

#LIVINGWHILEBLACK: RACIALLY MOTIVATED 911 CALLS AS A FORM OF PRIVATE RACIAL PROFILING*

I. INTRODUCTION

Private racial profiling is not new, but racially motivated 911 calls are a new method for private citizens to police Black people.¹ Specifically, #LivingWhileBlack refers to the recent increase in 911 calls white people make on Black people who are going about normal daily activities.² These everyday activities have included a family eating at Subway, a young girl selling bottled water, friends checking out of an Airbnb, a group of women golfing, a child accidentally mowing a part of someone else’s yard, and so many more.³ “For whites—most of whom never think twice about driving the highway, shopping at the mall, eating at a restaurant, entering an elevator, or walking around their block—there is no parallel experience.”⁴

When someone makes a 911 call reporting Black people for an illegitimate reason, the response from police varies. These 911 calls serve as a reminder to Black people and other people of color of their marginalized place in society.⁵ This issue is even more problematic when considering the history and effects of policing and the resulting trauma on Black people.⁶ This Comment suggests legal remedies for the victims of racially motivated 911 calls to deter subjecting innocent people to unnecessary intrusions on their peace due to callers’ biases.

This Comment uses hashtags in recognition of how social media has shaped racial justice conversations and to connect this Comment to the evolving discussion of #LivingWhileBlack. Hashtag activism is the latest development in digital activism that involves “discursive protest on social media united through a hashtagged word, phrase

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1. P.R. Lockhart, *911 Calls on Black People Were One of 2018’s Biggest Stories About Race*, VOX (Dec. 31, 2018, 9:00 AM), <http://www.vox.com/identities/2018/12/31/18159465/living-while-black-racial-profiling-911-police-racism> [https://perma.cc/W57V-SGK2] [hereinafter Lockhart, *911 Calls*].

2. See John Blake, *How 911 Calls on Blacks Are a New Twist on Something Old: White Flight*, CNN (Aug. 10, 2018, 8:05 AM), <http://www.cnn.com/2018/08/10/us/white-flight-911-calls/index.html> [https://perma.cc/VGH5-X5HW].

3. P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018, 8:00 AM), <http://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> [https://perma.cc/BR3P-67HF] [hereinafter Lockhart, *Living While Black*].

4. LEONARD STEINHORN & BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* 79 (1999).

5. See Blake, *supra* note 2.

6. See *id.*

or sentence.⁷ This Comment focuses on #DrivingWhileBlack, #ShoppingWhileBlack, and #LivingWhileBlack, but they are all stories about the Black experience linked to #BlackLivesMatter.⁸ Black Twitter⁹ and other social media platforms use these hashtags to recognize issues that the rest of the world ignores, and Black Twitter's "use of hashtag activism is a unique fusion of social justice, technology, and citizen journalism."¹⁰ The stories this Comment highlights have been shared widely and are known because of these hashtags. This Comment's legal arguments are dependent on the preexisting history and timeline that the stories, connected by these hashtags, establish.

This Comment proceeds in three sections. Section II contextualizes #LivingWhileBlack and the historical, legal, and social issues underlying racially motivated 911 calls. Then Section III analyzes the barriers to remedying racially motivated 911 calls and proposes solutions. This Comment concludes that callers would confront their implicit or explicit biases before making a 911 call if they were aware of a legal consequence that would hold them accountable.

II. OVERVIEW

Racially motivated 911 calls are a seemingly discrete issue. In reality, these calls are rooted in the United States' complicated history of institutionalized racism, and they serve as a lasting vestige of segregation and discrimination. In order to eradicate this issue, it is crucial to understand its origins, effects, and complications.

This Section explains the origin and effects of racially motivated 911 calls and examines whether the law is equipped to address this issue. First, Part II.A introduces the historical background of institutionalized racism and explores the many forms that it has taken throughout U.S. history. Part II.B then explains other forms of racial profiling harassment Black people face that predate #LivingWhileBlack. Next, Part II.C provides an explanation of #LivingWhileBlack and demonstrates the pervasiveness of these 911 calls. Part II.D examines the complex roles of emergency dispatcher laws and racial trauma exacerbating the issue. Then Part II.E tracks the developments in the phenomenon of racially motivated 911 calls and some attempted remedies. Finally, Part II.F outlines the various legal categories that private racial profiling could fit within and showcases how these legal categories are insufficient to address the harm caused by racially motivated 911 calls.

7. Guobin Yang, *Narrative Agency in Hashtag Activism: The Case of #BlackLivesMatter*, 4 MEDIA & COMM. 13, 13 (2016).

8. #BlackLivesMatter serves as an all-encompassing hashtag connecting various social justice movements affecting Black people. *Id.* at 15. Black women created #BlackLivesMatter, which is representative of how "[s]ocial media hashtags bring attention to black women's issues when traditional mainstream media newspaper articles and television stories ignore black women's concerns." Sherri Williams, *Digital Defense: Black Feminists Resist Violence with Hashtag Activism*, 15 FEMINIST MEDIA STUD. 341, 342 (2015).

9. Black Twitter is the collective name for the community of Black people on Twitter. Soraya Nadia McDonald, *Black Twitter: A Virtual Community Ready To Hashtag Out a Response to Cultural Issues*, WASH. POST (Jan. 20, 2014), http://www.washingtonpost.com/lifestyle/style/black-twitter-a-virtual-community-ready-to-hashtag-out-a-response-to-cultural-issues/2014/01/20/41ddac6f-7ec5-11e3-9556-4a4bf7cbcd84_story.html [https://perma.cc/4TYX-TQLD]. It has been described as the digital version of "barber, beauty shop talk." *Id.* Black Twitter is quick-witted and responsive to events in pop culture, politics, and more that affect the Black community. *See id.*

10. Williams, *supra* note 8, at 343.

A. *Institutional Racism Under Another Name*

Stokely Carmichael and Charles V. Hamilton coined the term “institutional racism,” described as “less overt, far more subtle, [and] less identifiable in terms of *specific* individuals committing the acts.”¹¹ Unlike individual racist acts, institutional racism is an “established and respected force[] in the society,” raising less awareness about its operation.¹² Institutional racism began through systems of overt racism that adapted over time to remain effective yet covert.¹³ This Part examines the timeline of de jure racism throughout U.S. history to better understand the current systems of oppression.

Before the Civil War, many states had laws known as “slave codes” regulating slavery, free Blacks, and the interactions between white and Black people.¹⁴ Slave codes restricted slaves and free Blacks from various activities, including prohibitions against walking alone, selling anything, riding horseback, and possessing a firearm.¹⁵ If Black people were caught not conforming with these slave codes in any manner, the punishment could range from whippings to imprisonment to death.¹⁶ Slave codes also included restrictions on how slave owners or other white people could treat slaves, but those limitations were not frequently enforced because Black people, enslaved or free, could not testify in court.¹⁷ In fact, Black people could only interact with a courtroom when criminally prosecuted because they could not be a plaintiff or defendant in a civil case.¹⁸ Slavery ended with the Civil War and the Thirteenth Amendment, but the essence of slave codes did not die with slavery.¹⁹ Instead, these slave codes reemerged in a new form known as “the Black Codes.”²⁰

The end of slavery freed approximately four million Black people, and with this new freedom came uncertainty about how the South would maintain its social order and economy.²¹ President Andrew Johnson’s Reconstruction plan authorized white Southerners to create new governments that excluded Black people.²² By 1865,

11. KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (Vintage Books 1992) (1967) (emphasis in original).

12. *Id.*

13. See Rasheena Latham, Comment, *Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between Institutional Racism in the Criminal Justice System and Trayvon Martin’s Death*, 8 S. J. POL’Y & JUST. 80, 91 (2014).

14. Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803–1865*, 24 S.U. L. REV. 145, 157 (1997).

15. See, e.g., *id.* at 149, 161; see also Latham, *supra* note 13, at 89 (“In their intent and application, the codes became the new medium to subordinate, suppress, and control freed blacks.”).

16. See Latham, *supra* note 13, at 89.

17. E.g., Quigley & Zaki, *supra* note 14, at 149–50.

18. See, e.g., *id.* at 154.

19. See J.E. Hansan, VCU Libraries, *Jim Crow Laws and Racial Segregation*, VCU, <http://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/> [https://perma.cc/ZZA3-8MG7] (last modified Aug. 15, 2018).

20. *Id.*

21. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 4–5 (2008).

22. See DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* 1–2 (1978).

Mississippi, South Carolina, Louisiana, and Alabama successfully passed Black Codes through their state legislatures to establish legal systems that would maintain a form of slavery and the reign of white supremacy.²³ Other states like Florida, Georgia, North Carolina, Virginia, and Texas were quick to follow.²⁴ These codes granted some rights that slaves did not have before, such as “rights to buy, sell, own, and bequeath real and personal property; to make contracts; to travel freely; to give testimony on oath; and to invoke the jurisdiction of the courts.”²⁵ The Black Codes still restricted the rights of Black people by limiting the rights to vote, hold office, and carry weapons.²⁶ Primarily, the codes created labor contracts, apprenticeships, or indentured servitude to maintain sources of labor from freed Black people.²⁷ The codes also included strict vagrancy laws, which permitted the police to arrest Black people for homelessness, unemployment, gambling, public drunkenness, or being associated with vagrants.²⁸ The punishment for noncompliance with the Black Codes was being “arrested and imprisoned at hard labor”—which became the equivalent of re-enslavement.²⁹

Compared to slave codes, the reign of the Black Codes was not long because the news of their existence spread to the North.³⁰ Northerners disapproved of President Johnson’s Reconstruction plan, and radical Republicans took control of Reconstruction by passing the Civil Rights Act of 1866.³¹ President Johnson vetoed the legislation, but Congress overrode his veto.³² By 1870, Congress passed the Civil Rights Act of 1866,³³ the Fourteenth Amendment granting citizenship,³⁴ and the Fifteenth Amendment

23. *Id.* at 2–6.

24. *Id.* at 6–7.

25. Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 552 (1989).

26. VANESSA HOLLOWAY, *BLACK RIGHTS IN THE RECONSTRUCTION ERA* 2–3 (2018).

27. See, e.g., *Southern Black Codes* CONST. RTS. FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> [<https://perma.cc/GV45-Z9ZR>] (last visited May 1, 2020) (South Carolina); see also *Louisiana Black Code (1865)*, DIGITAL HIST., http://www.digitalhistory.uh.edu/exhibits/reconstruction/section4/section4_blackcodes2.html [<https://perma.cc/4KC7-FSAK>] (last visited May 1, 2020) (Louisiana); *Mississippi Black Code (1865)*, DIGITAL HIST., http://www.digitalhistory.uh.edu/exhibits/reconstruction/section4/section4_blackcodes.html [<https://perma.cc/H93S-D3QE>] (last visited May 1, 2020) (Mississippi).

28. Act of Nov. 24, 1865, ch. VI, 1865 Miss. Laws 90–93; see also NOVAK, *supra* note 22, at 3–7; RECONSTRUCTION ERA (1865-1877), at 122, 126–27, 130 (Michael Shally-Jensen ed., 2014).

29. See *Southern Black Codes*, *supra* note 27.

30. See *id.*

31. See *id.* Congress enacted the Civil Rights Act of 1866 to enforce the Thirteenth Amendment and prohibit discrimination based on race. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2018)); Sullivan, *supra* note 25, at 556–57.

32. *Southern Black Codes*, *supra* note 27.

33. Civil Rights Act of 1866, 14 Stat. at 27.

34. U.S. CONST. amend. XIV.

granting the right to vote.³⁵ Thus, the Black Codes were effectively barred.³⁶ However, like slave codes, the sentiments of the Black Codes continued in a new, resilient form during the Jim Crow era.³⁷

White southerners enacted Jim Crow laws almost immediately after the Reconstruction era ended in 1877, and the Jim Crow era lasted until 1965.³⁸ Jim Crow laws were made specifically to segregate and disenfranchise Black people.³⁹ They governed the daily lives of Black and white people by prohibiting the mixing of the races and requiring segregation in all public accommodations.⁴⁰ The South enforced racial segregation in bathroom facilities, buses, schools, hospitals, housing, and restaurants,⁴¹ all under the guise that the separate public accommodations were equal.⁴² The Jim Crow era proliferated for decades after the U.S. Supreme Court's decision in *Plessy v. Ferguson*⁴³ that "separate but equal" was constitutional and that legislation was "powerless to . . . put [the different races] upon the same plane."⁴⁴ This holding "gave institutional racism the backbone it needed to flourish."⁴⁵ Public accommodations during the Jim Crow era were far from equal, and the numerous "Whites Only" signs served as a constant reminder that Black people were inferior.⁴⁶

Along with the de jure components of the Jim Crow era, there were unwritten social components demanding Black people constantly show respect and deference to white people.⁴⁷ As was also true for the Black Codes, law enforcement and the Ku Klux Klan enforced Jim Crow laws.⁴⁸ Because of the fear it instilled in Black people, lynching was the most "distinctive" method for enforcing these laws, making it "synonymous with the Jim Crow era."⁴⁹

35. U.S. CONST. amend. XV. The readmission requirements that Congress set for the former Confederate states to rejoin the Union largely drove the passage of the Fourteenth and Fifteenth Amendments. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 404–09 (2001). These requirements included ratifying the Fourteenth Amendment and bringing the states' laws into compliance with the Amendment. *Id.* at 404. Thus, passage of the Fifteenth Amendment was able to pass more easily. *Id.* at 378 n.12.

36. See HOLLOWAY, *supra* note 26, at 6–8.

37. Latham, *supra* note 13, at 89.

38. *Id.*

39. *Jim Crow Laws*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> [<https://perma.cc/P227-BPGW>] (last visited May 1, 2020).

40. *Id.*

41. *Jim Crow Laws*, NAT'L PARK SERV., http://www.nps.gov/malu/learn/education/jim_crow_laws.htm [<https://perma.cc/KNU6-A7JY>] (last updated Apr. 17, 2018).

42. RUTH THOMPSON-MILLER ET AL., *JIM CROW'S LEGACY: THE LASTING IMPACT OF SEGREGATION* 67 (2015).

43. 163 U.S. 537 (1896).

44. *Plessy*, 163 U.S. at 551–52.

45. Latham, *supra* note 13, at 89.

46. *Jim Crow Laws*, *supra* note 39.

47. See THOMPSON-MILLER ET AL., *supra* note 42, at 110.

48. Mykola Kulish & William Elwood, *The Road to Brown Transcript*, CAL. NEWSREEL, <http://newsreel.org/transcripts/roadto.htm> [<https://perma.cc/2VW2-6SJC>] (last visited May 1, 2020); see also THOMPSON-MILLER ET AL., *supra* note 42, at 1–4.

