

## #LIVINGWHILEBLACK: BLACKNESS AS NUISANCE

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*In 2018, the powerful combination of high-quality cellphone video and social media brought to light a barrage of incidents involving 911 calls reporting that Black people were occupying spaces that the callers believed they ought not occupy. In nearly all of these cases, the targeted men, women, and children were in places in which they had a legal right to be and engaging in activities in which they had a legal right to engage. Widely circulated and debated on social media, these incidents all went “viral,” spawning a series of social media hashtags, most strikingly “#LivingWhileBlack.”*

*One might see in these incidents a new phenomenon in need of new legal tools. In this Article, we argue that these incidents are not emblematic of anything new, but rather a technology-enhanced incarnation of a much older tradition: the invocation of the property law concepts of nuisance and trespass to exclude Blacks from spaces racialized as “white.” This Article examines both the historical and modern incarnations of this “Blackness as Nuisance” tradition and argues that these efforts to distort property law norms arise from discomfort with racial integration and perceived Black physical mobility. The Article concludes with the suggestion that policymakers carefully consider the intersections of property law and criminal law, and the historical origins of these types of incidents, in order to craft effective responses to these highly charged and potentially dangerous encounters.*

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## INTRODUCTION

The spring and summer of 2018<sup>1</sup> saw a torrent of media reports of white Americans calling the police when they perceived that Black<sup>2</sup> people were occupying spaces where they ought not be.<sup>3</sup> This phenomenon garnered widespread media attention beginning in April 2018, when a Starbucks store manager in downtown Philadelphia called 911 to report that two men (who had entered the store only two minutes prior to the call) were “refusing to make a purchase or leave.”<sup>4</sup> The

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1. This Article focuses on 2018 as a period of intense reporting of #LivingWhileBlack incidents. Such incidents, however, predate 2018 and have continued throughout 2019 and into 2020.

2. We capitalize the term “Black” when referring to people of African descent individually or collectively because “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991). It follows then that we do not capitalize “white,” “which is not a proper noun, since whites do not constitute a specific cultural group.” *Id.*

3. See Elisha Fieldstadt, *New Viral Videos Again Highlight Calls Made on Black People Who Have Done Nothing Wrong*, NBC NEWS (Oct. 15, 2018, 4:29 PM), <https://www.nbcnews.com/news/us-news/new-viral-videos-again-highlight-calls-made-black-people-who-n920231> [<https://perma.cc/4HYA-DNDY>]; 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), <https://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd> [<https://perma.cc/9X5U-9VW W>]; 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), <https://www.vox.com/first-person/2018/5/30/17406092/racial-profiling-911-bbq-becky-living-while-black-babysitting-while-black> [<https://perma.cc/CE3X-F33F>]; Bill Hutchinson, *From ‘BBQ Becky’ to ‘Golfcart Gail,’ List of Unnecessary 911 Calls Made on Blacks Continues to Grow*, ABC NEWS (Oct. 19, 2018, 12:25 PM), <https://abcnews.go.com/US/bbq-becky-golfcart-gail-list-unnecessary-911-calls/story?id=58584961> [<https://perma.cc/E9U7-WY7H>]. During this same period, there were similarly high-profile incidents involving white 911 callers targeting non-Black people of color. During a college campus tour at Colorado State University, a white woman called police on two Native American prospective students. See Dakin Andone & Hollie Silverman, *A Mom on a College Tour Called the Cops on Two Native American Teens Because They Made Her ‘Nervous’*, CNN (May 5, 2018, 3:13 PM), <https://www.cnn.com/2018/05/04/us/colorado-state-university-racial-profiling-trnd/index.html> [<https://perma.cc/68BN-6D8K>]. The caller told the 911 operator, “They’re not—definitely not—a part of the tour.” *Id.* Police were dispatched to the college, and the teens were stopped and questioned by police (and ultimately, missed the rest of the tour). *Id.*

