits); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 126 (E.D.N.Y. 2000) (finding descendants of Holocaust victims had standing to sue because property of intestate decedents would have passed to them directly by statute).

*than the white folks, so they are hoping to get their homes for nothing.*¹¹⁹

This sort of takings claim is unique. However, its uniqueness does not weaken the claim, but rather strengthens it. The factors that make race riot real property takings different from other takings cases simultaneously make them more egregious. It is often the case that very egregious acts fail to give rise to takings claims, as such acts are unauthorized by the government.¹²⁰ In the case of incidents like the Ocoee Riot, however, the acts appear to have been authorized by the government.¹²¹ It should be, perhaps, the clearest takings case: allegedly, government actors physically took and occupied private land belonging to United States citizens after either forcing them to leave or killing them.¹²² Plainly, there is no case law directly on point. This gap in jurisprudence is not an indication that the government has never taken property through such means—in some cases, the government has acknowledged that it has done so, such as with Native American lands and the Rosewood Massacre.¹²³ Rather, it may be an indication that these people were unable to bring claims for a host of reasons—fear, death, and the unavailability of courts among them. One historian summarized the situation as follows: “The law wouldn’t help There was just no one to turn to.”¹²⁴ Perry’s daughter made clear to reporters that, even at age eighty-seven, she never wanted to see a map of Ocoee; she had never returned out of fear for her life.¹²⁵

119. Letter from Mrs. J.H. Hamiter, *supra* note 24.

120. *See* *Bd. Mach., Inc. v. United States*, 49 Fed. Cl. 325, 331-32 (2001) (noting that the “more egregious acts” of the government cannot be compensated as takings claims).

121. *See* David W. Spohr, “*What Shall We Do with the Drunken Sailor?*”: *The Intersection of the Takings Clause and the Character, Merit, or Impropriety of Regulatory Action*, 17 SE. ENVTL. L.J. 1, 17 (2008) (discussing how to determine if a government act is authorized).

122. *See infra* Part II.A.

123. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 695, 696 tbl.1 (2003).

124. Barclay et al., *supra* note 9 (quoting historian George C. Wright, provost at the University of Texas at Arlington).

125. *See* Bond, *supra* note 82.

A. Physical Occupation of Real Property Caused by Government Action

*Captain Preston Ayers, Captain Chauncey Boyer, post commander of the local post of the American Legion, and Captain LeRoy Giles assumed charge of the work of organizing the various patrols, which was accomplished in a rapid and military manner. The patrols were armed with army rifles supplied by the county.*¹²⁶

Race riots like in Ocoee ostensibly involved physical occupation of real property by government actors.¹²⁷ If a government action results in the physical occupation of property, that action is a per se taking.¹²⁸ If government actions damage private property even indirectly, a plaintiff has grounds for a takings claim.¹²⁹ Generally speaking, any time a government actor takes property with the direct intention of depriving the owner of all rights associated with the land, it constitutes a physical taking.¹³⁰ Still, “there has rarely been a pure physical taking ... because our government and its agents rarely seize or occupy property without some arguable legal or regulatory authority.”¹³¹ The mere cutting off of access to the land is sufficient to support a takings claim.¹³² Notably, the Supreme Court has ruled that all permanent physical invasions of land are takings, regardless of whether or not that land is invaded for public purposes; accordingly, “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”¹³³ In the case of the Ocoee Riot, it appears government action was the cause of the property occupation.

The pasts of the powerful figures of that time in Orange County, particularly Captain Sims, bear mentioning when considering the role government action played in the Ocoee Riot. In addition to co-

126. *As Negro Houses Burned*, *supra* note 86.

127. *See id.*

128. *See* Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 WM. & MARY BILL RTS. J. 1181, 1188 (2012).

129. *See id.* at 1201.

130. *See* *Store Safe Redlands Assocs. v. United States*, 35 Fed. Cl. 726, 728 (1996).

131. *Id.*

132. *See* *Roth v. United States*, 73 Fed. Cl. 144, 148 (2006).

133. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

founding the town of Ocoee, Captain Sims sold July Perry his land¹³⁴ before later administering its sale after the riot.¹³⁵ Interestingly, Sims also sold the land that eventually housed the black community's church to several leaders of the black community in Ocoee, including Moses Norman, who would later disappear during the riot.¹³⁶ Many blamed the Ocoee Riot on Ku Klux Klan "outsiders,"¹³⁷ but it was—and is—widely accepted that as much as 90 percent of the Orange County Klan worked for the government at the time.¹³⁸

The political powers in Ocoee set the stage for the massive taking of land and property to occur.¹³⁹ Aware that black citizens were secretly registering to vote, they arranged for the Justice of the Peace to be out of town and for vigilant officials to be posted at the polls.¹⁴⁰ Should any black citizen attempt to vote, the officials would challenge their eligibility, and the only person who could verify their eligibility would be far away.¹⁴¹ Orange County Judge Bigelow went out of town in order to allow white backlash should the black citizens try to vote.¹⁴²

There is much disagreement on how, exactly, the riot started, but most agree that black citizen Moses Norman tried to vote, despite government steps to prevent him from doing so.¹⁴³ The survivors of the riot maintained that July Perry had voted early in order to sidestep the barriers erected by the government.¹⁴⁴ At some point, a deputized posse assembled outside the Perry home; accounts differ as to whether this original group was led by Deputy Sheriff Clyde Pounds or Orange County Sheriff Frank Gordon.¹⁴⁵ Sam Salisbury, former Orlando Police Chief, acknowledged after the riot that he led

134. ORANGE CTY. COMPTROLLER, DEED NO. 19200205060 (Book 205, Page 60) (recorded Jan. 1, 1920) (evidencing that B.M. Sims sold J.P. Perry his land).

135. See Order Appointing Administrator, *In re Estate of J.P. Perry* (Fla. Orange County Ct. Nov. 13, 1920) (appointing B.M. Sims as administrator of J.P. Perry's estate).