49. Latham, *supra* note 13, at 90; see also EQUAL JUSTICE INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017), <http://lynchinginamerica.eji.org/>

The National Association for the Advancement of Colored People (NAACP), Martin Luther King, Jr., the Freedom Riders, the Student Nonviolent Coordinating Committee (SNCC), and many more notable historical figures led the Civil Rights Movement, which eventually brought an end to the Jim Crow era.⁵⁰ The Supreme Court formally overturned “separate but equal” in *Brown v. Board of Education*,⁵¹ holding that it “has no place” in public education because separate schools are “inherently unequal.”⁵² Following *Brown*, the Supreme Court continued to chip away at segregation in other realms, such as public beaches⁵³ and golf courses in 1955,⁵⁴ bus systems in 1956,⁵⁵ and public housing in 1958.⁵⁶ The Court issued these memorandum decisions without opinions, which allowed the Court to desegregate while discouraging legal challenges.⁵⁷ In addition to these Supreme Court cases, the Jim Crow era ended with passage of the Civil Rights Act of 1964,⁵⁸ the Voting Rights Act of 1965,⁵⁹ and the Fair Housing Act of 1968,⁶⁰ which all provided additional rights to Black people.⁶¹

B. #DrivingWhileBlack and #ShoppingWhileBlack

This Part categorically examines the phenomena of #DrivingWhileBlack and #ShoppingWhileBlack. The concepts behind these hashtags are not new, but the technology available to shine a spotlight on these issues is a distinct feature of the twenty-first century.⁶² #DrivingWhileBlack refers to racial profiling by police officers.⁶³

report/ [https://perma.cc/SJQ8-MDC4] (documenting more than four thousand “racial terror lynchings” during the Jim Crow era of 1877–1950).

50. See Kulish & Elwood, *supra* note 48; *Civil Rights Movement*, HIST. (Oct. 27, 2009), <https://www.history.com/topics/black-history/civil-rights-movement> [https://perma.cc/HW6K-5P2L]; SNCC, HIST. (Nov. 12, 2009), <http://www.history.com/topics/black-history/sncc> [https://perma.cc/D99U-2CLW].

51. 347 U.S. 483 (1954).

52. *Brown*, 347 U.S. at 495.

53. *Mayor and City Council of Balt. City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (mem.), *aff’d* 220 F.2d 386 (4th Cir. 1955).

54. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (mem.), *vacating and remanding* 223 F.2d 93 (2d Cir. 1955).

55. *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (mem.), *aff’d* 142 F. Supp. 707 (M.D. Ala. 1956).

56. *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (mem.), *aff’d* 252 F.2d 122 (5th Cir. 1958).

57. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1204 (2012).

58. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

59. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

60. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

61. Nancy A. Heitzeg, *On the Occasion of the 50th Anniversary of the Civil Rights Act of 1964: Persistent White Supremacy, Relentless Anti-Blackness, and the Limits of the Law*, 36 HAMLINE J. PUB. L. & POL’Y 54, 54 (2015).

62. See *supra* notes 7–10 and accompanying text for a discussion of technology and social media expanding the conversation on the issues affecting Black people.

63. See *infra* notes 68–114 and accompanying text for a discussion of the definition of #DrivingWhileBlack, an explanation of racial profiling by police, and a chronicle of the issue of racial profiling.

Black people have experienced issues with police and traveling since the Jim Crow era,⁶⁴ but people did not coin “driving while Black” until the 1990s.⁶⁵ #ShoppingWhileBlack refers to racial profiling by businesses. This issue garnered attention in the late 1990s and early 2000s,⁶⁶ but like #DrivingWhileBlack, this issue traces back to the Jim Crow era.⁶⁷ Throughout time, these hashtags have expanded the discussion of which activities are overpoliced: from driving and shopping to simply living. This Part tracks that progression.

“Driving while Black,” a play on “driving while intoxicated,” refers to racial profiling by police that leads to traffic stops and searches.⁶⁸ Profiling refers to how law enforcement agencies use characteristics or identified behaviors to narrow the number of potential suspects and determine the probability that a suspect committed or is likely to commit a specific offense.⁶⁹ Profiling can be a legitimate policing tool “for investigative, administrative, and intelligence purposes” to increase “efficiency and effectiveness.”⁷⁰ Government agencies, such as the Drug Enforcement Agency, the Internal Revenue Service, and the Federal Bureau of Investigation, use profiles regularly.⁷¹ But *racial* profiling—when race is used as the basis for starting a criminal investigation⁷²—is problematic because it perpetuates the “assumption of innate black criminality,” affirms the Black community’s distrust of the criminal justice system, and exacerbates the overrepresentation of minorities in the criminal justice system.⁷³

Racial profiling and police abuse against Black people are remnants of the slave codes, Black Codes, and Jim Crow era.⁷⁴ In the context of driving, racial profiling occurs

64. See *supra* notes 38–49 and accompanying text for a discussion of the Jim Crow era and the issues Black people faced with police and in public accommodations.

65. See *infra* notes 79–82 and accompanying text for a discussion of the rise of #DrivingWhileBlack in the public conscious.

66. See *infra* notes 115–148 and accompanying text for a discussion of the definition of #ShoppingWhileBlack, an explanation of consumer racial profiling, and a chronicle of the issue of consumer racial profiling.

67. See *supra* notes 38–49.

68. DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS (1999), <http://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [https://perma.cc/32SJ-297S].

69. Charlie Brown & Amanda Jantzi, *Driving While Black*, CORNELL U., http://courses2.cit.cornell.edu/sociallaw/student_projects/DrivingWhileBlack.htm [https://perma.cc/R3KC-AYHC] (last visited May 1, 2020); cf. U.S. CONG., OFFICE OF TECH. ASSESSMENT, FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: ELECTRONIC RECORD SYSTEMS AND INDIVIDUAL PRIVACY 87, 87 (1986), <http://www.princeton.edu/~ota/disk2/1986/8606/860607.PDF> [https://perma.cc/4JK8-6CHL].

70. Cf. U.S. CONG., OFFICE OF TECH. ASSESSMENT, *supra* note 69, at 88.

71. Cf. *id.* at 87.

72. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 22–23 (2004).

73. *Id.* at 20, 22–27.

74. See *id.* at 21 (“[T]he widespread stigmatization of African Americans as predisposed toward criminality is a lingering vestige of the slave system and is therefore outlawed by the Thirteenth Amendment.”); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 25 (2012) (“[D]rug prohibition has become a replacement system for segregation. It has become a system of separating out, subjugating, imprisoning, and destroying substantial portions of a population based on skin color.” (quoting Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALA. L. REV. 703, 723 (2000))).

when law enforcement officers use traffic violations as a pretext for stopping and sometimes searching a person they deem to be more suspicious due to their race.⁷⁵ In the 1990s, racial profiling during traffic stops garnered national attention.⁷⁶ The War on Drugs⁷⁷ is frequently cited as the catalyst for an increase in traffic stops and searches of Black people and other people of color.⁷⁸

The media was largely responsible for the increased awareness of racial profiling by police. Racial profiling gained attention in the 1990s due to a New Jersey Turnpike study, which revealed the prevalence of racial profiling;⁷⁹ the videotaped police beating of Rodney King and subsequent Los Angeles riots;⁸⁰ an incident in New Jersey when two white officers wounded three of four Black and Hispanic passengers during a traffic stop;⁸¹ and the police shooting of an African immigrant, Amadou Diallo.⁸²

Additionally, several studies have analyzed the prevalence of racial profiling in police stops. In 1996, the American Civil Liberties Union of Maryland conducted a study finding that police were significantly more likely to stop and search Black drivers compared to white drivers.⁸³ This study observed 5,354 drivers violating traffic laws: 74.7% of the violators were White, while only 17.5% were Black.⁸⁴ In comparison, Maryland State Police conducted 823 searches between 1995 and 1996 outside of

75. William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 10 TEMP. POL. & C.R. L. REV. 387, 387–88 (2001).

76. See *infra* notes 79–82 and accompanying text.

77. The War on Drugs refers to the Reagan administration's commitment to eliminate illegal drug use in America through antidrug polices and law enforcement practices. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 386–88 (2002).

78. For criticisms of the War on Drugs and discussions of its impact as the driving force behind racial profiling, see, for example, HARRIS, *supra* note 68 ("Significant blame for this rampant abuse of power also can be laid at the feet of the government's 'war on drugs'"); Carter, *supra* note 72, at 59 ("The popular image of street crime, unsurprisingly, had a black face. Drugs and resulting crime during the crack epidemic of the 1980s and 1990s spurred widespread use of racial profiles to identify drug dealers."); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1045–52 (2010) ("Racial profiling of young African-American and Latino men in traffic stops . . . emerged as a central law enforcement tool in the 'war on drugs.'"); and David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 337 (2001) ("[T]he Court has significantly expanded police powers (in many cases in deference to the 'War on Drugs') and complaints concerning racial bias and random, arbitrary stop and frisks have continued to mount." (footnote omitted)).

79. Tiffany Danitz, *States Face Up to Realities of Police Racial Profiling*, PEW TRUSTS (May 10, 1999), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/1999/05/10/states-face-up-to-realities-of-police-racial-profiling> [<https://perma.cc/8Q8X-GY9W>].

80. Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <http://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/9ZL8-3D2H>].

81. John Kifner, *Van Shooting Revives Charges of Racial 'Profiling' by New Jersey State Police*, N.Y. TIMES (May 10, 1998), <http://www.nytimes.com/1998/05/10/nyregion/van-shooting-revives-charges-of-racial-profiling-by-new-jersey-state-police.html> [<https://perma.cc/Q72X-NPCX>].

82. Michael Grunwald, *Immigrant Killed by Police Mourned*, WASH. POST (Feb. 13, 1999), <http://www.washingtonpost.com/wp-srv/national/daily/feb99/bronx13.htm> [<https://perma.cc/P8JG-72KB>].

83. HARRIS, *supra* note 68.

84. *Id.*

Baltimore.⁸⁵ Of those searches,⁸⁶ 72.9% of the drivers were Black, while only 19.7% were white.⁸⁷ A 2018 study of twenty million traffic stops in North Carolina concluded that “[j]ust by getting in a car, a black driver has about twice the odds of being pulled over, and about four times the odds of being searched.”⁸⁸ Missouri revealed similar statistics that Black drivers were 85% more likely to be pulled over and 51% more likely to be searched than their white counterparts.⁸⁹

These disparities cause an increase in police interaction, which is dangerous for Black people. Between August 2014 and July 2015, three Black people—Walter L. Scott,⁹⁰ Samuel Dubose,⁹¹ and Sandra Bland⁹²—died at the hands of police in incidents beginning as police stops for minor offenses like “a broken brake light, a missing front license plate, [or] failure to signal a lane change.”⁹³ Notably, the NAACP released a travel warning for Black people traveling through Missouri, which is reportedly the first warning of this type that the NAACP has issued.⁹⁴ This is reminiscent of *The Negro Motorist Green Book*, which was a travel guide published during the Jim Crow era to assist Black people traveling through the segregated South without incident.⁹⁵

85. *Id.*

86. Only thirteen state troopers conducted 85.4% of the searches. *Id.*

87. *Id.*

88. John Sides, *What Data on 20 Million Traffic Stops Can Tell Us About 'Driving While Black,'* WASH. POST (July 17, 2018, 5:30 AM), <http://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black> [https://perma.cc/8JD8-6LEB].

89. Kansas City Star Editorial Board, *Driving While Black in Missouri Is Becoming More Perilous, Traffic Stop Report Shows*, KAN. CITY STAR (June 6, 2018, 5:30 AM), <http://www.kansascity.com/opinion/editorials/article212642139.html> [https://perma.cc/3NQ6-8L3V].

90. In North Charleston, South Carolina, police pulled Walter L. Scott over for a broken brake light, and, while running from the police officer, the officer killed him. Alan Blinder & Manny Fernandez, *North Charleston Prepares for Mourning and Protest in Walter Scott Shooting*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/11/us/north-charleston-prepares-for-weekend-of-mourning-and-protest-in-walter-scott-shooting.html> [https://perma.cc/3RQJ-PX9W].

91. A University of Cincinnati police officer killed Samuel Dubose during a traffic stop for missing a front license plate. Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html> [https://perma.cc/2VXN-TGK8].

92. Police pulled over Sandra Bland in Texas for failing to signal a lane change, and after the situation escalated, police arrested and placed her in police custody. Katie Rogers, *The Death of Sandra Bland: Questions and Answers*, N.Y. TIMES (July 23, 2015), <http://www.nytimes.com/interactive/2015/07/23/us/23blandlisty.html> [https://perma.cc/J9NF-7SPH]. Sandra Bland was found dead in her cell. *Id.* Her death was ruled a suicide, but many are suspicious of foul play. *See id.*

93. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [https://perma.cc/9GRM-G8BN].

94. Nancy Coleman, *NAACP Issues Its First Statewide Travel Advisory, for Missouri*, CNN (Aug. 3, 2017, 12:11 PM), <http://www.cnn.com/2017/08/02/us/naacp-missouri-travel-advisory-trnd/index.html> [https://perma.cc/299X-78CS]. Specifically, the statement advises individuals to “travel with extreme CAUTION.” NAACP, URGENT – MISSOURI TRAVEL ADVISORY 2 (2017). The warning cited “the sad passage of Senator Gary Romine’s Jim Crow Bill—SB 43—and recent events throughout Missouri” as the reason for the notice. *Id.* at 1.

95. *See generally* VICTOR H. GREEN & GEORGE L. SMITH, *THE NEGRO MOTORIST GREEN BOOK* (1937); Evan Andrews, *The Green Book: The Black Travelers’ Guide to Jim Crow America*, HIST. (Feb. 6, 2017),

People have attempted to use litigation to address the issue of racial profiling by police. Cases concerning #DrivingWhileBlack have centered on the prohibition of unreasonable searches and seizures from the Fourth and Fourteenth Amendments' Equal Protection and Due Process Clauses.⁹⁶ In *State v. Soto*⁹⁷ the equal protection and due process arguments under the Fourteenth Amendment succeeded,⁹⁸ while in *Whren v. United States*⁹⁹ the argument against unreasonable seizures under the Fourth Amendment presented more of a challenge.¹⁰⁰ The New Jersey Superior Court decided *Soto* three months before the U.S. Supreme Court decided *Whren*;¹⁰¹ however, there were notable differences in the litigants' strategies, especially in their balance of foundational constitutional theories.¹⁰²

Soto concerned seventeen Black defendants consolidating their motions to suppress evidence gathered through "discriminatory enforcement of the traffic laws by the New Jersey State Police."¹⁰³ The defense presented statistical evidence of the disproportionality between the percentage of Black drivers and the percentage of police stops involving Black people.¹⁰⁴ The defense also presented testimony that N.J. State Police trained state troopers to racially profile and high-ranking police officials allowed discrimination to further the War on Drugs.¹⁰⁵ The *Soto* court granted the defendants' motions to suppress evidence from traffic stops because the defense proved "at least a *de facto* policy."¹⁰⁶

In *Whren*, the Supreme Court decided whether the defendants' traffic violation was pretext to make a stop that lacked probable cause or reasonable suspicion.¹⁰⁷ For their motion to suppress the evidence obtained, the defendants made general arguments about racial profiling and #DrivingWhileBlack to argue that this stop was pretextual based on a hunch due to race.¹⁰⁸ In addition, the defendants argued that the government's proposed solution to address pretextual stops through the Equal Protection Clause was ineffective because of the difficulty proving discriminatory enforcement and the unavailability of the data required for proof.¹⁰⁹ In contrast, the defendants advocated for a "reasonable

<http://www.history.com/news/the-green-book-the-black-travelers-guide-to-jim-crow-america> [<https://perma.cc/U92N-APQE>].

96. U.S. CONST. amends IV, XIV; *see also* Carter, *supra* note 72, at 19.

97. 734 A.2d 350 (N.J. Super. Ct. 1996).

98. *Soto*, 734 A.2d at 352.

99. 517 U.S. 806 (1996).

100. *Whren*, 517 U.S. at 815.

101. *Compare Soto*, 734 A.2d at 350, *with Whren*, 517 U.S. at 806.

102. *See* William H. Buckman, *Racial Profiling: Truth and Consequences*, N.J. LAW., Apr. 2005, at 16, 16–18.