4. PhiladelphiaPolice, *4-12-18 Starbucks 911 Call, Dispatches and Officer Transmission*, YOUTUBE (Apr. 17, 2018), <https://www.youtube.com/watch?v=pFRP7QwIH0> [<https://perma.cc/8A7Z-WZUU>]. See Chris Palmer & Stephanie Farr, *Philly Police Dispatcher After 911 Call: ‘Group of Males’ Was ‘Causing a Disturbance’ at Starbucks*, PHILA. INQUIRER (Apr. 17, 2018), <https://www.philly.com/philly/news/crime/philly-police-release-audio-of-911-call>

incident prompted calls for a boycott of Starbucks, and protesters rallied outside of the store in question for days after the incident.<sup>5</sup> Approximately two weeks later, Jennifer Schulte of Oakland, California called 911 to report that “someone is illegally using a charcoal grill in a non-designated area.”<sup>6</sup> Social media users picked up the incident after the wife of one of the grill users captured and posted a cellphone video of Schulte arguing with the group and calling 911.<sup>7</sup> The video went viral,<sup>8</sup> with thousands of views within twenty-four hours (and more than one million views within two weeks),<sup>9</sup> and with social media users eventually bestowing upon Schulte the sobriquet “BBQ Becky.”<sup>10</sup>

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from-philadelphia-starbucks-20180417.html [https://perma.cc/M76R-FCAC] (describing timeline of 911 call and internal police dispatching calls). Moreover, they had not been asked to leave by any Starbucks employee. *Id.*

5. Hallie Detrick, *What You Need to Know About the Movement to Boycott Starbucks*, FORTUNE (Apr. 16, 2018), <https://fortune.com/2018/04/16/starbucks-boycott-philadelphia>; Anna Orso, *One Year Later: A Timeline of Controversy and Progress Since the Starbucks Arrests Seen 'Round the World*, PHILA. INQUIRER (Apr. 12, 2019), <https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html>

[https://perma.cc/E562-ZYR8]. Starbucks subsequently closed all of its stores for a one-day in-store training on unconscious bias for all employees. Yuko Noguchi, *Starbucks Training Focuses on the Evolving Study of Unconscious Bias*, NPR (May 17, 2018, 3:30 PM), <https://www.npr.org/2018/05/17/611909506/starbucks-training-focuses-on-the-evolving-study-of-unconscious-bias> [https://perma.cc/GZ6R-9G3C].

6. Simone Aponte, *2 Investigates Obtains 'BBQ Becky's' Viral 911 Calls*, KTVU (Sept. 2, 2018), <http://www.ktvu.com/news/listen-bbq-becky-s-viral-911-call-made-public> [https://perma.cc/FP3G-68TU].

7. That video was posted to YouTube, where it has since garnered 7.8 million views. See Michelle Dione Snider, *White Woman Called Out for Racially Targeting Black Men Having BBQ in Oakland*, YOUTUBE (Apr. 29, 2018), [https://www.youtube.com/watch?time\\_continue=7&v=Fh9D\\_PUe7QI](https://www.youtube.com/watch?time_continue=7&v=Fh9D_PUe7QI) [https://perma.cc/TZG6-PNNW] (8,158,900 views as of 08:30 PM EST on January 28, 2020).

8. A “viral” video is one that is “quickly and widely spread or popularized especially by means of social media.” Viral, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/viral> [https://perma.cc/485U-MEVF].

9. Michelle Dione Snider, SOCIAL BLADE, <https://socialblade.com/youtube/user/classic8designs/monthly> (last visited Jan. 28, 2020) (demonstrating views of videos posted on Michelle Dione Snider’s YouTube profile increased by 1,340,205 within two weeks of posting the “BBQ Becky” video).

10. Social media users initially devised monikers like “BBQ Becky” to delegitimize the antagonists and because the names of the complainants were either unknown or withheld by police. See Antonia Noori Farzan, *BBQ Becky, Permit Patty and Cornerstore Caroline: Too 'Cutesy' for Those White Women Calling Police on Black People?*, WASH. POST (Oct. 19, 2018, 6:08 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/19/bbq-becky-permit-patty-and-cornerstore-caroline-too-cutesy-for-those-white-women-calling-cops-on-blacks> (stating social media users used

Weeks later, Susan Westwood of Sunset Beach, North Carolina, called 911 to report two African-American women standing in an apartment complex parking lot (the women were tenants in the complex).<sup>11</sup> According to Westwood, the women had “been hanging out here for a while”; she pleaded with the 911 dispatcher, “I’ll tell you what, I’ll pay \$2,500 to get them out of here. Right now, I will. This is, this is, get them out of here.”<sup>12</sup> In each of the incidents catalogued by media outlets and considered here, the target of the crime report was a person of African descent, and the 911 caller was racialized as white. This observable racial difference and perceived racial motivation, coupled with the advent of high-quality cellphone video capability and social media’s capacity to rapidly circulate content, prompted the virality of the incidents as well as the public calls for redress and legislative solutions.<sup>13</sup>