136. See ORANGE CTY. COMPTROLLER, *supra* note 134.

137. Dabbs, *supra* note 21, at 18, 43.

138. See Parry, *supra* note 2, at 17-18.

139. See Dabbs, *supra* note 21, at 23.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.* at 23-24.

144. See *id.* at 24.

145. *Id.* at 25-26.

one of the groups to the Perry home:¹⁴⁶ “It was Sam Sal[i]sbury who took a running start and kicked the back door open.”¹⁴⁷ At this point, the bloodshed reportedly began, and a downtown government-operated screen used to air election results allegedly publicized the riot, spawning the arrival of hundreds of men, including government officials, eager to have a piece of the burning of the “Northern Quarters.”¹⁴⁸ The former police chief claimed that Perry eventually was left hanging from a tree in Orlando, and the attending surgeon purportedly expressed little concern about the hanging, explaining that Perry probably would have died anyway, had he not been hanged.¹⁴⁹ Survivors of the incident alleged that this may have been because Salisbury’s posse dragged Perry from a car before hanging him.¹⁵⁰

B. Government Authorization and Endorsement of Physical Occupation of Private Land

*At 10 o’clock a message came to the Reporter-Star to flash on the screen, which was being used to show the election returns, a request for all able bodied men who had arms, to report at police headquarters. Simultaneously came a request from Captain Leroy Giles for all Home Guards to report at police headquarters in uniform.*¹⁵¹

The Ocoee Riot and its land takings create the impression of implied authorization by the government, and they were also apparently endorsed by the government after the fact. These facts support a takings claim solution for redress. A compelled invasion of physical property that is authorized by the government demands compensation under the Takings Clause of the Fifth Amendment.¹⁵² Takings claims require an affirmative showing that the government

146. *Id.* at 26-27.

147. Hurston, *supra* note 42, at 131.

148. *See* Dabbs, *supra* note 21, at 28-29.

149. *Id.* at 30.

150. *See id.*

151. *Eight Known to Be Dead as Result of Ocoee Riot: July Perry Strung from Limb of Tree and Shot to Death at Early Hour This Morning; Negroes Armed Showed Fight*, ORLANDO EVENING REP.-STAR, Nov. 3, 1920 (on file at Library of Congress, Manuscript Division) [hereinafter *Eight Known to Be Dead*].

152. *See* *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

action was authorized.¹⁵³ Although it may seem counterintuitive, unlawful government actions can be government-authorized.¹⁵⁴ The issue, then, is not whether the action was unlawful, but whether it was *ultra vires*.¹⁵⁵ Approval or ratification after the government action is sufficient to show government authorization, so long as the invasion continues after approval has been given for the government action.¹⁵⁶ If Congress is silent after the taking occurs as to whether the government actions were authorized, this can be sufficient for showing authorization, as Congress must express a “positive intent” in order for the action to be found unauthorized.¹⁵⁷ Judicial acts, as well as acts of other governmental branches, can constitute authorized takings.¹⁵⁸ For authorized action to occur, it is not necessary that the taking itself be authorized; only the actions that led to the taking must have authorization.¹⁵⁹

Even if some of the government actors, such as the police force or the county commissioner, had not been acting within the scope of their authority during the Ocoee Riot, this taking would still be within the bounds of government authorization. At a bare minimum, the courts had the authority to take the land, and they seemingly did so within that authority.¹⁶⁰ The evidence shows, however, that the specific behavior of the government actors was in fact authorized. Deputized men—not an unorganized mob—along with various members of the Orange County police force, destroyed private property.¹⁶¹ Indeed, in Ocoee, the police had express statutory authorization to assemble a posse of bystanders to ensure good order was maintained during elections: “Such deputy sheriff shall

153. See *Bd. Mach., Inc. v. United States*, 49 Fed. Cl. 325, 328 (2001).

154. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

155. See *Laitos & Abel*, *supra* note 128, at 1208.

156. See *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920); *Bd. Mach.*, 49 Fed. Cl. at 329.

157. *Bd. Mach.*, 49 Fed. Cl. at 329 (quoting *Del-Rio*, 146 F.3d at 1362-63).

158. See Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811, 811-12 (2012).

159. See *Spohr*, *supra* note 121, at 17.

160. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 715 (2010) (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”).

161. See, e.g., *Lockwood*, *supra* note 19; *Vivid Story*, *supra* note 53, at 1.

have power, when necessary to maintain the peace, to summon a posse from among the bystanders to aid him in maintaining the peace and good order at the polls.”¹⁶² If bystanders refused to join the posse, they could be charged with a crime.¹⁶³ Refusal to aid the sheriff was punishable by up to six months imprisonment.¹⁶⁴ At the time, home guards were considered state actors insofar as they were in service to the State of Florida.¹⁶⁵ Home guards handled the aftermath of the Ocoee Riot, which evidently included the seizure and destruction of property.¹⁶⁶ Further, county officials appear to have wrongly disposed of the property of black citizens by fraudulently asserting that they were indebted.¹⁶⁷ House Committee hearing findings show that these men acted within the scope of their duty and under authority vested in them by the State.¹⁶⁸ The House deemed the Orange County police force to have acted within their authority to maintain law and order.¹⁶⁹ Here, the question of authorization has an unusually simple answer: Congress directly acknowledged the authorization of the specific government actors that took the land from Ocoee citizens.¹⁷⁰ A fact-finding grand jury likewise found—beyond their duty—that the actions had been authorized and even lawful.¹⁷¹

Furthermore, the repeated rejection of antilynching and antiriot legislation makes it apparent that Congress, at the very least, lacked the requisite positive intent for this conduct to be found *ultra vires*.¹⁷² In 2005, the Senate issued an apology admitting it was responsible for numerous lynchings as a result of its failure to pass

162. FLA. STAT. § 4.283 (1920).

163. *Id.*

164. *Id.* § 2.5896.

165. See PARK TRAMMELL, REPORT OF THE ATTORNEY GENERAL OF THE STATE OF FLORIDA 44 (1911).

166. See, e.g., *A Severe Lesson to the Negroes: Strong Ammunition and Attacking the Whites Does Not Pay Them*, Ocala Evening Star, Nov. 4, 1920, at 1.