103. *Soto*, 734 A.2d at 352.

104. *Id.* at 352–57.

105. *Id.* at 357–60 (highlighting N.J. State Police training videos that depicted only Latino or Black men as drug traffickers, comments about drug policing being more important than protecting motorists' rights, racialized remarks about citizens and the first Black trooper, and more).

106. *Id.* at 360–61.

107. *Whren v. United States*, 517 U.S. 806, 809 (1996).

108. Reply Brief for the Petitioners at *2–3, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 164375.

109. *Id.* at *8–9.

officer” standard that would ask “whether a reasonable officer in the circumstances would have taken a particular action.”¹¹⁰

Ultimately, the *Whren* Court held that “any traffic offense committed by a driver was a legitimate legal basis for a stop, regardless of the officer’s subjective state of mind.”¹¹¹ The Court reasoned that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause,” which stalled contesting pretextual stops through the Fourth Amendment.¹¹² The Court further held that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”¹¹³ The extensive “collaboration and strategy between lawyers and statistical experts” necessary for the defendants to prevail in *Soto* demonstrates the *Whren* defendants’ argument about the difficulty of Fourteenth Amendment litigation.¹¹⁴

“Shopping while Black” is another derivative of “driving while intoxicated” but in the context of consumer racial profiling (CRP).¹¹⁵ CRP is “any type of differential treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer.”¹¹⁶ CRP can take many forms for Black consumers including ignoring them, treating them rudely, following them in stores, harassing them, excluding them, or calling the police.¹¹⁷ Similar to how the War on Drugs increased racial profiling by police,¹¹⁸ the “war on shoplifting” is responsible for CRP.¹¹⁹ Contrary to the assumptions underlying CRP, a study revealed that shoplifters are more likely to be middle-aged white women, finding that 46.3% of shoplifters are white, while 32.7% are Black.¹²⁰

110. *Id.* at *12.

111. HARRIS, *supra* note 68 (discussing *Whren*); *see also Whren*, 517 U.S. at 814.

112. *Whren*, 517 U.S. at 813.

113. *Id.*

114. Buckman & Lamberth, *supra* note 75, at 394. Compare *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. 1996) (discussing how objective, statistical evidence demonstrated a de facto policy of targeting minorities sufficient to overcome the “objectively reasonable, without regard to his or her underlying motives or subjective intent” standard), with *Whren*, 517 U.S. at 812 (rejecting that “an officer’s motive invalidates objectively justifiable behavior”).

115. George E. Schreer et al., “*Shopping While Black*”: Examining Racial Discrimination in a Retail Setting, 39 J. APPLIED SOC. PSYCHOL. 1432, 1432–33 (2009).

116. Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 4 (2003) [hereinafter Harris, *Shopping While Black*].

117. *See id.* at 2–3; Schreer et al., *supra* note 115, at 1432–33.

118. *See supra* notes 77–78.

119. *See Schreer et al.*, *supra* note 115, at 1432–33. The “war on shoplifting” refers to the struggle that businesses go through to secure their merchandise against shoplifters. *See Rick McCrabb, Theft from Retail Centers Costs Shoppers, Stores*, DAYTON DAILY NEWS (Sept. 5, 2013), <http://www.daytondailynews.com/news/theft-from-retail-centers-costs-shoppers-stores/OREOYmG0Eqnm6mEemVSOMM/> [https://perma.cc/R44T-P3NK]. Shoplifting has cost stores more than \$30 billion a year. *Id.* Unlike the War on Drugs, this struggle has often been characterized as a war in an informal sense. *See, e.g., Paul Roberts, Some Seattle Merchants See Shoplifting on the Rise, Making Business More Difficult*, SEATTLE TIMES (Mar. 2, 2020, 6:00 AM), <https://www.seattletimes.com/business/local-business/some-seattle-merchants-see-shoplifting-on-the-rise-making-business-more-difficult/> [https://perma.cc/7KLD-3XQT].

120. Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL’Y & L. 331, 335 (2006) [hereinafter Harris, *A Survey*].

CRP economically affects profiled victims because they pay the same amount of money as others but receive lower quality service, and “[profiled] customers may pay a ‘premium’” by overcompensating to disprove the assumptions of store owners or salespeople.¹²¹ In addition, CRP psychologically affects Black consumers because they have to be hyperaware of their presence and appearance and question whether an establishment simply has bad service or if they are being treated differently because of their race.¹²² Further, CRP is exhausting for Black consumers: “No matter how affluent and influential, a black person cannot escape the stigma of being black, even while relaxing or shopping. There is the recurring strain of having to craft strategies for a broad range of discriminatory situations.”¹²³

Unlike #DrivingWhileBlack, profiled victims can use federal legislation to combat CRP in certain circumstances. The Civil Rights Act of 1964 was the first in a series of laws that ended the Jim Crow era.¹²⁴ Even though Title II of the Civil Rights Act states that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin,”¹²⁵ the statute only applies to businesses that engage in interstate commerce.¹²⁶ Also, Title II does not include retail stores in the list of public accommodations.¹²⁷ Despite these limitations, CRP victims can still bring Title II claims against businesses engaged in interstate commerce.¹²⁸ In addition to Title II, CRP claims can be brought under Title 42, Section 1981 of the U.S. Code, which protects against racial discrimination in contractual relationships between proprietor and customer.¹²⁹ Section 1981 allows an action where Title II does not because it can be litigated against private parties that prohibit contractual relationships based on race.¹³⁰

Despite these federal protections, litigation based on claims of CRP have met limited success. In 2005, the U.S. District Court for the District of Maryland in *Gennell v. Denny’s Corp.*¹³¹ granted a motion to dismiss and a motion for summary judgment against a Black woman’s claims under Title II, Section 1981, and other torts.¹³² The complaint alleged that, while dining at a Denny’s Restaurant, the plaintiff and her party waited an extended time for their meals, while others had their food much sooner; the plaintiff’s server and the manager were rude and unresponsive; and the plaintiff’s order

121. Harris, *Shopping While Black*, *supra* note 116, at 11.

122. *Id.*

123. Harris, *A Survey*, *supra* note 120, at 331 (quoting Joe R. Feagin, *The Continuing Significance of Race: Antiracial Discrimination in Public Places*, 56 AM. SOC. REV. 1, 106 (1991)).

124. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see also* Heitzeg, *supra* note 61, at 54.

125. 42 U.S.C. § 2000a(a) (2018).

126. *Id.* § 2000a(b)–(c); *see also* Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL’Y ANALYSIS & MGMT. 424, 425, 440 (2015).

127. Harris, *Shopping While Black*, *supra* note 116, at 23–24.

128. *See infra* notes 131–137 and accompanying text for an example of a Title II claim, albeit unsuccessful.

129. 42 U.S.C. § 1981.

130. Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 126–29 (2005).

131. 378 F. Supp. 2d 551 (D. Md. 2005).

132. *Gennell*, 378 F. Supp. 2d at 561.

was not properly filled.¹³³ The plaintiff requested compensatory and punitive damages.¹³⁴ The court dismissed the Title II claim because Title II provides only injunctive and declaratory relief.¹³⁵ For the Section 1981 claim, the court held that the plaintiff must “prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”¹³⁶ The plaintiff made a prima facie claim for discrimination, but the court found the restaurant’s explanation reasonable and not pretextual.¹³⁷

Conversely, in *Hampton v. Dillard Department Stores, Inc.*,¹³⁸ a Black woman successfully brought a claim for unlawfully interfering with the right to make and enforce a contract in violation of Section 1981 against Dillard’s.¹³⁹ The case involved the woman, her friend (also a Black woman), and a group of children being followed in the Dillard’s store and one of the women being forced to empty her belongings onto a store counter after being accused of shoplifting while trying to redeem a coupon.¹⁴⁰ The issues were whether the coupon was a benefit of the earlier store purchase, whether Dillard’s intentionally interfered with redemption of the coupon, and whether the interference was racially motivated.¹⁴¹ The court found in the plaintiff’s favor on each of these issues and affirmed the over \$1.1 million in compensatory and punitive damages that the jury awarded.¹⁴²

Currently, plaintiffs use Title II in litigation involving other demographic groups and contexts like religious discrimination, sexual orientation discrimination, and membership organizations.¹⁴³ For CRP, Title II jurisprudence has been undeveloped,¹⁴⁴ and for Section 1981 claims, courts have been cautious about overextending protections.¹⁴⁵ Some courts require an outright denial of the right to contract to elicit a Section 1981 claim.¹⁴⁶ Other courts accept discriminatory treatment before, during, or after the contractual relationship as evidence to support Section 1981 claims.¹⁴⁷ A more

133. *Id.* at 555.

134. *Id.*

135. *Id.* at 556.

136. *Id.* at 557 (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

137. *Id.* at 558–59.

138. 247 F.3d 1091 (10th Cir. 2001).

139. *Hampton*, 247 F.3d at 1098–99.

140. *Id.* at 1100.

141. *Id.* at 1101.

142. *Id.* at 1101, 1120–21.

143. See Justin Tanaka & David Lau, Comment, *Airbnb in Paradise: Updating Hawai’i’s Legal Approach Towards Racial Discrimination in the Sharing Economy*, 39 U. HAW. L. REV. 435, 443–45 (2017).

144. See Harris, *A Survey*, *supra* note 120, at 338–40 (discussing the limitations of Title II claims for CRP, including an inability to recover monetary damages and onerous notification requirements).

145. See Richardson, *supra* note 130, at 130–31.

146. *E.g.*, *Arguello v. Conoco, Inc.*, 330 F.3d 355, 359–60 (5th Cir. 2003) (holding that the Section 1981 claim failed because the plaintiff “successfully completed the transaction” despite the racial discrimination she endured during the contractual relationship); *Hampton*, 247 F.3d at 1104 (reasoning that a Section 1981 claim “must involve the actual loss of a contract interest” (quoting *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192, 1200 (D. Kan. 1999))).

147. See, *e.g.*, *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001) (adopting a new prima facie test for Section 1981 claims to include “receiv[ing] services in a markedly hostile manner and in a

expansive interpretation of Section 1981 would better protect victims of CRP and carry the statutory purpose of Section 1981 into modern times.¹⁴⁸

C. #LivingWhileBlack

#DrivingWhileBlack and #ShoppingWhileBlack provide context for #LivingWhileBlack, which is the newest iteration of these hashtags, highlighting discriminatory surveillance of people of color through racially motivated 911 calls. This new hashtag “encompasses the myriad ways black people are viewed with suspicion, profiled, and threatened with responses from police” when going about normal daily activities.¹⁴⁹ Although #LivingWhileBlack can involve public spaces like businesses, this hashtag focuses on the impacts of 911 calls and the police response, whereas #ShoppingWhileBlack may not involve the police at all.

These “call[s] of intimidation”¹⁵⁰ reinforce white supremacy because they are used to remind Black people of their place in society and perpetuate white-dominated spaces.¹⁵¹ In his memoir about his upbringing in Mississippi during the Jim Crow era, David Billings argued that these racially motivated 911 calls are an example of “internalized racial superiority” that can lead white people into unconsciously upholding white supremacy and protecting their place in society.¹⁵² Some researchers describe these racially motivated 911 calls as a symptom of diversity anxiety, which is “a feeling of unease about an anticipated or real increase in diversity.”¹⁵³

These calls could also be evidence of a more malicious intent. Some commentators have argued that these 911 calls are “about repression, projection, [and] the sublime pleasure of anti-black racism” with an uncanny resemblance to the Jim Crow era.¹⁵⁴ These racially motivated 911 calls can be seen as a tactic to “tak[e] the nation back,”¹⁵⁵ as various organizations and scholars have discussed the relationship between the

manner which a reasonable person would find objectively discriminatory”); *Hall v. Pa. State Police*, 570 F.2d 86, 92 (3d Cir. 1978) (holding that the disparaging treatment received by the plaintiff invoked a Section 1981 claim even though the plaintiff completed his transaction).

148. Richardson, *supra* note 130, at 147.

149. Lockhart, *Living While Black*, *supra* note 3.

150. Morgan Gсталter, *NY State Senator Wants To Criminalize Calling 911 on Law-Abiding Black People*, HILL (Aug. 16, 2018, 4:00 PM), <http://thehill.com/homenews/state-watch/402211-ny-state-senator-wants-to-criminalize-calling-911-on-law-abiding-black> [<https://perma.cc/7NVF-68FP>].

151. Blake, *supra* note 2.

152. *Id.* (citing DAVID BILLINGS, *DEEP DENIAL: THE PERSISTENCE OF WHITE SUPREMACY IN THE UNITED STATES HISTORY AND LIFE* (2016)).

153. Colette Poole-Boykin, *The Role Diversity Anxiety Can Play in ‘Living While Black’ Incidents: Opinion*, ABC NEWS (Oct. 18, 2018, 3:37 PM), <http://abcnews.go.com/Health/role-diversity-anxiety-play-living-black-incidents-opinion/story?id=58538855> [<https://perma.cc/2GMW-ZWRJ>]. Diversity anxiety is partially attributed to a projection that white people will be less than fifty percent of the U.S. population by 2044. *See id.*

154. Stacey Patton & Anthony Paul Farley, *There’s No Cost to White People Who Call 911 About Black People. There Should Be*, WASH. POST (May 16, 2018), <http://www.washingtonpost.com/news/posteverything/wp/2018/05/16/theres-no-cost-to-white-people-who-call-911-about-black-people-there-should-be> [<https://perma.cc/55VP-KGWE>].

155. Blake, *supra* note 2.

rhetoric of Trump’s presidency and the spike in hate crimes and domestic terrorism.¹⁵⁶ Racially motivated 911 calls are modern-day weapons because “calling the police on black people for non-crimes is a step away from asking for a tax-funded beatdown, if not an execution.”¹⁵⁷ These 911 calls allow white callers to control public spaces and use the police as an enforcer, intimidation tool, and removal service.¹⁵⁸

There is no limit on the types of activities where the presence of Black bodies will make some white people feel so uncomfortable or intimidated that they will call 911.¹⁵⁹ The victims of these 911 calls or bystanders have documented these incidents, which provides “a digital record for those affected by profiling and a way of alerting a wider audience to the ways in which black behavior continues to be criminalized and subject to policing.”¹⁶⁰ This Part highlights three categories of #LivingWhileBlack incidents to demonstrate the various innocuous acts that have led to racially motivated 911 calls and the pervasiveness of these calls.

1. #LivingWhileBlack in Public

On April 12, 2018, police arrested two Black men—Rashon Nelson and Donte Robinson—in a Philadelphia Starbucks after the manager called the police because they were sitting in the café and asking to use the restroom without making a purchase first.¹⁶¹ Philadelphia Police Commissioner Richard Ross defended the arrest as “fair and

156. See, e.g., Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes* (Jan. 14, 2018) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [<https://perma.cc/Z3VM-VLR2>] (“This Essay uncovers compelling empirical support for the Trump Effect. Our analysis finds that President Trump’s election coincided with a statistically significant surge in hate crimes, even when controlling for alternative explanations.”); Press Release, NAACP, NAACP Sees Continued Rise in Hate Crimes, Legacy of Trump’s Racism (June 29, 2018), <http://www.naacp.org/latest/naacp-sees-continued-rise-hate-crimes-legacy-trumps-racism/> [<https://perma.cc/X2QL-2CJ9>] (“The NAACP believes there is a direct relationship between the rise in hate crimes exemplified by the continual #LivingWhileBlack incidents and other reported crimes and President Donald J. Trump’s xenophobic rhetoric and racist policies.”); Chris Cillizza, *The Dangerous Consequences of Trump’s All-Out Assault on Political Correctness*, CNN (Oct. 30, 2018, 12:35 PM), <http://www.cnn.com/2018/10/30/politics/donald-trump-hate-speech-anti-semitism-steve-king-kevin-mccarthy/index.html> [<https://perma.cc/5H9E-3MRE>] (“The problem with Trump’s assault on political correctness is that he took it so far that he clearly emboldened not only those lurking in the shadows . . . but also lowered the overall bar for what is considered acceptable discourse . . .”). See generally *2017 Hate Crime Statistics Released: Report Shows More Departments Reporting Hate Crime Statistics*, FBI (Nov. 13, 2018), <http://www.fbi.gov/news/stories/2017-hate-crime-statistics-released-111318> [<https://perma.cc/S5AE-WM4L>] (finding a seventeen percent increase in hate crime report incidents in 2017 compared with previous years).