In the most widely reported incidents, white people called the police on Black people in public parks;<sup>14</sup> at youth sporting events;<sup>15</sup> at

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nicknames because they did not know the callers’ identities and wanted to ridicule the callers). The virality of monikers like “BBQ Becky” and “Permit Patty” acts as a way to try “Blackness as nuisance” claims in the court of public opinion and to raise awareness about the frequency with which such claims are made. Social media engagement around these incidents also performs a social norming function, helping to identify, address, and correct misconceptions about citizen-police interactions. Some commentators, however, have argued that the use of these nicknames minimizes the seriousness of the incidents and the actions of the white complainants involved. See David Dennis, Jr., *Please Stop Giving Racist White Woman Adorable Nicknames*, NEWSONE (Oct. 17, 2018), <https://newsone.com/3831926/racist-white-women-nicknames> [<https://perma.cc/5GQ9-9GPN>] (arguing nicknames shield white callers from real consequences).

11. Stephanie Tinoco, Tina Terry & Gina Esposito, *Woman Who Harassed 2 Black Women at Charlotte Apartment Complex Turns Herself In*, WSOC-TV (Nov. 5, 2018), <https://www.wsocv.com/news/local/charlotte-woman-fired-after-video-of-harassing-rant-goes-viral/861215158> [<https://perma.cc/8VCG-RNK8>].

12. *Id.*

13. We discuss the significance of cellphone video and its dissemination via social media in more detail in Part I. Moreover, we address specific calls for redress in the Conclusion.

14. See, e.g., Gianluca Mezzofiore, *A White Woman Called Police on Black People Barbequing. This is How the Community Responded*, CNN (May 22, 2018, 3:25 PM), <https://edition.cnn.com/2018/05/22/us/white-woman-black-people-oakland-bbq-trnd/index.html> [<https://perma.cc/SE7W-PU8Q>] (reporting on an event in Oakland dubbed “BBQing While Black” in response to incident during which a white woman called the police on Black people who were barbequing in a public park).

15. See, e.g., Elisha Fieldstadt, *White Woman Dubbed ‘Golfcart Gail’ Calls Police on Black Father at Soccer Game*, NBC NEWS (Oct. 17, 2018, 4:35 PM), <https://www.nbcnews.com/news/us-news/white-woman-dubbed-golfcart-gail-calls-police-black-father-soccer-n921121> [<https://perma.cc/28RM-WB57>] (reporting that a white youth sports “field marshal” called police on Black father instructing son to heed referee’s calls from the sidelines of youth soccer game).

community pools;<sup>16</sup> in retail stores;<sup>17</sup> in university classrooms,<sup>18</sup> dining halls<sup>19</sup> and dormitories;<sup>20</sup> in parking lots;<sup>21</sup> and on the sidewalk,<sup>22</sup> among other places.<sup>23</sup> These particular incidents of viral crime reporting were so numerous that they spawned their own social media hashtag: #LivingWhileBlack.<sup>24</sup> As sociologist Tressie McMillan Cottom

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16. See, e.g., Sarah Mervosh, *A Black Man Wore Socks in the Pool. After Calling the Police on Him, a Manager Got Fired*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/memphis-pool-manager-fired-socks.html> (reporting on incident where the white manager of an Memphis apartment complex called 911 to report a Black man—the guest of a resident of the complex—wearing socks in the community pool).

17. See, e.g., Valerie Edwards, *Trump-Supporting White CVS Manager Dubbed ‘Coupon Carl’ Calls Police on a Black Customer Because He Didn’t Recognize the Voucher She Was Trying to Use*, DAILY MAIL (July 15, 2018, 10:50 PM), <https://www.dailymail.co.uk/news/article-5956011/White-CVS-manager-dubbed-Coupon-Carl-calls-police-black-woman-fraudulent-coupon.html> [<https://perma.cc/WE8W-3ASL>] (reporting on white drug store manager calling the police on a Black woman because he did not recognize the coupon that she was attempting to use).

18. See, e.g., Didi Martinez & Jareen Imam, *Black Texas College Student Has Police Called on Her by Professor, Prompting Investigation*, NBC NEWS (Nov. 15, 2018, 10:04 AM), <https://www.nbcnews.com/news/us-news/black-texas-college-student-has-police-called-her-professor-prompting-n936256> [<https://perma.cc/M43J-VXPK>] (reporting on incident in which white lecturer at the University of Texas at San Antonio called police on a Black student for placing her feet on a chair).