167. See Perry Petition, *supra* note 79; ORANGE CTY. COMPTROLLER, *supra* note 88.

168. See *KKK Hearings*, *supra* note 10, at 63-65.

169. See *id.* at 65.

170. See *id.*

171. See *id.* It is noteworthy that a grand jury also found the cause of the Tulsa Race Riot to be black troublemakers. See Brief for Appellants, *supra* note 39, at 6.

172. See Avis Thomas-Lester, *A Senate Apology for History on Lynching*, WASH. POST (June 14, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301720.html> [<https://perma.cc/HNW5-QGHT>].

necessary legislation, saying that preventing such acts was the “minimum and most basic of Federal responsibilities.”¹⁷³ The Senate’s apology acknowledged the Senate’s failure to pass antilynching legislation, and descendants of victims testified this failure resulted in their loss of real property following lynching.¹⁷⁴ Disturbingly, the intent of Congress looks to have been that the lynchings, mob violence, and constitutional violations continue: southern lawmakers maintained that lynching was “necessary for the protection of Southern womanhood.”¹⁷⁵ It seems doubtful that Congress would have found the Ocoee government’s actions unauthorized, considering the Senate resolution expressly stated that the Senate itself was responsible for the wrongs that took place.¹⁷⁶ It is telling that the same Congress that was able to amend the Constitution to ban alcohol¹⁷⁷ was unwilling to ban lynching.

Some takings stemming from the Ocoee Riot occurred through the courts: county judges knowingly facilitated the sale of stolen real property.¹⁷⁸ An Orange County judge also appointed County Commissioner Captain Sims as administrator of estates, despite the presence of lawful, capable heirs to whom Florida law gave priority.¹⁷⁹ Under Florida law at the time, the spouse of the decedent was the first preferred administrator, followed by the decedent’s children or lawful heirs entitled to distribution of the decedent’s estate; creditors were only to be appointed if none of these applied.¹⁸⁰ This appointment led to the uncompensated taking of Perry’s land.¹⁸¹ The county court fraudulently ordered seizure of Perry’s property due to mortgage debt; the debt was fabricated, likely by

173. S. Res. 39, 109th Cong. (2005).

174. *See id.*

175. *Anti-Lynching Bill Engages Senate in Lengthy Filibuster*, VASSAR MISCELLANY NEWS, May 1, 1935, at 1.

176. *See generally* Dabbs, *supra* note 21.

177. *See* U.S. CONST. amend. XVIII (repealed 1933).

178. *See* Order Confirming Report, *In re* Estate of J.P. Perry (Fla. Orange County Ct. Sept. 6, 1928).

179. *See* Perry Petition, *supra* note 79; *see also* *Widow and Daughter of Ocoee Negro Released from Custody of Sheriff*, MIAMI HERALD, Dec. 3, 1920, at 9.

180. FLA. STAT. § 2.3662 (1920). This was not unique to Ocoee. *See, e.g.*, Barclay et al., *supra* note 9 (noting that white citizens with ties to the mob that lynched a property owner were appointed executors of the lynching victim’s estate, which included hundreds of acres of “prime cotton land”).

181. *See* ORANGE CTY. COMPTROLLER, *supra* note 88, at 150; Barclay et al., *supra* note 9.

either the court or the county commissioner.¹⁸² By ensuring the Perry family was fearful of making an application to the court in the aftermath of the riot, Captain Sims was able to control the estate by claiming he was a creditor.

Additionally, this taking of property could hardly be said to be unauthorized when avoiding “Negro domination” was a widely expressed goal of the government. As Congressman Frank Clark pointed out:

I do not know if they are in the States generally enforcing the law, but I do know that we are enforcing it in Florida, and I do not think you will get a single, solitary, intelligent Negro in Florida to come here and say he is not being treated rightly.... They might just as well make up their minds that we are not going to have Negro domination in Florida.¹⁸³

While today this seems an atrocious and bizarre goal, Florida lawmakers would have considered efforts to avoid “Negro domination” as not only within the scope of governmental authority, but a top priority—the duty of government actors.¹⁸⁴ This mindset was not unique to Florida. In Louisiana, one defense attorney argued that his client could not be guilty of rape because he was still alive at the time of trial, knowing the southern jury would assume that were he guilty, he would have already been lynched.¹⁸⁵ The district attorney suggested lynching had been necessary to avoid “Negro domination.”¹⁸⁶ These remarks were held not prejudicial.¹⁸⁷

The Ocoee Riot occurred during the first presidential election following the then-popular film, *The Birth of a Nation*.¹⁸⁸ *The Birth of a Nation* was the first movie shown at the White House,¹⁸⁹ and one

182. Compare ORANGE CTY. COMPTROLLER, *supra* note 88, at 150, with ORANGE CTY. COMPTROLLER, *supra* note 48.

183. *Apportionment of Representatives: Hearings on H.R. 14498, H.R. 15021, H.R. 15158 and H.R. 15217 Before the H. Comm. on the Census*, 66th Cong. 194 (1921) [hereinafter *Apportionment Hearings*].

184. *See id.*

185. *State v. Petit*, 44 So. 848, 849 (La. 1907).

186. *Id.*

187. *Id.*

188. *See* THE BIRTH OF A NATION (Epoch Producing Corp. 1915).

189. *See* Michael Rogin, “*The Sword Became a Flashing Vision*”: D.W. Griffith’s *The Birth of a Nation*, 9 REPRESENTATIONS 150, 151 (1985).

particular part of this horrific film is important here. The movie ends with a message: after words flash across the screen, indicating that this is the next Election Day (1920), viewers are shown that many of society's problems are solved when white citizens gather together, don Klan attire, and prevent the black citizens from voting—at gunpoint.¹⁹⁰ Near Ocoee, a Kissimmee newspaper called *The Birth of a Nation* the “greatest world film.”¹⁹¹ Less than two years before the Ocoee Massacre, the same newspaper referred to the movie's “happy ending.”¹⁹² Even as late as 1946, a senator advised Mississippi citizens “to use *any means* to keep the n[-----]s away from the polls.”¹⁹³ This is precisely what the government and white citizens of Ocoee did.