157. Patton & Farley, *supra* note 154 (quoting political commentator Jason Johnson); see also Blake, *supra* note 2.

158. See Blake, *supra* note 2.

159. See Lockhart, *Living While Black*, *supra* note 3 (“A black or brown person, doing something innocuous or nothing at all, prompts a suspicious white person to call the police.”).

160. *Id.*

161. *Id.*; Kelly McCleary & Amir Vera, *A Video of Black Men Being Arrested at Starbucks. Three Very Different Reactions*, CNN (Apr. 15, 2018, 10:45 PM), <http://www.cnn.com/2018/04/14/us/philadelphia-police-starbucks-arrests/index.html> [<https://perma.cc/87ZH-DU6L>].

unbiased policing,”¹⁶² but he later apologized for the event.¹⁶³ Nelson and Robinson settled with the city for one dollar each, and the city agreed to fund a \$200,000 program for high schoolers aspiring to become entrepreneurs.¹⁶⁴ Starbucks reached an undisclosed settlement with Nelson and Robinson, and the then-CEO formed a business mentorship with the two men.¹⁶⁵ Additionally, Starbucks closed eight thousand stores on May 29, 2018, for an anti-racial-bias training.¹⁶⁶

2. #LivingWhileBlack in Higher Education

Almost exactly a month later, a similar incident occurred at Yale University.¹⁶⁷ Sarah Braasch, a white graduate student at Yale, called the police on Lolade Siyonbola, a Black graduate student at Yale, for napping in their dorm’s common room.¹⁶⁸ Multiple police officers questioned Lolade to verify her identity and her justification for being in the building.¹⁶⁹ After some confusion about Lolade’s identification listing her preferred name instead of the name in the student database, the police told her that she was free to go.¹⁷⁰ Yale’s administration responded by emphasizing its commitment to an inclusive environment, while also defending the officers’ response to the situation.¹⁷¹ In response to the incident, Lolade Siyonbola said, “We’re constantly having to prove that we’re allowed to be where we are, that we have permission—that we have freedom papers.”¹⁷² This incident highlights how institutions of higher education are not safe from bias-motivated incidents. Unfortunately, other incidents at higher education institutions have occurred since: police questioned a Black student for eating her lunch in her university’s cafeteria,¹⁷³ campus police pulled two Native American prospective students

162. McCleary & Vera, *supra* note 161.

163. Rachel Siegel, *Two Black Men Arrested at Starbucks Settle with Philadelphia for \$1 Each*, WASH. POST (May 3, 2018, 10:52 AM), <http://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/> [https://perma.cc/GJ2W-WHCB].

164. *Id.*

165. *Id.*

166. *Id.*

167. Cleve R. Wootson Jr., *A Black Yale Student Fell Asleep in Her Dorm’s Common Room. A White Student Called Police.*, WASH. POST (May 11, 2018, 8:07 AM), <http://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police/> [https://perma.cc/P49L-DZE5].

168. *Id.*

169. Brandon Griggs, *A Black Yale Graduate Student Took a Nap in Her Dorm’s Common Room. So a White Student Called Police*, CNN (May 12, 2018, 12:32 AM), <http://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html> [https://perma.cc/26B5-73EC].

170. *Id.*

171. *Id.*

172. Carl Takei, *Colleges and Universities Have a Racial Profiling Problem*, ACLU (Sept. 21, 2018, 1:30 PM), <http://www.aclu.org/blog/racial-justice/race-and-inequality-education/colleges-and-universities-have-racial-profiling> [https://perma.cc/AX6A-YQPZ] [hereinafter Takei, *Colleges and Universities*].

173. Oumou Kanoute, *A Smith College Employee Called the Police on Me for Eating Lunch While Black*, ACLU (Sept. 13, 2018, 3:30 PM), <http://www.aclu.org/blog/racial-justice/race-and-criminal-justice/smith-college-employee-called-police-me-eating-lunch> [https://perma.cc/ZJP5-7838].

from a college tour for being suspicious,¹⁷⁴ and campus police questioned a Black university employee for looking agitated while walking to work from the on-campus gym.¹⁷⁵

3. #LivingWhileBlack When Home

Incidents of racially motivated 911 calls also follow victims to their homes. In April 2018, around 10:30 p.m., former White House staffer Darren Martin moved into an apartment in New York City.¹⁷⁶ While moving in, multiple police officers responded to a call reporting a “potential break-in by someone who may have had a weapon.”¹⁷⁷ A half-dozen officers responded to the call.¹⁷⁸ The officers questioned Martin in the lobby about what he was doing in the building, and they would not let him get his identification from his upstairs apartment.¹⁷⁹ The police left after about ten to fifteen minutes, and Martin said he felt lucky that the situation ended without an altercation.¹⁸⁰ Martin described, “[H]is dominant emotion was fear—of not being able to explain himself in time, of making the wrong move, of getting shot while doing absolutely nothing wrong.”¹⁸¹

This incident is just one example of the countless Black people whom white people have victimized in or near their own homes. A white woman blocked a Black man, D’Arreion Toles, from entering his upscale building because she did not think he belonged there.¹⁸² She subsequently called the police on Toles.¹⁸³ A white man questioned and eventually called the police on a Black woman, Jasmine Abhulimen, for not showing identification at the pool in their private community.¹⁸⁴ Unfortunately, these incidents show that no matter who you are, where you live, or how much money you

174. Bill Chappell, *College Apologizes After Native American Students’ Visit Is Sidelined by Police*, NPR (May 4, 2018, 2:43 PM), <http://www.npr.org/sections/thetwo-way/2018/05/04/608533284/college-apologizes-after-native-american-students-visit-is-sidelined-by-police> [https://perma.cc/AN26-ZVLC].

175. Reginald Andrade, *I Was Reported to Police as an ‘Agitated Black Male’ – for Simply Walking to Work*, ACLU (Oct. 10, 2018, 2:00 PM), <http://www.aclu.org/blog/racial-justice/race-and-criminal-justice/i-was-reported-police-agitated-black-male-simply> [https://perma.cc/H64B-NPMG].

176. Eli Rosenberg, *A Black Former White House Staffer Was Moving into a New Apartment. Someone Reported a Burglary.*, WASH. POST (May 1, 2018, 10:12 PM), <http://www.washingtonpost.com/news/post-nation/wp/2018/05/01/a-black-former-white-house-staffer-was-moving-into-a-new-apartment-someone-reported-a-burglary> [https://perma.cc/9SCA-6KLY].

177. *Id.*

178. Cleve R. Wootson Jr., *#LivingWhileBlack Victims Want Congressional Hearing on Racial Profiling*, WASH. POST (June 4, 2018, 7:02 AM), <http://www.washingtonpost.com/news/post-nation/wp/2018/06/04/they-were-harassed-for-livingwhileblack-now-they-want-congressional-hearings-on-profiling> [https://perma.cc/P382-NFQ8].

179. Rosenberg, *supra* note 176.

180. *Id.*

181. Wootson, *supra* note 178.

182. Melissa Gomez, *White Woman Who Blocked Black Neighbor from Building Is Fired*, N.Y. TIMES (Oct. 15, 2018), <http://www.nytimes.com/2018/10/15/us/hilary-brooke-apartment-patty-st-louis.html> [https://perma.cc/QJZ2-9EQE].

183. *Id.*

184. Karen Zraick, *Man Labeled ‘ID Adam’ Is Fired After Calling the Police on a Black Woman at Pool*, N.Y. TIMES (July 6, 2018), <http://www.nytimes.com/2018/07/06/us/pool-racial-profiling-white-man.html> [https://perma.cc/CU6P-3V3M].

make, if a white person perceives a Black person as a threat, then that person will call the police.

D. Complexities That Dispatcher Laws and Racial Trauma Produce

Emergency dispatcher laws and policies complicate addressing racially motivated 911 calls. Individual cities and towns control their emergency dispatch centers to fit the needs of specific police and fire departments.¹⁸⁵ Thus, all emergency dispatch centers do not have a consistent system for handling nonemergency calls,¹⁸⁶ which is the category that many racially motivated 911 calls fit into.¹⁸⁷ For example, many cities—such as Baltimore, Chicago, New York City, and Philadelphia—have adopted a 311 system for nonemergency calls.¹⁸⁸ Milwaukee uses a differential response system, which permits the emergency dispatchers to exercise discretion on whether to dispatch an officer or take a report over the phone.¹⁸⁹ In Miami, emergency dispatchers have discretion to send police officers or Public Service Aides, who are unarmed and trained to handle nonemergencies.¹⁹⁰

In some areas, emergency dispatchers do not have discretion over which incidents emergency personnel respond to, even if the dispatcher recognizes the call as racially motivated.¹⁹¹ However, emergency dispatchers have some discretion to make racially motivated calls a lower priority. For example, in April 2018, a white woman called 911 to report two Black men for using a charcoal grill in the wrong area.¹⁹² Originally, the dispatcher documented the call as “Priority 3,” meaning the call was not a priority and officers could take hours to respond.¹⁹³ Police ultimately responded when someone called again because the original caller began to fight with the people having the barbeque.¹⁹⁴

Emergency dispatchers face a lot of pressure to log calls appropriately because they could face liability for negligence.¹⁹⁵ There is debate, unrelated to racially motivated calls, about how much discretion emergency dispatchers should have.¹⁹⁶ Some argue that requiring a script of questions before dispatch, instead of allowing the dispatcher to use

185. See NPR Staff, *Police Take Different Approaches to ‘The Tyranny of 911,’* NPR (June 28, 2013, 5:21 PM), <http://www.npr.org/2013/06/28/196588465/police-take-different-approaches-to-the-tyranny-of-911> [https://perma.cc/EXE8-4HCB].

186. See *id.*

187. See Rachael Herron, *I Used To Be a 911 Dispatcher. I Had To Respond to Racist Calls Every Day.*, VOX (Oct. 31, 2018, 12:08 PM), <http://www.vox.com/first-person/2018/5/30/17406092/racial-profiling-911-bbq-becky-living-while-black-babysitting-while-black> [https://perma.cc/ZT2S-HXPE].

188. Heather Kerrigan, *Learning from the Best City 311 Systems*, GOVLOOP (June 5, 2015), <http://www.govloop.com/community/blog/learning-best-city-311-systems/> [https://perma.cc/7N2F-FVSA].

189. NPR Staff, *supra* note 185.

190. *Id.*

191. See Herron, *supra* note 187.

192. Otis R. Taylor Jr., *Even in Oakland, Calling the Cops on Black People Just Living Their Lives*, S.F. CHRON. (May 17, 2018, 6:00 AM), <http://www.sfchronicle.com/news/article/Even-in-Oakland-calling-the-cops-on-black-people-12920652.php> [https://perma.cc/DKC9-Y5ML].

193. Herron, *supra* note 187.

194. *Id.*

195. See *id.*

196. See *id.*

discretion to immediately send help, can put lives at risk by delaying the dispatch of emergency services.¹⁹⁷ Others argue that dispatcher discretion to ask any number or variety of questions can lead to more inaccuracy and medically risky situations if dispatchers do not gather enough information to assist emergency personnel.¹⁹⁸

This issue of racially motivated 911 calls is even more problematic when considering the history and effects of policing and the resulting trauma for Black people. As discussed above, in some jurisdictions, the police must respond to every 911 call.¹⁹⁹ Thus, racially motivated 911 calls unnecessarily increase interactions between the police and Black people.²⁰⁰ Even if a Black person is not arrested, assaulted, or killed, police interactions can cause trauma.²⁰¹ Racial trauma or race-based traumatic stress “may result from racial harassment, witnessing racial violence, or experiencing institutional racism.”²⁰² In the context of a racially motivated 911 call, the interaction with the police requires the victim to justify their presence in a white space, and this requirement can make the victim feel less human.²⁰³ In the moment, this can cause a stress response of increased blood pressure, increased heart rate, and a release of cortisol (a stress hormone).²⁰⁴

Police interactions can cause trauma because of the deep distrust that exists between the police and the Black community.²⁰⁵ At the root of this distrust is a long history of police brutality.²⁰⁶ Fifteen percent of police-involved deaths in 2015 were Black men between the ages of fifteen and thirty-four, despite being only two percent of the U.S. population.²⁰⁷ This disparity in police-involved deaths, the high volume of Black people who have personally experienced police harassment, and the sensationalism of these

197. E.g., David Givot, *Humans vs. Toys: What Happened to Dispatch Discretion?*, EMS1 (Oct. 4, 2012), <http://www.ems1.com/ems-products/communications/articles/1351523-Humans-vs-toys-What-happened-to-dispatch-discretion/> [https://perma.cc/MGP7-7UXM].

198. E.g., Jeff J. Clawson et al., *Protocols vs. Guidelines—Choosing a Medical-Dispatch Program*, INT’L ACADS. EMERGENCY DISPATCH (Oct. 1994), <http://www.emergencydispatch.org/articles/protocolsvsguidelines1.htm> [https://perma.cc/JAY2-ZUAB]. See *infra* Part III.B for a discussion of the role of emergency dispatchers in relation to racially motivated 911 calls.

199. See Herron, *supra* note 187.

200. See Lockhart, *Living While Black*, *supra* note 3.

201. See *id.*; Patton & Farley, *supra* note 154.

202. Erlanger A. Turner & Jasmine Richardson, *Racial Trauma Is Real: The Impact of Police Shootings on African Americans*, PSYCHOL. BENEFITS SOC’Y (July 14, 2016), <http://psychologybenefits.org/2016/07/14/racial-trauma-police-shootings-on-african-americans/> [https://perma.cc/2BUU-DX2N].

203. Lockhart, *Living While Black*, *supra* note 3.

204. Douglas Jacobs, Opinion, *We’re Sick of Racism, Literally*, N.Y. TIMES (Nov. 11, 2017), <http://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html> [https://perma.cc/7RPL-TB9N].

205. See *id.*

206. E.g., Robert Fikes, Jr., *Breathing While Black: Rude and Frightful Encounters with the Police Recalled by Distinguished African Americans, 1860-2012*, 5 J. PAN AFRICAN STUD. 41 (2012) (describing experiences of police brutality suffered by well-known and respected Black people spanning from 1860 to 2012).

207. Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> [https://perma.cc/Y3Y2-MRKB].

stories in the media all contribute to the “depth and persistence of African American sensitivity, fear, and grievance in regards to the police.”²⁰⁸

The trauma from police interactions can have a physiological and psychological impact.²⁰⁹ For example, a young Black man experienced a stop and frisk in New York City; afterwards, he experienced feelings of grief and sadness, difficulty sleeping at night, and anxiety about additional police encounters.²¹⁰ A series of qualitative interviews revealed that young Black men subjected to police profiling experienced anxiety, despair, and fear.²¹¹ Race-based traumatic stress has a variety of physiological effects including chronic pain, low birth weight, obesity, diabetes, heart attacks, and more.²¹² Race-based trauma impacts observers as well as victims.²¹³ Observers who perceive racialized events in the media can be physiologically affected as much as the victim.²¹⁴

E. Remedial Attempts

#LivingWhileBlack stories have proliferated in the media, and people have responded: creating strategies to decrease these 911 calls from happening in the first place, proposing remedies for the victims, and initiating consequences against the callers. Many of the remedial attempts that this Part discusses have been met with criticism or resistance. However, racially motivated 911 calls are a multifaceted issue, and the response needs to be the same.

1. Proactively Preventing Calls

A church in Oakland, California, has pledged to find methods for de-escalation to respond to mental health emergencies, instead of defaulting to calling the police.²¹⁵ First Congregational Church of Oakland frequently interacts with the homeless population in the community, and those interactions often lead to police involvement.²¹⁶ Now, the church is planning to explore alternatives to police intervention beginning with a community workshop, “How Not to Call the Cops Ever.”²¹⁷ Though situations may arise that require police involvement, this church community considering its role in decreasing negative police interactions with people of color is a step in the right direction.²¹⁸

208. Fikes, *supra* note 206, at 41; *see also* Samuel R. Aymer, “I Can’t Breathe”: A Case Study—Helping Black Men Cope with Race-Related Trauma Stemming from Police Killing and Brutality, 26 J. HUM. BEHAV. SOC. ENV’T 367, 368 (2016).

209. Aymer, *supra* note 208, at 372.

210. *Id.* at 371–72.

211. *Id.* at 372.

212. Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 347–48 (2018).

213. Jacobs, *supra* note 204.

214. *See id.*

215. Otis R. Taylor Jr., *Oakland Church Plans To Stop Calling Police*, S.F. CHRON. (Apr. 29, 2018, 9:00 AM), <http://www.sfchronicle.com/news/article/Oakland-church-plans-to-stop-calling-police-12872445.php> [<https://perma.cc/EWM6-5F6C>].

216. *See id.*

217. *Id.*

218. *See id.*

Additionally, after the Starbucks incident discussed above,²¹⁹ Starbucks closed eight thousand stores across the country to have more than 175,000 Starbucks employees receive a mandatory racial-bias education.²²⁰ Although the CEO recognized that one racial-bias training will not be enough to fix the underlying issues that led to the incident,²²¹ Starbucks has at least begun the conversation. Whereas, even though many incidents of racial bias have been reported at other stores such as Wal-Mart, other companies have not responded to the same degree as Starbucks.²²² Hopefully, following Starbucks's lead, the conversation will continue.

2. Proposed Legislation

Four state legislators introduced efforts to make racially motivated 911 calls a crime or authorize civil litigation. In New York, State Senator Jesse Hamilton—a Black man—introduced a bill that would make racially motivated false reports to the police a hate crime.²²³ Specifically, the bill would add “falsely reporting an incident” in the first, second, or third degree to the list of specified offenses for hate crimes.²²⁴ State Senator Hamilton introduced the bill in August 2018, not long after he was the victim of a white woman calling the police on him for canvassing in one of his Brooklyn districts.²²⁵ The bill did not make it out of the Senate Rules Committee,²²⁶ but Assistant Speaker Félix Ortiz of the New York State Assembly reintroduced the bill in the 2019–2020 legislative session.²²⁷ As of May 4, 2020, it is currently in the Assembly Codes Committee.²²⁸

Additionally, in Michigan, State Representative LaTanya Garrett—a Black woman—introduced a bill that would have made racially motivated false reports to the police a felony.²²⁹ Specifically, the bill stated that when a false report is made “based solely on the race or ethnicity of the alleged perpetrator,” then the person who made the

219. See *supra* Part II.C.1.

220. Jennifer Calfas, *Was Starbucks' Racial Bias Training Effective? Here's What These Employees Thought*, TIME (May 30, 2018, 12:01 AM), <http://time.com/5294343/starbucks-employees-racial-bias-training/> [https://perma.cc/S4YL-L3KN].

221. See Rachel Abrams et al., *Starbucks's Tall Order: Tackle Systemic Racism in 4 Hours*, N.Y. TIMES (May 29, 2018), <http://www.nytimes.com/2018/05/29/business/starbucks-closing-racial-bias-training.html> [https://perma.cc/7EJ9-RZYE].

222. See Andrew Ross Sorkin, *Why Starbucks's Bias Training, Despite Skepticism, Is an Important Start*, N.Y. TIMES (May 28, 2018), <http://www.nytimes.com/2018/05/28/business/starbucks-stores-closed-racial-bias-sorkin.html> [https://perma.cc/LY8Q-B67V].

223. Gstalter, *supra* note 150.

224. S. 9149, 2017–2018 Leg., Reg. Sess. § 1 (N.Y. 2018).

225. See Zahara Hill, *Black Senator Who Had Cops Called on Him Proposes Legislation That Could Make White Folks Put Their Phones Down*, BLAVITY (Mar. 8, 2019, 3:05 PM), <http://blavity.com/black-senator-who-had-cops-called-on-him-proposes-legislation-that-could-make-white-folks-put-their-phones-down> [https://perma.cc/QPC7-8CRF].

226. *Senate Bill S9149*, N.Y. ST. SENATE, <http://www.nysenate.gov/legislation/bills/2017/s9149> [https://perma.cc/R8EE-JW9W] (last visited May 1, 2020).

227. Assemb. 3566, 2019–2020 Leg., Reg. Sess. § 1 (N.Y. 2019).

228. *Assembly Bill A3566*, N.Y. ST. SENATE, <http://www.nysenate.gov/legislation/bills/2019/A3566> [https://perma.cc/5TA8-A99G] (last visited May 1, 2020).

229. Rochelle Riley, *New Michigan Bill Would Stop 911 Calls for Breathing While Black*, DETROIT FREE PRESS (Sept. 5, 2018, 7:13 PM), <http://www.freep.com/story/news/columnists/rochelle-riley/2018/09/05/michigan-bill-falsely-report-crime-based-race/1207129002/> [https://perma.cc/6UML-7587].

report would have been guilty of a felony.²³⁰ This felony would have a maximum of a four year sentence.²³¹ However, this bill never made it out of committee and has not been reintroduced.²³²

In Oregon, State Representative Janelle Bynum—a Black woman—introduced legislation to authorize the victims of racially motivated 911 calls to bring civil litigation against the caller.²³³ Specifically, the law permits a person to bring a civil suit against “any person who knowingly causes a police officer to arrive at a location to contact another person” in order to discriminate, harass, “expel[] from a place in which the other person is lawfully located,” or damage the victim’s reputation or financial interests.²³⁴ The law allows recovery for the greater of “[s]pecial and general damages . . . or [s]tatutory damages of \$250” and punitive damages.²³⁵ Like New York State Senator Hamilton, State Representative Bynum introduced the bill not long after she was the victim of a woman calling the police on her for canvassing in one of her districts.²³⁶ It entered into effect in January 2020.²³⁷

Most recently in Wisconsin, State Representative LaKeshia Myers—a Black woman—introduced a bill to make “unlawfully summoning a police officer” a class C misdemeanor and to authorize a civil cause of action against the summoner.²³⁸ The legislation is also referred to as the “BBQ Becky Bill,” referencing the woman who called the police on two Black men having a barbeque.²³⁹ Myers’s motivation for the bill was to conserve police resources for legitimate crimes and to reduce the “undue harm, danger, and stress to individuals involved.”²⁴⁰ Additionally, Myers was inspired by the successful legislation passed in Oregon.²⁴¹ The Wisconsin bill was introduced in January 2020, but the bill failed to pass in April 2020.²⁴²

3. Legal and Social Consequences

In 2018, victims of two separate racially motivated 911 calls were successful in bringing consequences against the callers. On October 19, 2018, in North Carolina, an intoxicated white woman, Susan Westwood, harassed two Black sisters, Leisa Meria

230. H.R. 6318, 99th Leg., Reg. Sess. (Mich. 2018).

231. H.R. 6319, 99th Leg., Reg. Sess. (Mich. 2018).

232. *See House Bill 6318 (2018)*, MICH. LEGISLATURE, <http://legislature.mi.gov/doc.aspx?2018-HB-6318> [https://perma.cc/ER4V-XE2N] (last visited May 1, 2020).

233. P.R. Lockhart, *Oregon Senate Passes Bill Punishing Racist 911 Callers*, VOX (June 5, 2019, 4:50 PM), <http://www.vox.com/identities/2019/6/5/18654140/oregon-911-call-legislation-racism-living-while-black> [https://perma.cc/PKM7-PNTE] [hereinafter Lockhart, *Oregon Senate*].

234. OR. REV. STAT. ANN. § 30.845(1) (West 2020).

235. *Id.* § 30.845(2).

236. Lockhart, *Oregon Senate*, *supra* note 233.

237. OR. REV. STAT. ANN. § 30.845.

238. Assemb. 755, 2019–2020 Leg., Reg. Sess. (Wis. 2020).

239. *Lawmaker Introduces ‘BBQ Becky Bill’ Aimed at Curbing Frivolous Law Enforcement Calls*, FOX6 NEWS (Dec. 22, 2019, 6:54 AM), <http://fox6now.com/2019/12/22/lawmaker-introduces-bbq-becky-bill-aimed-at-curbing-frivolous-law-enforcement-calls/> [https://perma.cc/D8B7-7THW].

240. *Id.*

241. *See id.*

242. *Assembly Bill 755*, WIS. ST. LEGISLATURE, <http://docs.legis.wisconsin.gov/2019/proposals/ab755> [https://perma.cc/MA67-2RMH] (last visited May 1, 2020).

Garris and Mary Michelle Garris, while they were waiting for AAA in the parking lot of an apartment complex where one of the sisters lived.²⁴³ Westwood made a slew of racist comments against the sisters before she called the police and lied saying the women were trying to break into an apartment.²⁴⁴ One of the sisters filed a police report against Westwood, and after the video went viral, Westwood turned herself in.²⁴⁵ Westwood was arrested and released on bond after being charged with two counts of communicating threats, two counts of simple assault, and misusing the 911 system.²⁴⁶ In June 2019, Westwood pled guilty to simple assault and misusing the 911 system and was sentenced to probation for twelve months.²⁴⁷ This story could be a start for more prosecutions against racially motivated 911 callers.²⁴⁸

In Detroit, Marc Peeples—a Black urban farmer—was the victim of incessant racially motivated 911 calls and false accusations from three white women for almost a year.²⁴⁹ The calls and accusations based on Marc Peeples’s maintenance of a community garden eventually led to his arrest.²⁵⁰ In October 2018, a judge dismissed the case, calling it “‘ridiculous’ and ‘disgusting,’ and admonished police and prosecution for moving forward with it.”²⁵¹ Afterwards, Marc sued the women for \$300,000 in damages claiming “the women ‘knowingly fabricated all of [their] allegations’ and ‘acted intentionally and concertedly to cause [him] economic harm and emotional distress.’”²⁵² Few 911 callers have faced consequences beyond social accountability, so he filed this suit to change that narrative.²⁵³

In addition, many of the callers have been held socially accountable for making a racially motivated 911 call. Black Twitter has demonstrated the power of social accountability. As different stories have proliferated on the internet, Black Twitter has dubbed white 911 callers with alliterated monikers related to the event—Barbeque Becky, Permit Patty, ID Adam, and more.²⁵⁴ These monikers, used as hashtags, have

243. Veronica Wells, *White Woman Who Harassed & Lied on Two Black Sisters Arrested for Misusing 911 System*, MADAMENOIRE (Nov. 5, 2018), <http://madamenoire.com/1046623/white-woman-who-harassed-lied-on-two-black-sisters-arrested-for-misusing-911-system/> [https://perma.cc/6YNT-5WFH].

244. *Id.*

245. *Id.*

246. Jason Silverstein, “*I’m White and I’m Hot*”: *Woman Fired, Could Be Charged for Harassing Black Sisters in Viral Video*, CBS NEWS (Oct. 29, 2018, 4:57 PM), <http://www.cbsnews.com/news/north-carolina-woman-susan-westwood-fired-could-be-charged-for-harassing-black-sisters-in-viral-video/> [https://perma.cc/Y2LZ-P4C3]; Wells, *supra* note 243.

247. WCNC Staff, ‘*South Park Susan*’ *Sentenced to Probation After Entering Guilty Pleas*, WCNC (June 5, 2019, 11:51 AM), <http://www.wcnc.com/article/news/crime/south-park-susan-sentenced-to-probation-after-entering-guilty-pleas/275-047226c8-c103-4efc-866c-5d8342b416fd> [https://perma.cc/2SCR-ZFS2].

248. *See* Wells, *supra* note 243.

249. Tom Perkins, ‘*Gardening While Black*’: *Lawsuit Targets White Accusers over ‘Outrageous’ Claims*, GUARDIAN (Mar. 8, 2019, 7:00 AM), <http://www.theguardian.com/us-news/2019/mar/08/gardening-while-black-lawsuit-marc-peeples> [https://perma.cc/WK78-QGKS].

250. *Id.*

251. *Id.*

252. *Id.* (first alteration in original).

253. *See id.*

254. Jessica Guynn, *BBQ Becky, Permit Patty and Why the Internet Is Shaming White People Who Police People ‘Simply for Being Black,’* USA TODAY (July 18, 2018, 6:30 AM),

made these stories circulate nationally or “go viral.”²⁵⁵ After these stories have reached notoriety, a second form of social accountability has occurred from employers or customers acting against the 911 caller.²⁵⁶ Some recipients of social media shaming have argued that the consequences from the shaming vastly outweigh the initial harm because the widespread, negative attention resulted in hate mail, loss of employment, or detriment to personal relationships.²⁵⁷ Some commentators have argued that the potential for shaming makes people both consider the consequences of their actions and aim to be more civil.²⁵⁸ Also, some believe that the shaming is a necessary consequence for racist behavior, especially when other remedies for victims are limited.²⁵⁹

F. Potential Legal Remedies

When an unpredictable issue arises, legally or socially, the law’s breadth is tested to determine whether this new issue will be inside or outside the scope of existing law. Racially motivated 911 calls are a new method for private racial profiling. These 911 calls do not fit neatly into an existing legal framework. However, the law may still be able to make victims of these calls legally whole. This Part outlines potential legal remedies and discusses their viability.²⁶⁰ Specifically, this Part analyzes federal civil rights law, state tort claims, and state criminal law.

1. Federal Claims

Section 1983 authorizes lawsuits for violations of federal civil rights against state and local government officials, private parties acting in concert with the state, or private parties alone.²⁶¹ Liability can be brought against a person who carries a badge of authority of a state, represents the state in some way, or has power entrusted to them under state law.²⁶² In order to use a Section 1983 claim, a victim of a racially motivated 911 call would need to establish that the caller is considered a person acting under the color of state law.²⁶³ A private actor may qualify as a state actor if they rely on government assistance or benefits, they are performing a traditional government

<http://www.usatoday.com/story/tech/2018/07/18/bbq-becky-permit-patty-and-why-internet-shaming-white-people-who-police-black-people/793574002/> [<https://perma.cc/SM5L-SAVS>].