19. See, e.g., *Police Called on Black Smith College Student Eating Lunch*, CBS NEWS (Aug. 3, 2018, 6:35 AM), <https://www.cbsnews.com/news/police-called-on-black-smith-college-student-eating-lunch> [<https://perma.cc/2EZK-Z99P>] (reporting that a university employee called the police on a Black female student reading and eating lunch in dormitory dining hall).

20. See, e.g., 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), <https://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html> [<https://perma.cc/PEX9-V2JM>] (reporting on a white graduate student calling the police on a Black graduate student who had fallen asleep in their dormitory common room).

21. See *supra* notes 11–12 and accompanying text.

22. See, e.g., Kalhan Rosenblatt, *White Woman Dubbed ‘Permit Patty’ for Calling Police on Black Girl Denies It Was Racial*, NBC NEWS (June 25, 2018, 2:21 PM), <https://www.nbcnews.com/news/us-news/white-woman-dubbed-permit-patty-calling-police-black-girl-denies-n886226> [<https://perma.cc/4DLV-LDTL>] (reporting on white woman who called the police on an eight-year-old Black girl who was selling water on the sidewalk in front of the building in which she lived).

23. See *infra* Section I.B.3.

24. P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018, 8:00 AM), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> [<https://perma.cc/KWQ4-KKGF>]; Cleve R. Wootson, Jr., *‘You Know Why the Lady Called the Police’: Black People Face 911 Calls for Innocuous Acts*, WASH. POST (May 30, 2018), <https://www.washingtonpost.com>

has observed regarding the proliferation of media coverage of these incidents, “It’s a genre.”<sup>25</sup>

These #LivingWhileBlack incidents garnered widespread attention primarily because the persons targeted or their allies captured a cellphone video of the encounter, including, in several instances, the police response. Having now gone viral,<sup>26</sup> this phenomenon is a matter of intense public debate and, often, outrage.

Media and scholarly discussions of these #LivingWhileBlack incidents have mostly taken place in the context of the intersection of bias—whether implicit or explicit—and policing.<sup>27</sup> Some discussions have even contemplated whether lawmakers ought to develop legislative measures targeting inappropriate or ill-intentioned emergency service or crime reporting calls.<sup>28</sup> While the popular

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/national/living-while-black-viral-videos-raise-concerns-about-everyday-racial-profiling/2018/05/29/d4bd630a-5b74-11e8-8836-a4a123c359ab\_story.

25. TRESSIE McMILLAN COTTOM, *THICK: AND OTHER ESSAYS* 159 (2019).

26. See *#LivingWhileBlack Twitter Hashtag Analytics*, RITETAG, <https://ritetag.com/hashtag-stats/LivingWhileBlack> (recording more than 12,850 tweets using the hashtag #LivingWhileBlack sent by nearly 6000 separate Twitter accounts between April 11, 2019 and May 11, 2019); SOCIALERT, <https://socialert.net/dashboard#analytics/120530/initindex> (showing that 330 Twitter users posted 430 tweets using #LivingWhileBlack in the period between June 14, 2019, 07:28 p.m. to June 24, 2019, 01:01 p.m. Central Standard Time).

27. See, e.g., Daniel Craig, *It Took Two Minutes for Philly Starbucks Manager to Call Cops on Two Black Men*, PHILLYVOICE (Apr. 19, 2018), <https://www.phillyvoice.com/philadelphia-starbucks-rashon-nelson-donte-robinson-black-men-arrested> [<https://perma.cc/5HUN-GDHR>]; Nicol Turner Lee, *#LivingWhileBlack—A New Normal or History Repeating Itself?*, BROOKINGS: FIXGOV (May 17, 2018) <https://www.brookings.edu/blog/fixgov/2018/05/17/livingwhileblack-a-new-normal-or-history-repeating-itself> [<https://perma.cc/PZ5M-DX49>] (linking selected incidents to nation’s history of lynching); *Responding to #LivingWhileBlack: Confronting Unexamined Bias in Everyday Life*, FACING HIST. AND OURSELVES (2019), <https://www.facinghistory.org/educator-resources/current-events/responding-livingwhileblack> [<https://perma.cc/W6XN-H5L9>] (recommending educators teach implicit bias to their students).