There was a common perception among lawmakers that those disobeying the law were not lynch mobs, but lynching victims; Congressman James Aswell, while addressing an NAACP representative during a hearing on antilynching legislation, asked the representative whether the NAACP had made “an effort to prevent the Negro from doing the thing that causes lynching.”¹⁹⁴ While there was no specific statutory authorization to seize land and kill its owners, there was authorization to do whatever necessary to keep black citizens in check.¹⁹⁵ The South often refrained from codifying de facto laws to avoid Northern chastisement, but discriminatory laws persisted, even if off the books. When unable to discriminate through legislation, Florida enforced discriminatory de facto laws via a “prejudiced court.”¹⁹⁶

The takings of the Ocoee Riot involved numerous government actors, all acting within the scope of their positions.¹⁹⁷ Clearly, the police have the power to eject people from their homes, and the courts have the power to order the seizure of property and to appoint estate administrators. Property seizures during different race

190. See *THE BIRTH OF A NATION*, *supra* note 188.

191. “*Birth of a Nation*”: *Greatest World Film at Casino Thursday*, *KISSIMMEE VALLEY GAZETTE*, Jan. 6, 1922.

192. “*The Birth of a Nation*”, *KISSIMMEE VALLEY GAZETTE*, Feb. 8, 1918.

193. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 *FLA. ST. U. L. REV.* 55, 93 (2001).

194. *Apportionment Hearings*, *supra* note 183, at 69.

195. *See id.*

196. Joe M. Richardson, *Florida Black Codes*, 47 *FLA. HIST. Q.* 365, 376 (1969).

197. *See supra* Part II.A.

riots were also carried out by government officials. While in the case of Ocoee, they used these powers in an arguably unlawful manner, they did not do so in an unauthorized manner. The Ocoee Riot is not unique here; the mobs of the Tulsa Race Riot had government authorization as well.¹⁹⁸

The evidence implies that this injury was caused by the Orange County government, a branch of the government of the State of Florida. While many people say that it was not Ocoee specifically, but rather “outsiders” that caused the trouble, no one denies that all contributors were from Orange County.¹⁹⁹ This government action resulted in damages to the victims of the Ocoee Riot, inherited by their descendants.

III. DECIDING TAKINGS CLAIMS BY DESCENDANTS OF RACE RIOT VICTIMS ON THE MERITS

*It is not anticipated that further trouble will arise, though a heavy guard is being maintained to prevent the negroes from congregating or organizing.*²⁰⁰

Statutes of limitations are major hurdles for descendants of race riots, but courts should not permit procedural rules to compromise substantive justice here. It is within the discretion of courts to decide these cases on the merits. Courts can permit equitable defenses to overcome the statutes of limitations, and this approach is supported by policy considerations. Deciding these cases on the merits would provide a means of redress to race riot victims while avoiding many of the concerns that arise in typical reparations cases.

A. *Equitable Defenses as a Means of Overcoming Statutes of Limitation*

Equitable defenses, which can prevent defendants from effectively raising the statute of limitations as an affirmative defense, apply to the government just as they apply to private defendants.²⁰¹ Equita-

198. See Brief for Appellants, *supra* note 39, at 4, 7-9.

199. See Hurston, *supra* note 42, at 62.

200. *Eight Known to Be Dead*, *supra* note 151.

201. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

ble estoppel, applicable in cases in which defendant misconduct prevents a timely recovery, is unique in that it is essentially free of hard and fast rules.²⁰² The Supreme Court has made clear that equitable estoppel is not to be applied inflexibly, and that “specific factual contexts” may change the analysis.²⁰³ Essentially, equitable estoppel lacks a “universal definition.”²⁰⁴

Equitable estoppel, though flexible, has a firm basis in fraud.²⁰⁵ Generally speaking, equitable estoppel requires that one party has taken action that induced another party to fail to take legal action that the party would have otherwise taken.²⁰⁶ Traditionally, equitable estoppel involves detrimental reliance.²⁰⁷ Although reliance is often required, numerous courts have applied equitable estoppel when there has been no reliance in order to best serve principles of fairness or justice.²⁰⁸ Similarly, intent, while often required, has also been waived as a necessary element by some courts in order to promote fair play.²⁰⁹ Though many courts require willful misconduct, some courts have expanded this definition to include blameworthy negligence.²¹⁰

Most jurisdictions require that the misconduct be affirmative.²¹¹ Consequently, if the statute of limitations on an action has expired, equitable estoppel will allow a plaintiff to bring the claim only if the defendant has taken “active steps to prevent the plaintiff from suing on time.”²¹² False representation by the government is also required in most jurisdictions.²¹³ For example, if a defendant produces forged documents in order to prevent a plaintiff from knowing she

202. See T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 403 (2008).

203. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (observing that certain factors tipped the balance of equities in favor of barring the complaint before the Court).

204. Anenson, *supra* note 202, at 410.

205. See generally 28 AM. JUR. 2D *Estoppel and Waiver* § 46 (2015).

206. See *id.*

207. See Anenson, *supra* note 202, at 389.

208. See *id.* at 390.

209. See *id.* at 398-99.

210. See *id.* at 399.

211. See, e.g., *Bartlett v. U.S. Dep't of Agric.*, 716 F.3d 464, 475 (8th Cir. 2013); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985).

212. *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1072 (N.D. Ill. 2004) (quoting *Brademas v. Ind. Hous. Fin. Auth.*, 354 F.3d 681, 686-87 (7th Cir. 2004)).