255. *See id.*

256. *See id.*

257. *See* Kaelyn Forde, *Inside Online Shaming, and the ‘Viral Infamy’ That Follows*, ABC NEWS (July 7, 2018, 10:43 AM), <http://abcnews.go.com/US/inside-online-shaming-viral-infamy/story?id=56200539> [<https://perma.cc/2U9U-N2XG>].

258. *See, e.g., id.*

259. *See, e.g., id.*

260. This Part includes analyses of the *Restatement of Torts* and the Model Penal Code (MPC). I recognize that the Restatement and the MPC are not the best and most complete measures of the actual criminal law or common law. However, this Comment seeks to address a national issue that would be further complicated if I analyzed the laws of each state. Thus, this Comment uses a holistic survey of the law so that it applies broadly.

261. 42 U.S.C. § 1983 (2018).

262. ROBERT P. CAPISTRANO, 5.1.A EXPRESS CAUSES OF ACTION, SECTION 1983, ELEMENTS OF THE CLAIM 7–8 (2013), <http://judicialmisconduct.us/sites/default/files/2017-11/FederalPracticeManual%3D42USC1983.pdf> [<https://perma.cc/B2HJ-372B>].

263. *See id.*

function, or the government compelled or encouraged the actor to act in a particular way causing the deprivation.²⁶⁴

In the instance of a racially motivated 911 call, the caller is relying on the assistance of law enforcement officers, which causes the deprivation of the victim's rights. However, the Supreme Court has specified that "utilization of public services by private actors" without overt and significant assistance does not qualify as reliance on government assistance or benefits,²⁶⁵ and it is unlikely that responding to a 911 call would be found to constitute overt and significant assistance. Thus, a victim could bring a Section 1983 claim against a responding police officer if they were also the victim of excessive force or could sufficiently argue that carrying out the caller's biased objective transforms the action into governmental discrimination.²⁶⁶

A claim under Section 1985(3) is another potential federal claim against racially motivated 911 callers. Section 1985(3) permits a cause of action against individuals who conspire to deprive a person of the equal protection of the law or equal privileges and immunities under the law.²⁶⁷ If any act of a conspiracy injures or deprives an individual from exercising any right or privilege, then the victim can bring a Section 1985(3) claim "against any one or more of the conspirators."²⁶⁸ This claim is promising because some plaintiffs may be able to establish that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" motivated the action of placing a racially motivated 911 call.²⁶⁹ Depending on the circumstance, a victim of a racially motivated 911 call could argue that the caller, "directly and indirectly, intimidated and prevented [the victim] from enjoying and exercising their rights."²⁷⁰ The specific rights implicated by a racially motivated 911 call include the "rights to freedom of speech, movement, association and assembly . . . [and] right to be secure in their person."²⁷¹

2. State Tort Claims

Some commentators have discussed the civil claims that they believe could apply to racially motivated 911 calls including malicious prosecution, defamation, and

264. *Id.* at 8–9.

265. Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 566 (2008) (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999)).

266. See Carl Takei, *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, ACLU (June 18, 2018, 6:00 PM), <http://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated> [<https://perma.cc/S8FZ-PYWB>] [hereinafter Takei, *911 Calls*].

267. 42 U.S.C. § 1985(3) (2018).

268. *Id.*

269. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

270. *Id.* at 91.

271. See *id.* This language is modeled from the plaintiffs' successful arguments in *Griffin v. Breckenridge*. *Id.* at 91, 103. In this case, a group of white men attacked a group of Black men in Mississippi. *Id.* at 90. The Black plaintiffs brought a Section 1985(3) claim against the white defendants. *Id.* at 92. The Court held that Section 1985(3) does cover private conspiracies and state action was not required for this claim because Congress has authority to regulate this type of conspiracy under the Thirteenth Amendment and interstate travel under the Commerce Clause. *Id.* at 101–07. Specifically, the Court reasoned that Congress has the power to legislate the badges and incidents of slavery under the Thirteenth Amendment; thus, Congress could create a cause of action for the victims of "conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.* at 104–05.

intentional infliction of emotional distress.²⁷² This Part assesses whether those civil claims are viable remedies for victims.

Malicious prosecution is the most promising state tort claim for providing a remedy for victims of racially motivated 911 calls. An individual can successfully bring a claim for malicious prosecution if they prove that (1) a private person initiated criminal proceedings against them, (2) without probable cause, (3) for a purpose other than the enforcement of criminal law, and (4) the proceedings ended in favor of the accused.²⁷³ For the first element, a lawful arrest on a criminal charge constitutes an initiation of a criminal proceeding.²⁷⁴ Thus, a racially motivated 911 call could satisfy the first element if the caller communicates information to a dispatcher or police officer that precipitates a lawful arrest.²⁷⁵

The third element is satisfied if the victim can establish that an improper purpose primarily motivated the caller.²⁷⁶ An example of an improper purpose is a purpose “to harm the accused because of spite, ill will or personal hostility to him.”²⁷⁷ Malice, spite, or ill will can be inferred from the circumstances of the prosecution or a lack of probable cause.²⁷⁸ Thus, if a victim can establish the 911 caller had a discriminatory animus, then the victim could convince a jury that the third element is satisfied. The fourth element is satisfied if the police officer later “discover[ed the accused] is innocent and release[d] him without any further steps to prosecute him.”²⁷⁹ Most instances of racially motivated 911 calls can satisfy this element because if there is an arrest, charges are typically dropped not long after.²⁸⁰

However, the second element, probable cause, complicates a claim for malicious prosecution. A private citizen has probable cause for initiating criminal proceedings when the person reasonably believes that the accused committed an offense and the facts known or believed justify this belief.²⁸¹ A private citizen can initiate criminal proceedings with incorrect facts or an improper understanding of the law if their actions meet the reasonable person standard.²⁸² This is problematic for racially motivated 911 calls because callers often feel justified in their understanding of the facts or the law to contact the police about victims’ alleged actions.²⁸³ In response, a victim could argue that their actions were so clearly not a crime that the caller’s actions cannot qualify as a reasonable mistake.

272. *E.g.*, Patton & Farley, *supra* note 154.

273. RESTATEMENT (SECOND) OF TORTS § 653 (AM. LAW INST. 1977).

274. *Id.* § 654(2)(c).

275. *Id.* § 654 cmt. e, illus. 1.

276. *Id.* § 668 cmt. c.

277. *Id.* § 668 cmt. f.

278. *E.g.*, *Sims v. Kent*, 130 So. 213, 215–16 (Ala. 1930); *Smith v. Kidd*, 246 S.W.2d 155, 159 (Ky. 1951).

279. RESTATEMENT (SECOND) OF TORTS § 654 cmt. e, illus. 1.

280. See, for example, Part II.C.1 for a discussion of the #LivingWhileBlack incident at Starbucks that resulted in the arrests of two Black men.

281. RESTATEMENT (SECOND) OF TORTS § 662.

282. *Id.* § 662 cmt. e–i.

283. See Lockhart, *Living While Black*, *supra* note 3 (“[T]he [#LivingWhileBlack] incidents highlight just how quickly a misplaced assumption or feeling uncomfortable can lead a white person to call the police.”).

Two other state tort claims that are potential options for recourse are publication of injurious falsehood and intentional infliction of emotional harm. A person is liable for publication of an injurious falsehood if they intend for the statement to harm the interests of the victim and know or act in reckless disregard of the statement's truth.²⁸⁴ The injurious falsehood can be made to a third party orally or implied from conduct,²⁸⁵ meaning a 911 call to the police could qualify as a statement to a third party. However, the main issue with a claim for injurious falsehood is that damages are limited to the plaintiff's pecuniary losses.²⁸⁶ Pecuniary losses refer to prevention of sales, diminution in prices, and other monetary damages due to the influence the falsehood had on third parties.²⁸⁷ None of the racially motivated 911 calls that this Comment discusses present these types of damages.²⁸⁸

For intentional infliction of emotional harm, the plaintiff must prove that the actor "by extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional harm."²⁸⁹ However, the tort sets a high bar for the level of emotional harm. This tort was meant to cover a small sliver of conduct beyond the utmost bounds of human decency.²⁹⁰ The underlying conduct must be extreme and outrageous and exercising a legal right, such as placing a 911 call, does not typically lead to liability.²⁹¹ Thus, a 911 call would most likely fail to reach the level required for intentional infliction of emotional harm. The Marc Peebles case, however, which may be considered an extreme example of racially motivated 911 calls, could have proved this wrong.²⁹²

3. State Criminal Law

Some state legislators have proposed criminal sanctions for racially motivated 911 callers.²⁹³ This Part further explores whether any crimes currently encompass these calls and how these laws can be adapted to better suit prosecution of racially motivated callers. First, this Part examines the consequence of criminal misuse of the 911 system. Second, this Part evaluates falsely reporting a crime to law enforcement as a misdemeanor and a felony. Finally, this Part analyzes hate crime statutes as a potential remedy.

The first potential category of crime for a racially motivated 911 call is criminal misuse of the 911 system. Criminal misuse of the 911 system includes both purposeful nonemergency and prank calls.²⁹⁴ Each state has its own criteria for what qualifies as

284. RESTATEMENT (SECOND) OF TORTS § 623A.

285. *Id.* § 623A cmt. e.

286. *Id.* § 623A cmt. f.

287. *Id.* § 633 cmt. c, f–g.

288. *See supra* Part II.C.

289. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW INST. 2012).

290. *Id.* § 46 cmt. d.

291. *Id.* § 46 cmt. d–e.

292. *See Perkins, supra* note 249.

293. *See supra* notes 223–232 and accompanying text for a discussion of the proposed legislation in New York and Michigan.

294. Christina M. Eastman, *Chapter 89: Rescuing 911?*, 40 MCGEORGE L. REV. 486, 488 (2009). Purposeful nonemergency calls are intentional, frivolous calls or calls "about matters that require police attention

criminal misuse and varying punishments for the offense. For example, under California law it is a misdemeanor to call 911 with the “intent to annoy or harass . . . established by proof of repeated calls or communications over a period of time, however short, that are unreasonable under the circumstances.”²⁹⁵ This means a single 911 call would not establish intent for this statute.²⁹⁶ But California has another criminal statute that prohibits knowingly using the 911 system for any reason other than an emergency.²⁹⁷ This statute has a graduated violation system that ranges from receiving a written warning and educational materials on appropriate 911 use to a \$250 fine.²⁹⁸

In comparison, under North Carolina law—a state with a prosecution for a racially motivated 911 call²⁹⁹—it is a class 1 misdemeanor to knowingly call 911 for a purpose other than an emergency communication.³⁰⁰ Florida law makes it a misdemeanor to use 911 to make a “false alarm or complaint or report[] false information that could result in [an] emergency response.”³⁰¹ If the value of the service provided exceeds \$100 or a person has been convicted of the misdemeanor offense for misuse of the service four times, then the offense is a felony in the third degree.³⁰² In each state, criminal misuse of the 911 system has a very low penalty.³⁰³ However, California’s consequence of receiving educational materials could be beneficial in the context of racially motivated 911 calls, if the literature was specific to overcoming implicit bias and understanding when it is appropriate to call 911 on a person.³⁰⁴

The second potential category of crime for a racially motivated 911 call is the crime of falsely reporting to law enforcement authorities. The Model Penal Code (MPC) states that it is a misdemeanor to “knowingly give[] false information to a law enforcement officer with purpose to implicate another.”³⁰⁵ Some states, like Pennsylvania, have adopted the MPC almost verbatim while others, like California, have expanded the level and consequence for falsely reporting a crime.³⁰⁶

Pennsylvania closely adopted the MPC with its law against false reports to law enforcement authorities, but the offense is a misdemeanor in the second degree.³⁰⁷ Specifically, the Pennsylvania Superior Court held that a false report to authorities has four elements: “(1) the defendant must have made the statement to a law enforcement

but are not emergencies, such as reporting that a car was broken into overnight or reporting a non-injury vehicle accident.” *Id.*

295. CAL. PENAL CODE § 653x(b) (West 2020).

296. *See id.*

297. *Id.* § 653y(a).

298. *Id.* § 653y(a)(1)–(2)(C).

299. *See* WCNC Staff, *supra* note 247.

300. N.C. GEN. STAT. ANN. § 14-111.4 (West 2020).

301. FLA. STAT. ANN. § 365.172(14) (West 2020).

302. *Id.*

303. *E.g.*, CAL. PENAL CODE § 653y(a); FLA. STAT. ANN. § 365.172(14); N.C. GEN. STAT. ANN. § 14-111.4.

304. *See* CAL. PENAL CODE § 653y(a)(1) (“The law enforcement agency may provide educational materials regarding the appropriate use of the 911 emergency system.”).

305. MODEL PENAL CODE § 241.5(1) (AM. LAW INST. 1962).

306. *Compare* 18 PA. STAT. AND CONS. STAT. ANN. § 4906(a) (West 2020), *with* CAL. PENAL CODE § 148.3(a).

307. 18 PA. STAT. AND CONS. STAT. ANN. § 4906(a).

officer; (2) the defendant's statement must be false; (3) the defendant must know the statement is false; and (4) the defendant must intend to implicate another."³⁰⁸ A racially motivated 911 call could meet this standard, but, like criminal misuse, the issue of a low penalty remains because the consequences of a misdemeanor are not proportional to the harm caused.

California has both a felony and a misdemeanor for falsely reporting an emergency.³⁰⁹ The misdemeanor is like the MPC, finding an individual guilty if they knowingly give a false report of an emergency.³¹⁰ The felony law, however, states that an individual is guilty if they falsely report an emergency and know or should know that the police response is likely to cause death or great bodily injury and a death or injury is sustained.³¹¹ The California legislature created this felony as a response to "swatting."³¹² A racially motivated 911 call does not always rise to the level of being likely to cause death or great bodily harm, but the prevalence of police brutality or the severity of the situation that the caller claimed could make such a result possible. For example, it is not difficult to imagine how the accusation that Darren Martin had a weapon could have had a very different ending.³¹³

The final potential category of crime for a racially motivated 911 call is a hate crime. Although the MPC does not include a hate crime provision,³¹⁴ states have many different provisions and elements for these types of crimes. Some states make it easier for a racially motivated 911 call to constitute a hate crime and some make that almost impossible. The states where justice is most accessible are those that do not limit hate crimes to specific offenses. For example, in California, *a criminal act* due to a victim's actual or perceived characteristics can qualify as a hate crime,³¹⁵ and a hate crime "includes, but is not limited to," an interference with civil rights.³¹⁶ Likewise, Florida's statute states that *any felony or misdemeanor* can be reclassified as a higher offense if it qualifies as a hate crime.³¹⁷ Conversely, the statutes in Washington, D.C.,³¹⁸ New

308. Commonwealth v. Soto, 650 A.2d 108, 110 (Pa. Super. Ct. 1994).

309. CAL. PENAL CODE § 148.3(a)–(b).

310. *Id.* § 148.3(a).

311. *Id.* § 148.3(b).

312. Eric Brumfield, *Chapter 284: Deterring and Paying for Prank 911 Calls That Generate a SWAT Team Response*, 45 MCGEORGE L. REV. 571, 571–72 (2014). "Swatting occurs when an individual calls 911 as a prank to falsely report an emergency situation at a home, thereby causing the police to respond with a SWAT team." *Id.* at 571 (footnote omitted). Various celebrities have been the victims of swatting. *Id.* In 2017, swatting became international news when an online gaming feud led to an attempted "swat" that resulted in the death of a young man who was completely unconnected to the online events. Kyle Swenson, *Two Rival Gamers Allegedly Involved in Kansas 'Swatting' Death Plead Not Guilty in Federal Court*, WASH. POST (June 14, 2018, 4:06 AM), <http://www.washingtonpost.com/news/morning-mix/wp/2018/06/14/two-rival-gamers-allegedly-involved-in-kansas-swatting-death-plead-not-guilty-in-federal-court> [https://perma.cc/2R8W-26XU]. One of the young men involved in the swatting was from California. *Id.*

313. See *supra* notes 176–181 and accompanying text for a discussion of the #LivingWhileBlack incident when Darren Martin moved into a New York City apartment building.

314. Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 157, 158 (2003).

315. CAL. PENAL CODE § 422.55(a).

316. See *id.* § 422.55(b).

317. FLA. STAT. ANN. § 775.085(1)(a) (West 2020).

318. D.C. Code Ann. § 22-3701(2) (West 2020).

Jersey,³¹⁹ Pennsylvania,³²⁰ and New York³²¹ specify a list of offenses that can qualify as a hate crime, but none of those lists include misuse of the 911 system or falsely reporting an emergency.³²²

Some hate crime statutes are detrimental to victims by requiring the accused to have general intent or specific intent to commit the hate crime, like the statutes in New Jersey, New York, and Pennsylvania.³²³ Most racially motivated callers are not aware of their unconscious biases or prejudices that lead them to make these 911 calls.³²⁴ Thus, an intent requirement becomes a barrier for prosecution of most racially motivated 911 calls. In the alternative, the statutes in California, Washington, D.C., and Florida require prejudice to be a motivator or for the commission of the act to demonstrate prejudice.³²⁵ This maintains a high bar for prosecution of a hate crime, but it is more attainable for the victims of racially motivated 911 calls.

III. DISCUSSION

Black people have been historically policed. This overpolicing and regulation of Black bodies has continued into the present day as evidenced by 911 calls based on implicit bias. These 911 calls are a vestige of slave codes, the Black Codes, and the Jim Crow era. As Lolade Siyonbola highlighted in her response after the Yale incident, these 911 calls are illustrations that some white people in this country still, knowingly or subconsciously, believe that Black people are a threat and their presence in certain spaces must be justified and regulated.³²⁶

Part III.A outlines how #DrivingWhileBlack and #ShoppingWhileBlack provide lessons for recommended approaches and pitfalls to avoid when litigating private racial profiling. Part III.B explains the role that police departments and emergency dispatchers have in mitigating the harms of racially motivated 911 calls, supporting victims, and educating the public. Finally, Part III.C explores avenues of legal remedies for victims, discusses strategies to open these avenues, and predicts the likelihood of success.

A. Lessons from #DrivingWhileBlack and #ShoppingWhileBlack

Private racial profiling cannot be viewed in isolation from racial profiling by police and CRP because of their shared history. As the predecessors of #LivingWhileBlack, #DrivingWhileBlack and #ShoppingWhileBlack provide valuable insight on how the law can protect people of color from discrimination. This Part evaluates the legal paths

319. N.J. STAT. ANN. § 2C:16-1(a) (West 2020).

320. 18 PA. STAT. AND CONS. STAT. ANN. § 2710(a) (West 2020).

321. N.Y. PENAL LAW § 485.05(3) (McKinney 2020).

322. See D.C. Code Ann. § 22-3701(2); N.J. STAT. ANN. § 2C:16-1(a); 18 PA. STAT. AND CONS. STAT. ANN. § 2710(a). This is why the proposed legislation in New York adds racially motivated false reports to the list of specified offenses for hate crimes. See *supra* note 224 and accompanying text.

323. See *supra* notes 319-321 and accompanying text.

324. See *supra* note 152 and accompanying text for a discussion of internalized racial superiority as a motive behind private racial profiling.

325. CAL. PENAL CODE § 422.55(a) (West 2020) (in whole or in part); D.C. Code Ann. § 22-3701(1); FLA. STAT. ANN. § 775.085(1)(a) (West 2020).

326. See Takei, *Colleges and Universities*, *supra* note 172.

for remedying other forms of racial profiling and discusses what the legal path for #LivingWhileBlack should be.

#DrivingWhileBlack was the first iteration of the racial profiling hashtags. Its history provides insight on how to address #LivingWhileBlack. *State v. Soto* and *Whren v. United States* teach multiple lessons. First, these cases underscore the power of statistics.³²⁷ Currently, 911 calls do not have the same statistical foundation as traffic stops,³²⁸ but this information could be recorded and reported with the assistance of emergency dispatchers, social scientists, and statistical experts. State and local governments should begin collecting and analyzing 911 call data to determine if there is a recurring issue with racially motivated calls. Second, these racial profiling cases demonstrate the power of messaging and public pressure. #DrivingWhileBlack became a nationally recognized issue due to “the dozens of stories in the press and on the airwaves, combined with the statistical reports, the lawsuits, and recent legislative action.”³²⁹ However, the vast news coverage and statistics may push local governments and police departments at the center of the scrutiny to become obstinate. This was demonstrated in New Jersey when, despite all of the statistics and news coverage in the 1990s,³³⁰ “officials in law enforcement and government [were] not eager to acknowledge the problem of racial profiling.”³³¹

This is a lesson for #LivingWhileBlack because these 911 calls have generated sufficient attention from the media, thus generating social pressure.³³² Also, some state legislatures have begun taking action.³³³ Unlike #DrivingWhileBlack, private citizens are the subject of #LivingWhileBlack claims, so police departments and local governments are not likely to resist these efforts. However, private citizens may reject the prevalence of the issue or not want to address their implicit biases, which may lead to similar resistance.

There are multiple lessons from #ShoppingWhileBlack for #LivingWhileBlack. Like #ShoppingWhileBlack, #LivingWhileBlack involves racial profiling from individuals that are not government actors, so the protections are different than #DrivingWhileBlack.³³⁴ Similar to racial profiling by police, CRP shares a message about the use of studies and media perception of the issue. Statistics, studies, and media stories legitimized the issue of CRP to demonstrate the full extent of the issue.³³⁵ Private racial profiling has received sufficient media attention that brings scrutiny to racially

327. See Buckman & Lamberth, *supra* note 75, at 399–400.

328. See *id.* at 404–06.

329. HARRIS, *supra* note 68.

330. See *supra* notes 79, 81, 103–106 and accompanying text for a discussion of racial profiling in New Jersey.

331. HARRIS, *supra* note 68.

332. See Lockhart, *911 Calls*, *supra* note 1 (discussing how #LivingWhileBlack incidents dominated news coverage about race relations in 2018).

333. See *supra* Part II.E.2 for a discussion of the proposed bills in New York, Michigan, Oregon, and Wisconsin.

334. See *supra* Part II.B for a discussion that outlines the similarities and differences between racial profiling by police, businesses and retailers, and private citizens.

335. See, e.g., Harris, *A Survey*, *supra* note 120, at 335 (using statistics to combat the assumption about CRP being needed to stop rampant shoplifting by Black people); Harris, *Shopping While Black*, *supra* note 116, at 6 (using a Gallup study to quantify the pervasiveness of CRP for Black people).

motivated 911 calls.³³⁶ However, the full scope of #LivingWhileBlack is unclear. Not every instance of racially motivated 911 calls makes the news,³³⁷ so statistics or studies would be helpful to contextualize the full scope of the problem.³³⁸

In addition, #ShoppingWhileBlack raises thoughts about the effectiveness of federal litigation to address racial profiling. Essentially, the viability for federal claims about CRP has been reduced to Section 1981 claims, and Section 1981 claims are riddled with difficulty.³³⁹ The Section 1981 case law suggests that a private racial profiling plaintiff could advocate for an expansive interpretation of a federal statute.³⁴⁰ However, private racial profiling lacks a federal statutory framework that can be used as recourse like with #DrivingWhileBlack and #ShoppingWhileBlack.³⁴¹ Thus, the ultimate lesson from #DrivingWhileBlack and #ShoppingWhileBlack is that racial profiling by private citizens may be best remedied by state tort or criminal law.

B. Police Procedures and Emergency Dispatchers Policies

Although this Comment focuses on the caller who misuses the 911 system to target an innocent Black person triggering the caller's discomfort, police procedures and emergency dispatcher policies should be amended to make it clear to these callers that this behavior is unacceptable. Further, responding law enforcement officers should support the victims of racially motivated 911 calls, not further ostracize them and subject them to unnecessary questioning. In addition, police departments and 911 call centers can use a public education strategy to inform citizens of appropriate and inappropriate 911 use.

When the police respond to a racially motivated 911 call and focus on interrogating the victim instead of addressing the caller's unnecessary call, the police are allowing themselves to be used to enforce the racial biases of private citizens.³⁴² One method for addressing this issue is to use unarmed community service officers, like the Public Service Aides in Miami,³⁴³ to respond to these nonemergency calls and change the nature

336. See Lockhart, *911 Calls*, *supra* note 1.

337. Brandon Griggs, *Living While Black: Here Are All the Routine Activities for Which Police Were Called on African-Americans This Year*, CNN (Dec. 28, 2018, 8:37 AM), <http://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd/index.html> [<https://perma.cc/U94M-VPE6>] (noting that the list of incidents is not exhaustive and recognizing that there are "no doubt many others").

338. See, e.g., HUFFINGTON POST, HUFFPOST: RACIAL EXPERIENCE (2018), <http://big.assets.huffingtonpost.com/athena/files/2018/10/17/5bc7791fe4b0a8f17ee8bf59.pdf> [<https://perma.cc/SF9C-ZN2D>] (showing the results of a survey that asked questions about respondents' experiences with racial profiling by police, CRP, and private racial profiling).

339. See *supra* notes 143–148 and accompanying text.

340. See *supra* notes 147–148 and accompanying text.

341. See *supra* Part II.B for a discussion of #DrivingWhileBlack and #ShoppingWhileBlack, including the federal statutory framework and litigation options for recourse. See also *infra* Part III.C.1 for a discussion of the failures of federal statutory framework with regard to private racial profiling.

342. Takei, *911 Calls*, *supra* note 266.

343. NPR Staff, *supra* note 185 (discussing dispatcher discretion in Miami to send a police officer or unarmed Public Service Aide).

of these interactions.³⁴⁴ This would allow the interaction between community service officer, caller, and call victim to be focused on mediation and de-escalation. If a police department does not have community service officers, then regular police officers can be trained in implicit bias and de-escalation tactics.³⁴⁵ A police officer's presence can make even innocent people uneasy, especially Black people, so police officers must be reminded that "[a]pproach means everything, and emotional control must always be the responsibility of the officer."³⁴⁶ Ultimately, police officers must be able to recognize when a situation may have been exaggerated due to a caller's bias. Police departments and officers may be more receptive to considering their role in racially motivated 911 calls due to this current period of change regarding police-citizen relationships and community policing.³⁴⁷

Emergency dispatchers play a role because they communicate information about the 911 call to the responding officer. This information can prepare officers for the situation, but misinformation can lead to an over- or undervigilant police response.³⁴⁸ For example, the 911 call that resulted in the police shooting of Tamir Rice, a 12-year-old Black boy, provided details that the "guy" in the park was "probably a juvenile," the gun was "probably fake," and that the caller did not "know if [the gun was] real or not."³⁴⁹ However, these potentially life-changing details from the 911 call were never communicated to the responding police officers.³⁵⁰ Instead, the dispatcher categorized the call as a "code one," the highest priority level, and one of the responding officers fatally wounded Tamir shortly after arriving on the scene.³⁵¹

When responding to a racially motivated 911 call, emergency dispatchers should ask a prescribed series of questions and identify "whether the caller has seen possible criminal activity that is worth an officer's time to investigate."³⁵² If the emergency dispatcher believes the caller is being racist or biased, there are two different approaches the dispatcher could take: (1) make sure that this information is communicated to the responding officers, or (2) explain that an officer will not be dispatched without a legitimate basis.³⁵³ The former is a more appropriate response than not sending a police officer because the latter approach would allow an emergency dispatcher too much

344. David C. Couper, *Best Way To Respond to Foolish 911 Calls—Stop Sending Armed Cops*, USA TODAY (June 27, 2018, 8:39 PM), <http://www.usatoday.com/story/opinion/policing/2018/06/27/911-calls-cops-policing-usa/732692002/> [<https://perma.cc/9W3W-9VFFV>].

345. *Id.*

346. *Id.*

347. See RICH MORIN ET AL., PEW RESEARCH CTR., *BEHIND THE BADGE* 48–59 (2017), <http://www.pewsocialtrends.org/2017/01/11/police-and-the-community/> [<https://perma.cc/ZWAS-A2MM>] (discussing officer perceptions on their relationship with the community and recognizing areas for improvement).

348. See Takei, *911 Calls*, *supra* note 266.

349. Jaeah Lee, *How Cleveland Police May Have Botched a 911 Call Just Before Killing Tamir Rice*, MOTHER JONES (June 24, 2015), <http://www.motherjones.com/politics/2015/06/tamir-rice-police-killing-911-call-investigation/>.

350. *Id.*

351. *Id.*

352. Takei, *911 Calls*, *supra* note 266.

353. See *id.*

discretion to determine what it means to be racist, and it is clear that individual Americans do not have a uniform understanding of this meaning.

However, the best response would be a combination of the two. At a minimum, both police officers and emergency dispatchers should receive implicit bias training, so they can learn how to recognize and address situations that have overt and discreet tones of bias. An emergency dispatcher should ask prescribed questions and dispatch an officer but also have the discretion to ask if there is a legitimate basis for the call based on their implicit bias training. In addition, public education on proper 911 use is essential and should include methods for callers to recognize when there is an emergency that requires policing. Unfortunately, public education on 911 use cannot undo racism, but it may cause callers to reevaluate their reason for calling and whether it is indeed an emergency.

C. *Addressing the Gaps in the Law*

This Comment contextualizes the pervasive, disruptive, and traumatic nature of #LivingWhileBlack incidents. The law should expand to provide a legal reprieve for the victims of these incidents against the 911 caller. As Part II.F discusses, there are a variety of legal remedies that would have to be stretched to protect victims. However, this Comment is not focused on legal imagination, and some of these remedies are impractical. For example, Section 1983 is an impractical solution because it is a remedy for responding to police abuses, and private citizens would not be considered state actors.³⁵⁴ Depending on the circumstances, a claim could be brought against the responding police officer,³⁵⁵ but this Comment's purpose is to establish legal remedies against the 911 caller. Further, as discussed above, injurious falsehood does not cover the type of damages implicated in #LivingWhileBlack incidents,³⁵⁶ and the bar for intentional infliction of emotional distress is too high to apply for most victims.³⁵⁷ This Part evaluates the most viable legal remedies, addresses any barriers to these remedies, and proposes potential solutions.

1. Limitations of Section 1985(3)

A claim under federal law remains the most difficult remedy to attain. The most promising federal claim is under Section 1985(3). However, this claim requires the plaintiff establish a conspiracy between "two or more persons acting in concert."³⁵⁸ A civil conspiracy requires the plaintiff allege an agreement or a meeting of the minds.³⁵⁹ Besides the instance of two people calling 911 together, the next best argument for a conspiracy is to allege that the caller is engaging in a conspiracy with the responding police officer or the emergency dispatcher. In a case that involved the federal criminal

354. See *supra* notes 263–265 and accompanying text for a discussion of when private citizens qualify as state actors.

355. See Takei, *911 Calls*, *supra* note 266 ("When police enforce the racial biases of private citizens, they convert those biases into governmental discrimination.").