28. 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, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/16/theres-no-cost-to-white-people-who-call-911-about-black-people-there-should-be> (“But lawsuits and publicity might make callers think twice and decrease the danger of false arrest and death.”); Sandra Thompson, *Golfing While Black: Grandview Golf Club Asks Five Black Women to Leave the Club for Golfing Too Slow*, CHARLESTON CHRON., (May 14, 2018), <https://www.charlestonchronicle.net/2018/05/14/golfing-while-black-grandview-golf-club-asks-five-black-women-to-leave-the-club-for-golfing-too-slow> [<https://perma.cc/JJ8M-B6UV>] (“Police must enforce laws against these businesses and their owners who file false complaints.”).

narrative is, justifiably, influenced by concerns about criminal justice policy and high-profile police shootings of unarmed civilians, another element to the #LivingWhileBlack phenomenon deserves attention: the 911 callers requesting police intervention to remove or detain the Black targets of such claims were not merely relying upon criminal law concepts to articulate their claims of imminent harm. These callers were also using property law concepts, particularly trespass<sup>29</sup> and nuisance, to invoke the intervention and assistance of law enforcement.

At its core, property law articulates the incidents, privileges, and limitations of ownership and use. In the context of nonblacks' policing of Blacks' presence in both public and private spaces, these principles—the incidents, privileges, and limitations of property rights—come into stark relief. What are the incidents of ownership in such cases? Who gets to claim the privileges or “entitlements” of property? And what are the limitations imposed by law, policy, or custom to such privilege taking? From the perspective of the use or, more precisely, the *misuse* of notions of real property ownership and the rights incident to such ownership, the #LivingWhileBlack phenomenon appears to be emblematic of a persistent discomfort associated with racial integration, generally, and Black proximity, specifically.<sup>30</sup> This casting of Blackness as a property harm—an interference with existing (white) property entitlements—is a deep-seated phenomenon that has been pervasive throughout U.S. history.

This Article's examination of what we loosely term “Blackness as nuisance” bridges the gap between the criminal law and property

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29. While several of the highly-publicized #LivingWhileBlack cases involve attempts to regulate Black occupancy in private space, we were unable to identify a single publicized instance in which the target of the law enforcement call lacked a legal right to occupy said space. See *supra* notes 14–22 and accompanying text. In other words, while callers may have believed that they were “securing” space by limiting access by trespassers, in each case we have identified, the target of the call had a right to be present. At first glance, the April 2018 incident in the Philadelphia Starbucks may present as a straightforward trespass case, but we disagree with any contention that the circumstances of that conflict presented a legitimate suspicion of criminal trespass. The two men who were the target of the store manager's call to police were in the establishment for less than three minutes before the manager called 911. Nathaniel Meyersohn, *Men Say They Were Arrested Within Minutes After Arriving at Philadelphia Starbucks*, CNN MONEY (Apr. 19, 2018, 7:55 AM) <https://money.cnn.com/2018/04/19/news/companies/starbucks-arrests-philadelphia> [https://perma.cc/P9U4-BDJ7]. Moreover, they had not been asked to leave by any Starbucks employee prior to the 911 call. *Id.*

30. See also Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019) (examining persistent white anxiety over residential integration).

norms and considers what Hari Osofsky terms the “intersecting vectors of place, space and time” at play in these #LivingWhileBlack incidents.<sup>31</sup> Part I of this Article examines how white complainants in a subset of #LivingWhileBlack incidents weaponized the language of land use, particularly that of nuisance and trespass, in their efforts to exclude Blacks from various shared spaces. This qualitative textual analysis focuses on the actual words of the #LivingWhileBlack antagonists to better understand the discursive strategies of exclusion and intimidation at work in these incidents. Part II delves into litigated claims of Blackness as nuisance, examining late nineteenth-century and early twentieth-century court cases wherein white complainants attempted—and failed—to use nuisance law to insulate themselves from Black proximity. Moreover, in Part II, we consider these historical manifestations of “Blackness as nuisance” claims alongside the more recent examples from 2018, drawing out the ways in which the rhetoric of racial exclusion has evolved over time, and linking these historical examples to the themes and types of spaces discussed in Part I. In Part III, we explore the specific racialized property entitlements at work in #LivingWhileBlack incidents. These entitlements are contextualized in notions of the right to exclude, white antagonists’ denial of racial animus, and tropes of Black male predation and white female vulnerability. Finally, this Article concludes by examining the push to criminalize racially motivated emergency services calls and argues that effective policy interventions will require integration of the property and criminal law norms at work in such incidents. As policymakers debate the optimal response to threats to institutional legitimacy and the rule of law in disputes over public spaces, private spaces, and so-called “third places”<sup>32</sup> in the context of #LivingWhileBlack, a historically grounded consideration of prior efforts to restrict Black property uses may be fruitful.