213. See *Bartlett*, 716 F.3d at 476.

has a basis for legal action, equitable estoppel applies.²¹⁴ Along with misrepresentation by the government, courts generally also require “government intent to induce the claimant to act on the misrepresentation.”²¹⁵ Either ignorance of the facts or inability to obtain the facts is required of the plaintiff.²¹⁶ Most courts assess whether the plaintiff actually relied on the government misrepresentation to their detriment:

Thus, the party claiming the estoppel must have relied on its adversary’s conduct “in such a manner as to change his position for the worse,” and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary’s conduct was misleading.²¹⁷

Consequently, equitable estoppel can be raised successfully whenever a public entity engages in fraud with the intent that an individual change his position in a way that is detrimental to that individual.²¹⁸

Ocoee government actors engaged in affirmative misconduct that resulted in the taking of property rights from black citizens. The sheriff, with statutory authorization, deputized a posse of men to go investigate the trouble at the Perry house, which ultimately led to the destruction of Perry’s private property.²¹⁹ One property owner was reportedly beaten and castrated after trying to stay on his land,²²⁰ such accounts imply that the black citizens did not leave willingly. It was not passive indifference, but alleged affirmative misconduct, that resulted in the property takings.

Here, Orange County denied the Perry family redress in the courts; it promised them an accounting that never came, as it had already sold off their land.²²¹ Perry’s death certificate was altered in

214. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).

215. *Bartlett*, 716 F.3d at 475 (quoting *Rutten v. United States*, 299 F.3d 993, 995 (8th Cir. 2002)).

216. *See id.* at 476.

217. *Heckler v. Cmty. Health Servs. of Crawford Cty.*, 467 U.S. 51, 59 (1984) (footnotes and citation omitted); *see also Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *United States v. Harvey*, 661 F.2d 767, 774 (9th Cir. 1981).

218. *See Bell v. Fowler*, 99 F.3d 262, 267 (8th Cir. 1996).

219. *See supra* notes 145-50 and accompanying text.

220. *See supra* notes 54-55 and accompanying text.

221. *See supra* notes 90-93 and accompanying text.

an attempt to distance his death from the massacre and property seizures.²²² Considering the absence of supportive probate records, the administrator of Perry's estate may well have been falsely alleged to be insane.²²³ Perry was wrongly said to be in debt.²²⁴ The evidence strongly suggests the government inaccurately claimed that all "Negro property owner[s]" were paid for their land.²²⁵ The Orange County Supervisor of Elections appears to have falsified records to blame the riot on black citizens.²²⁶

Importantly, the government's apparent forgeries and falsehoods would have prevented the Ocoee victims from knowing they had a basis for legal action. The Tulsa Riot victims made a similar argument, contending "that the government fraudulently concealed its role in the race riot of 1921, thereby precluding them from timely filing."²²⁷ Unlike Tulsa, however, Orange County has never admitted responsibility for the Ocoee Riot.²²⁸ One recent Ocoee mayor continued to deny a massacre occurred, questioning the accuracy of estimates of those killed.²²⁹ Records suggest that the Ocoee government has engaged in misrepresentation on a massive scale.

As the government has repeatedly denied responsibility for the events, survivors would never have had any reason to know that the government was the appropriate defendant. Here, as with Tulsa, "[t]he plaintiffs' condemnation of the government for its laxity in policing ... is not the same as the plaintiffs' recognizing the government's affirmative participation in the riot."²³⁰ Ocoee officials have

222. See Death Certificate of July Perry, *supra* note 2; see also Parry, *supra* note 2, at 25.

223. See Perry Petition, *supra* note 79 (declaring that B.M. Sims was deemed insane in September of 1923, and that his daughter-in-law was appointed his guardian); ORANGE CTY. COMPTROLLER, *supra* note 88 (showing B.M. Sims engaging in a land transaction, with no guardian, in 1922).

224. See ORANGE CTY. COMPTROLLER, *supra* note 88; U.S. CENSUS BUREAU, *supra* note 5 (Florida, Orange County, Precinct 10: Ocoee, Sheet No. 4, Line 19: Perry, Julius P.); *Interview with Ella Brown Clark Pt. 2*, ORLANDO MEMORY (June 24, 2012), <http://orlandomemory.info/memory/audio/interview-ella-brown-clark-pt-2> [<https://perma.cc/7PHC-CP58>] [hereinafter *Interview with Ella Brown Clark*].

225. Dabbs, *supra* note 21, at 36-37.

226. See White, *supra* note 43, at 10.

227. Malveaux, *supra* note 20, at 99.

228. See, e.g., Hurston, *supra* note 42, at 62; see also Ericson, *supra* note 2.

229. See Craig Quintana, *Riot Still Painful for Ocoee*, ORLANDO SENTINEL (Nov. 2, 1998), http://articles.orlandosentinel.com/1998-11-02/news/9811020046_1_ocoee-riot-perry [<https://perma.cc/SDF2-UW24>].

230. Malveaux, *supra* note 20, at 96 (discussing the Tulsa Race Riot).

repeatedly persuaded individuals to leave the event in the past.²³¹ To this day, rightful heirs of Ocoee Riot victims remain unaware that the government was involved with the taking of the property.²³² The Ocoee government has maintained that compensation was given to the victims of the Ocoee Riot, which further led descendants to believe that they had no claim.²³³ It is unclear what the government intent behind these representations was, if it was not to prevent people from uncovering the truth about the Ocoee Riot.