356. See *supra* notes 284–288 and accompanying text.

357. See *supra* notes 289–292 and accompanying text.

358. *Graves v. United States*, 961 F. Supp. 314, 320 (D.D.C. 1997).

359. *Id.*

law equivalent to Section 1985(3),³⁶⁰ the Supreme Court held that the indictment included a sufficient allegation of state involvement to require denial of the motion to dismiss.³⁶¹ The Court reasoned that “a charge of active connivance by agents of the State in the making of the ‘false reports,’ or other conduct amounting to official discrimination” is sufficient to constitute a denial of rights under the Equal Protection Clause.³⁶² However, a civil conspiracy requires that “two or more individuals . . . knowingly engaged over a period of time in a common purpose to accomplish unlawful objectives.”³⁶³ It would be very difficult for a plaintiff to establish that a 911 caller and a responding officer or emergency dispatcher established a conspiracy with the specific intent and timing required. Ultimately, a victim of a racially motivated 911 call is most likely foreclosed from bringing a federal claim against the caller.

2. Probable Cause for Malicious Prosecution

The most promising tort claim for victims of racially motivated 911 calls is malicious prosecution. The application of tort law to address private racial profiling is promising because it would allow the victim to directly address the caller. Criminal consequences would involve an adversarial process between the state and the caller with the victim only serving as a witness, but direct, civil confrontation between the victim and the caller is powerful for long-term change and empowers the victim after the attack on their dignity. However, as is the case with all malicious prosecution claims, it can be difficult for plaintiffs to establish that the private citizen did not have probable cause to initiate criminal proceedings.³⁶⁴ Also, some states explicitly do not favor malicious prosecution claims.³⁶⁵ Generally, defendants can establish they had probable cause to initiate criminal proceedings by demonstrating that the known facts would lead a reasonable person to believe the accused was guilty of an offense.³⁶⁶ Establishing probable cause is a complicated question of law and fact requiring the court to determine whether the private citizen has met the legal standard to initiate the proceedings.³⁶⁷

360. 18 U.S.C. § 241 (2018).

361. *United States v. Guest*, 383 U.S. 745, 756–57 (1966). The case involved six white men who were indicted for criminal conspiracy under 18 U.S.C. § 241. *See id.* at 746–47. Specifically, the indictment alleged that one of the acts for the conspiracy was “causing the arrest of [Black people] by means of false reports that such [Black people] had committed criminal acts.” *Id.* at 756.

362. *Id.* at 756–57.

363. *E.g.*, *Dreyer v. Jalet*, 349 F. Supp. 452, 472 (S.D. Tex. 1972).

364. *See supra* notes 281–283 and accompanying text; *see also* 8 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 28:8, Westlaw AMLOT (database updated March 2020) (explaining that probable cause is “probably the most frequently and intensively litigated element in actions, claims, or causes of action for malicious prosecution”).

365. *See, e.g.*, *Lewis v. Kei*, 708 S.E.2d 884, 889 (Va. 2011) (“Actions for malicious prosecution arising from criminal proceedings are not favored in Virginia and the requirements for maintaining such actions are more stringent [than] those applied to other tort cases to ensure that criminal prosecutions are brought in appropriate cases without fear of reprisal by civil actions.” (first citing *O’Connor v. Tice*, 704 S.E.2d 572, 575 (Va. 2011); and then citing *Ayyildiz v. Kidd*, 266 S.E.2d 108, 110–11 (Va. 1980))).

366. *See SPEISER ET AL.*, *supra* note 364, § 28:8.

367. *See supra* notes 281–283 and accompanying text for the legal standard for probable cause in malicious prosecution cases.

Courts should use the element of probable cause to push social norms forward. In order to determine whether the private citizen's belief was reasonable for probable cause, the court should use a race-switching analysis. Under this analysis, courts would consider whether the private citizen's belief that the actions of the accused were criminal would change if the accused's race was different. If the belief would change, then calling 911 was unreasonable. This type of race-switching analysis is conducted primarily in criminal proceedings,³⁶⁸ and some commentators have debated the effectiveness of such race-switching instructions.³⁶⁹ This would be a question for the judge or jury to analyze, not a question to be asked of the 911 caller during trial. This rule applied to actual incidents of #LivingWhileBlack 911 calls would look as follows: If the eight-year-old selling water was white, would the caller believe this was a criminal offense worth calling 911? If the graduate student napping in a Yale common room was white, would the caller believe this was a criminal offense worth calling 911? If the women golfing too slowly were white, would the caller believe this was a criminal offense worth calling 911? If the answer to this type of question is no, then the private citizen's belief is unreasonable; thus, the criminal proceedings would not have been initiated with probable cause. This construction of probable cause would send a message that people need to fight their biases, which should be the true goal for seeking legal remedies for the victims of racially motivated 911 calls.

3. Hate Crime Legislation

Racially motivated 911 calls predominantly fall within the purview of criminal misuse of the 911 system and false reports of an emergency.³⁷⁰ However, the consequences under these statutes are quite low.³⁷¹ So, the deterrence for placing a racially motivated 911 call is minimal or nonexistent, and prosecution for one of these offenses may not make someone want to change their behavior. The desired outcome for creating legal remedies for the victims of racially motivated 911 calls is to force the callers to confront their biases and understand why these 911 calls are problematic as well as for others to consider if they are calling 911 in a nonemergency because of bias.

Similar to swatting, the application of falsely reporting an emergency as a misdemeanor or felony for a racially motivated 911 call should depend on the content of the call and the actual harm.³⁷² If the 911 call generates a more serious police response,

368. See, e.g., 18 U.S.C. § 3593(f) (2018) (stating that a jury should not recommend a death sentence unless it would recommend the same sentence no matter the personal and demographic characteristics of the defendant and the victim).

369. E.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1678–79 (1985) (critiquing the effectiveness of racial-bias jury instructions due to jurors not attending to jury instructions, instructions to ignore race being unproductive, and the reverse effect that these instructions might place greater emphasis on race); V.F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 363 (2004) (book review) (describing switching instructions as creative attempts to address bias in the criminal decision-making process but questioning how much can be actually accomplished through switching instructions).

370. See *supra* notes 294–313 and accompanying text.

371. See *supra* notes 295–303, 305–313 and accompanying text for a discussion of the low-level consequences for criminal misuse of the 911 system and falsely reporting a crime.

372. See *supra* notes 309–312 and accompanying text for a discussion of swatting and the statutory framework distinguishing felonies and misdemeanors in California.

like an armed robbery, then the content of the call should trigger felony classification. However, if the 911 call generates a less serious police response, like using a charcoal grill in the wrong area, but the victim of the call is injured due to police brutality, then the call should still trigger felony classification. No statute for falsely reporting an emergency includes this type of misdemeanor or felony classification structure for racially motivated calls.³⁷³ As is, misuse of the 911 system and falsely reporting an emergency do not accomplish the needed level of deterrence, because they are not utilized in the context of private racial profiling and the consequences for these low-level misdemeanors are minimal.

Racially motivated 911 calls should be classified as a hate crime. The proposed bill in Michigan would have created a felony for falsely reporting a crime based solely on the race or ethnicity of the alleged perpetrator.³⁷⁴ If passed, this type of legislation would take a similar approach as California's felony for falsely reporting used to target swatting.³⁷⁵ A concern about the success of the bill is that it requires the 911 caller to intentionally make the call because of race or ethnicity.³⁷⁶ This is to be expected of Michigan, as their hate crime statute requires specific intent for a list of limited offenses.³⁷⁷ Even if reintroduced and passed, this bill would fall short of providing an adequate remedy because, as previously discussed, most racially motivated 911 calls are due to unconscious bias or prejudice, not intent.³⁷⁸ Similarly, the proposed legislation in New York would amend the list of specified offenses that can qualify as a hate crime to include falsely reporting a crime.³⁷⁹ New York's hate crime statute contains the same problem as Michigan's, in that it requires intent.³⁸⁰

Therefore, the type of hate crime legislation that states should adopt as a remedy for a racially motivated 911 call is a statute that permits any misdemeanor or felony to be reclassified as a hate crime.³⁸¹ This would allow criminal misuse of the 911 system or falsely reporting a crime to be reclassified as a hate crime without additional legislation. Also, the most remedial statute would require a lower mens rea, instead of specific intent, like establishing that prejudice was a motivator behind the commission of the crime in whole or in part.³⁸² A lower mens rea requirement would warrant prosecution for 911 calls that are, as the name suggests, racially motivated. Though there is a debate on

373. See *supra* notes 305–313 and accompanying text.

374. H.R. 6318, 99th Leg., Reg. Sess. (Mich. 2018).

375. Compare *id.* (classifying the false report of a crime based solely on race or ethnicity of the alleged perpetrator as a felony when the person does not have an actual suspicion that a crime was committed), with CAL. PENAL CODE § 148.3(b) (West 2020) (classifying the false report that an emergency exists as a felony when the person knows that the response is likely to and does result in death or bodily injury).

376. Mich. H.R. 6318.

377. MICH. COMP. LAWS ANN. § 750.147b(1) (West 2020).

378. See *supra* notes 150–158 and accompanying text for a discussion of the reasons why white people make racially motivated 911 calls.

379. S. 9149, 2017–2018 Leg., Reg. Sess. § 1 (N.Y. 2018).

380. N.Y. PENAL LAW § 485.05(1) (McKinney 2020).

381. See *supra* notes 315–317 and accompanying text for a discussion of California and Florida's hate crime statutes.

382. *E.g.*, CAL. PENAL CODE § 422.55(a) (West 2020) (using a lower mens rea to define a hate crime as a “criminal act committed, in whole or in part, because of . . . actual or perceived characteristics of the victim,” such as disability, gender, race, and religion).

whether criminal prosecution due to someone's implicit bias is appropriate, the debate is actually about the theories of punishment in relation to hate crimes.³⁸³ Nevertheless, if the existence of a criminal statute or knowledge of potential prosecution causes people to pause, question their biases, and realize a 911 call is unnecessary, then the legislation or threat of prosecution is successful. This is one reason why even less-than-optimal legislation, like New York or Michigan's, is still encouraged.³⁸⁴ Even proposed legislation that may fail to pass forces a conversation to take place in the legislature, news, and households.

4. The Oregon Law

The Oregon law is an ideal model for a state legislative response to racially motivated 911 calls. First, this law is ideal because it is civil action as opposed to criminal prosecution.³⁸⁵ Criminal prosecution is at the discretion of the prosecutor, and the focus is not on restorative justice for the victim.³⁸⁶ Civil action against the 911 caller permits the victim to receive more direct justice and potentially heal some of the resulting racial trauma.³⁸⁷ Second, the Oregon law specifically permits civil action against a person who intends to "[c]ause the other person to be expelled from a place in which the other person is lawfully located."³⁸⁸ This statutory language is expansive enough to cover many of the #LivingWhileBlack incidents outlined in this Comment.³⁸⁹ Also, the intent requirement for this provision is more attainable for a victim of a racially motivated 911 call because the caller's words could establish their intent. For example, a caller may say, "You do not belong here" or question the victim's credentials for being in a space before or while calling the police.³⁹⁰ The emergency dispatchers will have the 911 call transcript, and many of these racially motivated 911 incidents are video recorded.³⁹¹

Third, the Oregon law is ideal because it demonstrates that the penalty for a racially motivated 911 call does not have to be high.³⁹² At a minimum, victims of racially motivated 911 calls who win their cases are awarded \$250.³⁹³ As discussed, the passing of a new law can potentially make 911 callers consider their implicit biases, so a high

383. See BRYCE THERRIEN & NADIA-ELYSSE HARRIS, *CRIMINALIZING HATE: AMERICA'S LEGISLATIVE RESPONSE TO BIAS CRIMES* 7–12 (2011). The authors outline each of the five theories for criminal punishment: retribution, incapacitation, deterrence, rehabilitation, and restoration. *Id.* Retribution theory can be considered the primary basis for hate crime legislation because it focuses on the proportionality of punishment for the seriousness of bias-motivated crimes. *See id.* at 8–9. Deterrence theory can be considered the primary opponent of hate crime legislation because "hate crime offenders are unaware of hate crime laws." *See id.* at 10. However, the authors support that hate crime legislation can deter greater systemic hate crimes. *Id.*

384. *See supra* notes 374–380 and accompanying text.

385. OR. REV. STAT. ANN. § 30.845(1) (West 2020).

386. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929–30 (2006).

387. *See supra* Part II.D for a discussion linking racial trauma and racially motivated 911 calls.

388. OR. REV. STAT. ANN. § 30.845(1)(d).

389. *See supra* Part II.C for an outline of various #LivingWhileBlack instances.

390. *See supra* Part II.C for examples of situations in which these actions have occurred.

391. *See* Herron, *supra* note 187.

392. OR. REV. STAT. ANN. § 30.845(2) (defining the damages as the higher of special and general damages or \$250 with punitive damages).

393. *Id.*

punishment or potential for damages is not always necessary for effectiveness.³⁹⁴ Also, a lower amount of damages will make these claims easier to bring pro se in small claims court, which makes the remedy more accessible.³⁹⁵

Overall, the Oregon law is a great step in remedying racially motivated 911 calls. This is a groundbreaking law.³⁹⁶ The success in Oregon, which does not have a diverse state legislature,³⁹⁷ demonstrates that this type of legislation has potential. This law has already inspired another state legislator to propose a similar law.³⁹⁸ It went into effect in January 2020,³⁹⁹ so its effectiveness will not be known for a while. However, even without knowing the exact effect, this law achieves the main goal that this Comment advocates for: a remedy that raises awareness on the issue, which causes potential callers to address their implicit biases.

IV. CONCLUSION

Currently, almost every state cannot provide reprieve for victims of racially motivated 911 calls. This Comment advocated for creating an avenue for victims of racially motivated 911 calls to have a legal remedy against the caller. To achieve this goal, legislatures and the public must be further educated on the pervasiveness of this issue, which can be demonstrated through recording 911 statistics of how many calls may be racially motivated. Additionally, this Comment proposed amendments to both emergency dispatcher policies for categorizing racially motivated 911 calls and police procedures for responding to these calls. Moreover, this Comment argued that courts should adopt a race-switching test for determining probable cause in malicious prosecution cases. Finally, this Comment proposed a statutory framework for new legislation that would either include racially motivated 911 calls as a hate crime or follow Oregon's example by creating a civil cause of action.

The Civil War ended slavery over 150 years ago. The Jim Crow era ended over fifty years ago. Yet, the battle for equality and equal treatment under the law is still being fought. There is no difference between slave codes restricting free Blacks from walking alone and a Black person having the police called on them today for doing the same thing. Instead of the strict vagrancy laws of the Black Codes, a Black person today can have the police called on them for being perceived as a vagrant. Instead of signs explicitly saying what is for white versus Black people, a white person can use the police as their removal service. At their core, racially motivated 911 calls affect the victim and all who perceive them. These calls echo a message about who belongs and who does not. This Comment serves to educate on these lasting vestiges of segregation and discrimination and spur a dialogue about confronting bias. The law can encourage this reconciliation.

394. See *supra* notes 383–384 and accompanying text.

395. See Tal Finney & Joel Yanovich, *Expanding Social Justice Through the "People's Court,"* 39 LOY. L.A. L. REV. 769, 773 (2006).

396. See Lockhart, *Oregon Senate*, *supra* note 233.

397. *Id.* (explaining that Oregon has three Black state legislators).

398. See *supra* notes 238–242 and accompanying text.

399. OR. REV. STAT. ANN. § 30.845.