Black residents feared for their lives if they tried to obtain information about the Ocoee Riot.²³⁴ The Hamiters, for example, may well have felt unable to contest the forced sale, as the deed they signed conspicuously asserted they were not being coerced or threatened into the sale.²³⁵ Other deeds from this time period do not include a similar clause.²³⁶ Interestingly, the Hamiters sold their land for ten dollars to J. Maxwell Scott, the same man who bought the Perry Land from Captain Sims.²³⁷ The Hamiters recognized that the riot may have been planned to confiscate black citizens' property.²³⁸ Descendants of Perry seeking to investigate would have found false assertions of debt as a rationale for the seizure of his estate.²³⁹ No one could definitively figure out who was responsible for the land takings.²⁴⁰ Even attorney Alexander Akerman, as discussed above,

231. See Parry, *supra* note 2, at 38; Quintana, *supra* note 229.

232. Telephone Interview with Geraldine Nunn, descendant of John Perry (Sept. 15, 2014).

233. See Fallstrom, *supra* note 17.

234. OCOEE: LEGACY OF THE ELECTION DAY MASSACRE (The Documentary Inst., Univ. of Fla. 2002).

235. ORANGE CTY. COMPTROLLER, DEED NO. 19240250491 (Book 250, Page 491) (recorded Apr. 25, 1924).

236. See, e.g., ORANGE CTY. COMPTROLLER, DEED NO. 19230231522 (Book 231, Page 522) (recorded Jan. 30, 1923).

237. See ORANGE CTY. COMPTROLLER, *supra* note 235. Before the Ocoee Riot, John Maxwell Scott was a factory clerk. See John Maxwell Scott Draft Card, World War I Draft Registration Cards, 1917-1918 (June 5, 1917) (on file at Washington, D.C.: National Archives and Records Administration at M1509, 4,582 rolls). Afterward, he was a citrus grove buyer. See TENTH CENSUS OF THE STATE OF FLORIDA (1935) (Orange County, Precinct 11: Ocoee), *microformed on Microfilm series S 5*, 30 reels, Record Group 001021 (State Library & Archives of Fla., Tallahassee).

238. See Letter from Mrs. J.H. Hamiter, *supra* note 24.

239. See *supra* notes 88, 224 and accompanying text.

240. See Interview with Ella Brown Clark, *supra* note 224.

was unable to obtain information as to who was responsible for the Ocoee Riot.²⁴¹

While perhaps the black citizens of Ocoee should have known that the conduct of the government was wrongful, they could not have known that it was misleading relative to the illegality of the conduct.²⁴² Over and over again the government reiterated that it was not responsible for any of the wrongs.²⁴³ It appears that the victims believed the government and were unaware of the cause of the tragedy: “Mrs. Smith says that there was no apparent cause for the dastardly deeds of the Ocoee mob, it being simply one of the many examples of the way the reign of terror is working in certain communities.”²⁴⁴ Survivors of the riot relied on the misrepresentations of the government insofar as they believed the government’s statements were legally supreme and that they would be unable to bring suit against the government. Further, survivors of the riot relied on the misrepresentations of the government because they believed the government was not the responsible entity.²⁴⁵ This was also true of the Tulsa Riot; “[g]iven the state of chaos, destruction, and devastation during and immediately following the riot, the plaintiffs were certainly in no condition to accurately assess the government’s credibility—one way or the other.”²⁴⁶ Worse still, survivors relied on the statements of government actors that they would be killed should they return to their land.²⁴⁷ In these ways, the victims and their descendants relied heavily on government information to their detriment.

241. See Letter from Akerman, *supra* note 70, at 2 (“After the polls closed, a number of armed men went to his house without a warrant and without authority of law, as is claimed by those approving their action and conduct.”).

242. Cf. Malveaux, *supra* note 20, at 103 (“It does not follow that because the defendants eventually reneged on their promise to provide restitution that the plaintiffs’ initial reliance on that promise was unreasonable. As the plaintiffs argued, the fact that the defendants gave conflicting messages does not mean that the plaintiffs did not reasonably rely on the defendants’ assurances.”).

243. See *Clark Attacks Negro Meddlers*, MACON DAILY TELEGRAPH, Jan. 6, 1921, at 1 (“Among the documents presented to the committee was one from the supervisor of Orange county, stating that the negro alleged to have started the election day riot at Ocoee was not a qualified voter.”); see also *supra* notes 229-31 and accompanying text.

244. *Vivid Story*, *supra* note 53, at 1.

245. See Hurston, *supra* note 42, at 62.

246. Malveaux, *supra* note 20, at 103 (discussing the Tulsa Race Riot).

247. See Letter from Mrs. J.H. Hamiter, *supra* note 24.

Certainly, in jurisdictions that consider fraudulent concealment grounds for overcoming the statute of limitations, the Ocoee Riot fits the bill. The depth of the apparent Ocoee cover-up by the Orange County government might be best explained with a single piece of paper: a death certificate from November 3, 1920. July Perry, it states—in neat cursive matching the signature of the black undertaker who removed Perry's body—died by being hung, the day after Election Day.²⁴⁸ In markedly different penmanship, the remaining lines warn, Perry's death was "not by violence caused by racial disturbance."²⁴⁹ Perry's occupation is listed as farmer, and his father, according to sloppy scrawling across a good portion of the certificate, is "not known."²⁵⁰ As this information was all inaccurate, one wonders why a government would put forth the effort to falsify a death certificate.

The answer lies in Perry's unusual wealth. Perry was a labor broker, and he owned a great deal of land.²⁵¹ The Orange County government no doubt expected someone might come looking for it: perhaps his family, who they locked up in jail for good measure.²⁵² When his family did come looking for it, in the courts of Orange County, having a paper trail that absolved the government of wrongdoing was sure to come in handy. Cover-ups like these were not unique to the Ocoee Riot; the inflammatory news article that sparked the Tulsa Race Riot was "deliberately torn out" of the microfilm prior to the litigation.²⁵³

The largest collection of firsthand accounts of the Ocoee Riot comes from former Ocoee Mayor Lester Dabbs, in a paper he wrote as his Master's thesis. Written in 1968, the thesis acknowledges that most records pertaining to the Ocoee incidents had been purged or had never existed.²⁵⁴ The Orange County Sheriff at the time, who had also been with the Sheriff's Office in 1920, maintained that no such event ever occurred.²⁵⁵ The FBI had no record of it despite

248. See Death Certificate of July Perry, *supra* note 2.

249. *Id.*; see also Parry, *supra* note 2, at 24-25.

250. Death Certificate of July Perry, *supra* note 2.

251. See Dabbs, *supra* note 21, at 21; see also *supra* notes 3, 49-50 and accompanying text.

252. See *supra* notes 84-85 and accompanying text.

253. Brief for Appellants, *supra* note 39, at 5 n.2.

254. See Dabbs, *supra* note 21, at 5-6.

255. See *id.*

investigating, and neither did the State Attorney's Office.²⁵⁶ Because of the depth and enduring nature of the evident fraudulent concealment and affirmative misconduct, the government should be equitably estopped from asserting the statute of limitations as a defense to an action by descendants of the Ocoee Riot, lest they profit from their inducement of this tragedy.²⁵⁷ Estopping the government is within the discretion of the courts, and doing so permits a decision on the merits for the descendants of property-owning race riot victims.

B. Redress Without the Problems that Plague Reparations Claims

Real property claims have several advantages when it comes to overcoming the typical hurdles reparations suits face. They have the potential to solve the problems of inheritability of claims and consequential implications for standing because courts already recognize property rights as something that can be inherited.²⁵⁸ They solve some evidentiary problems, because more real property records than lynching, slavery, or civil rights violation records exist today; the records are also more easily accessible. One does not need legal training, or even access to legal databases or law libraries, to uncover real property information.²⁵⁹ Takings claims also overcome the reparations problem of the deceased defendant, because governments exist today as the same entities they were when these tragedies occurred.²⁶⁰ Real property claims involve injuries that are

256. *See id.*

257. *Cf.* Malveaux, *supra* note 20, at 71 (“The Tulsa case is just one example of government-sanctioned collective violence going unpunished because of a procedural hurdle—the statute of limitations.”).

258. *See, e.g.,* Leggett v. United States, 120 F.3d 592, 597 (5th Cir. 1997) (“New York law creates a property interest in an intended beneficiary’s right to accept a gift.”); St. Louis Union Tr. Co. v. United States, 617 F.2d 1293, 1302 (8th Cir. 1980) (“The unqualified contractual right to receive property is itself a property right.”). *See generally* Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N’COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 687-93 (2010).

259. *See, e.g.,* Todd Lewan & Dolores Barclay, *Property Swindles Victimized Blacks*, ONLINEATHENS (Dec. 23, 2001), http://onlineathens.com/stories/122301/new_1223010092.shtml#.Vk415WSrRVx [<https://perma.cc/E5H8-EGPN>].

260. *Cf.* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 831-33 (2006) (arguing that the taxpayers and the existing government inherit the obligations and debts of past government actions).

particularized, and it is easier to value them than reparations claims related to things like enslavement; the land taken during the Ocoee Riot alone has already been estimated to be worth over four million dollars.²⁶¹ Reparations opponents often object to old claims based on the theory that modern innocents should not be punished for historical wrongs, but real property claims and particularly takings claims can help to cut against this argument: the United States already recognizes that society as a whole should bear the burden when the government takes property for public use, or when the government engages in tortious conduct.²⁶²

The takings claim solution is more practical than traditional reparations avenues because real property theft often provides a paper trail that shows affirmative misconduct and its connection to the governmental entity. While lynchings and personal property theft were, no doubt, examples of egregious misconduct, real property takings leave behind evidence through title records and probate proceedings that the former do not, making them particularly well-suited for remedies of racial wrongs. The official records that exist in numerous Jim Crow race riot property takings not only allow the inference of municipal government wrongdoing, but indeed can show it in the municipal entity's own words and in its own courts.²⁶³ Litigants have brought numerous reparations claims for slavery and Jim Crow atrocities, but real property claims have seldom been among the seriously proposed solutions for redress of racial injustice.²⁶⁴ Some legal scholars have conceptualized the harms of Jim Crow and slavery as property issues or takings claims, but these

261. See Barclay et al., *supra* note 9. See generally Kaimipono David Wenger, "Too Big to Remedy?" *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177 (2010) (discussing complexity of calculating compensation for slavery).

262. Brophy, *supra* note 260, at 830 ("[We] typically expect that taxpayers must pay for the torts of their government.").

263. See, e.g., *supra* notes 79-95 and accompanying text.

264. See, e.g., JASPIN, *supra* note 18, at 10 (explaining that even when white landowners know their property was originally stolen from a black landowner, they disagree that anyone today should be held economically responsible); Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1238 (2004) (distinguishing slavery reparations plaintiffs from real property actions by heirs); cf. Barclay et al., *supra* note 9 ("Racial violence in America is a familiar story, but the importance of land as a motive for lynchings and white mob attacks on blacks has been widely overlooked."). But see Jack Greenberg, *Reparations: Politically Inconceivable*, 29 T. JEFFERSON L. REV. 157, 157 (2007) ("Some American Indian tribes have claimed what some have called reparations for land taken in violation of claimed treaty rights.").

efforts have generally been related to intangible property.²⁶⁵ Claims for reparations for Native Americans, Holocaust victims, and Japanese Internment survivors are more often related to tangible property.²⁶⁶ It seems odd, then, that this sort of real property claim has not yet been made for victims of Jim Crow—especially because Jim Crow atrocities continued into the 1960s.²⁶⁷ Some scholars have suggested that slaves had property rights in the land they worked, but this is a less clear case than situations where legal title existed in the claimant, as is the case with race riot victims.²⁶⁸ The lack of reparations for slavery is more understandable, as it has the problem of commodifying lives; slaves did not own land.

Perhaps most importantly, considering past struggles to achieve redress for racial injustice victims, real property claims present unique advantages for attempting to overcome the statute of limitations.²⁶⁹ Equitable defenses, properly interpreted, can preclude responsible municipal entities from raising statutory limitation period defenses in response to litigation brought by victims of real property theft during Jim Crow. Equitable estoppel doctrine precludes such a statutory defense in relation to real property theft in a way that it does not with other wrongs perpetuated during slavery and the Jim Crow era.

There is no shortage of arguments against reparations, but many of the strongest ones are inapplicable to the takings claim solution. Esteemed legal scholars Eric Posner and Adrian Vermeule noted that claims under the Takings Clause were not properly categorized as reparations schemes; instead, “[a] violation of the Takings Clause or Contracts Clause gives rise to a judicially enforceable claim for damages against the government, not a reparations scheme.”²⁷⁰ As the proposed takings claim solution is not a reparations scheme, the real counterarguments to explore are those against equitable tolling or equitable estoppel of the statutes of limitations. Any other

265. For example, scholars have characterized the labor of slaves, the bodies of slaves, or the lives of lynching victims as property. See Barnard, *supra* note 97, at 125-27; see also Miller, *supra* note 104, at 91.

266. See, e.g., Epstein, *supra* note 98, at 1186; Greenberg, *supra* note 264, at 157-58.

267. See Malveaux, *supra* note 20, at 109.

268. For arguments that slaves were entitled to the land they cultivated, see Aiyetoro & Davis, *supra* note 258, at 724.

269. See *supra* Part III.A.

270. Posner & Vermeule, *supra* note 123, at 692 (footnotes omitted).

arguments would be specific to satisfaction of individual takings claim elements (which would vary from case to case) or the appropriateness of takings claims in general. Even opponents of reparations often argue that standing issues should not be a serious obstacle to litigation merely because the suit is brought by descendants of victims.²⁷¹

While this is not a true reparations scheme, arguments relating to tolling or estopping parties from raising statutes of limitations are probably best viewed here in the context of reparations.²⁷² This is due to the similarities that persist: the takings claim solution aims to compensate descendants of victims that suffered racial injustice, if through the means of the Takings Clause. Richard Epstein argued that in reparations cases, tolling the statute of limitations beyond slavery is unacceptable, as black citizens could bring suits as soon as they were granted personhood (although he acknowledges these suits may have been unwinnable).²⁷³ He explained that a “hostile legal climate” is insufficient for statutory tolling.²⁷⁴ As detailed above, however, the climate in places like Ocoee went far beyond mere hostility. Property owners did not simply risk losing their cases because of legal hostility; they risked death.²⁷⁵ Epstein distinguishes reparations cases from cases of concealment, hinting that tolling might be merited if concealment were present.²⁷⁶ In the Ocoee case, it is clear that concealment existed.²⁷⁷

Epstein also discusses statutory tolling for stolen works of art, arguing that it is more appropriate than reparations tolling based on a more limited remedy, a narrower focus, reduced valuation problems, and greater difficulty in verifying the identity of the proper defendant: “First, with art claims there is a genuine case for denying the operation of the statute of limitations, for even though the plaintiff knows that a wrong is committed, it may be impossible to figure out by whom, especially for art not on public display.”²⁷⁸ The takings claim solution shares these advantages with actions to

271. See Epstein, *supra* note 98, at 1180-81.

272. Cf. Malveaux, *supra* note 20, at 74.

273. See Epstein, *supra* note 98, at 1184.

274. *Id.*

275. See *supra* Part I.B.

276. See Epstein, *supra* note 98, at 1185.

277. See *supra* Part I.B.

278. Epstein, *supra* note 98, at 1186-87.

recover stolen art. Land, unlike slave labor, has an easily determinable value. Getting redress for property owners that suffered racial injustice in the form of takings is admittedly underinclusive, but it is also the sort of limited, focused remedy that Epstein describes as more workable.²⁷⁹ Perhaps most importantly, like the art theft victims, Ocoee victims knew their property was stolen; they just did not know by whom. They were unaware, like in Epstein's example, of the proper defendant.²⁸⁰ The distinctions between the takings claim solution and past reparations cases make race riots an opportunity for courts to provide redress to victims of racial injustice while avoiding the problems that have crippled reparations cases.

CONCLUSION

*Relations between whites and blacks must be conducted along lines which will promote in the colored race a proper idea of station, and the white people who have dealings with the negro must exercise caution and wisdom. The situation is in the safe-keeping of sane and thoughtful white citizens.*²⁸¹

The potential for the floodgates to open is an unjust reason to deny redress here.²⁸² Though there are hundreds, if not thousands, of potential cases like the Ocoee Massacre, this only makes the need for justice greater. If descendants of these victims bring claims, the courts should at least decide them on the merits. If courts fail to do so, the message is clear. Government actors are permitted to kill citizens, take their land, deny their heirs access to the courts, threaten their descendants, and falsify records to cover it up—as long as they do it in such a horrific and gruesome manner that the descendants

279. *See id.* at 1187.

280. *Cf. Malveaux, supra* note 20, at 102 (“What types of information fall under the fraudulent concealment rubric such that equitable estoppel will result? The courts have relied on various types of information, including the identity of the defendant and other facts vital to the plaintiffs’ case.”).

281. *The Race Trouble*, ORLANDO MORNING SENTINEL, Nov. 4, 1920 (on file at Library of Congress, Manuscript Division).

282. *See Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) (“Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and ‘disruptive’ remedies.”).

are too fearful to bring a claim during the statutory limitations period. Victims of unspeakable crimes should not be expected to risk death to bring suit. Otherwise, as long as a wrongdoer kills enough generations, the wrong will disappear, as the link becomes too tenuous to establish standing.

This cannot be the policy the courts intend to promote. Surely it should not be the case that these plaintiffs would have a better chance of success on a takings claim if the Ocoee government had required that they tolerate a telephone pole on their property instead of killing the property owners and then seizing their land. Although the statute of limitations expired decades ago, there was no time during that period when these victims could have obtained redress in the courts. Justice demands that courts at least acknowledge—even if they refuse to award damages—that the claims of these people have merit, and that even if it was a long time ago, massacring a group of people and taking their property afterward is not an action that the government can engage in without consequence.

While it seems inarguable that burning an entire black community to the ground, dismembering those who stayed behind in an effort to protect their lives, and thereafter celebrating by taking home body parts as souvenirs is unjust, neither the State of Florida nor the City of Ocoee has admitted that it acted unjustly. Despite the records that make it apparent that the State of Florida approved of Ocoee's actions, Florida has never hinted that this approval might have been inappropriate. It might be too late for July Perry's rights, but it is not too late for an attempt at justice.

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