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31. Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemma from Property and Criminal Law*, 53 VILL. L. REV. 117, 120, 123–24 (2008) (analyzing the vectors of place, space, and time holistically by engaging with literal and conceptual definitions of each vector).

32. “Third places” have been referred to as “a community’s living room”—places such as cafes, bars, salons and barbershops—where people of all backgrounds gather to exchange ideas. Diana Budds, *It’s Time to Take Back Third Places*, CURBED (May 31, 2018, 5:21 PM), <https://www.curbed.com/2018/5/31/17414768/starbucks-third-place-bathroom-public> [<https://perma.cc/SBS2-V9MS>]. The “third place” is discussed in more detail in Section I.B.3.

I. WEAPONIZING THE LANGUAGE OF LAND USE: #LIVINGWHILEBLACK AND CLAIMS TO RACIALIZED PROPERTY ENTITLEMENT

All of property law is about the societal problem of resource allocation or “entitlements.” When the state (through its courts) decides a property dispute between or among litigants, the state both articulates and sets an entitlement for the prevailing party and makes a tacit promise to enforce the entitlement now set.<sup>33</sup> In the context of the prototypical common law nuisance claim, the court considers the reasonableness, utility, and impact of the alleged interference with the complainant’s property rights.<sup>34</sup> If, and only if, that interference crosses a threshold of unreasonableness and/or harm, the state will set an entitlement in favor of the complainant.<sup>35</sup>

In their efforts to leverage public resources (i.e., local law enforcement) to remove Black people from public, private, and third places, #LivingWhileBlack antagonists have painted with a wide brush the outer limits of the proverbial “right to exclude.” Held out by property scholars as “either the most important, or one of the most important, rights associated with ownership,”<sup>36</sup> the right to exclude is typically implicated in conflicts involving the holders of competing entitlements to property. In the genre of #LivingWhileBlack incidents, however, claimants (the 911 callers) have typically *not* been competing entitlement holders. This absence of any cognizable competing property interests between antagonists and targets in such incidents suggests that some other interest is at stake for complainants in these cases.

The notion that something other than land use is at issue in such cases is betrayed by the language of antagonists. 911 callers in these incidents have consistently used the language of land use, specifically concepts of trespass and nuisance, to articulate the basis for their crime-reporting calls. This Part considers the callers’ own words in the context of property theory and argues that callers in #LivingWhileBlack incidents have consistently leveraged property concepts of entitlement and belonging to advocate for the physical ouster of Black people from shared spaces.

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33. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) (stating the fundamental function of any legal system is deciding which conflicting party is entitled to prevail and then enforcing that decision).

34. See RESTATEMENT (SECOND) OF TORTS § 821 (f) (AM. LAW INST. 1979).

35. *Id.*

36. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* xxxix (5th ed. 2010).

A. *Blackness as Nuisance and #LivingWhileBlack in Public Space*

#LivingWhileBlack scenarios, admittedly, do not neatly fit the elements of traditional nuisance. Common law private nuisance is the intentional (i.e., voluntary), nontrespassory, unreasonable interference with another person's use and enjoyment of land.<sup>37</sup> It operates to prevent one owner from using her property in a manner that would injure or impede a neighboring land use.<sup>38</sup> Whereas private nuisance is the unreasonable interference with another's private use of land,<sup>39</sup> public nuisance is the "unreasonable interference with a right common to the general public."<sup>40</sup> Public nuisance claims center on the unreasonable disruption of collective rights to peace, safety, comfort, and convenience.<sup>41</sup> When 911 callers request that police forcibly remove Black people from lawfully shared spaces, those callers claim an affront to both individual and collective peace, safety, comfort, or convenience. In two of the most well-known #LivingWhileBlack incidents, which involved alleged negligent grilling in a public park and selling bottled water on the sidewalk outside a stadium, 911 callers articulated claims reflecting perceived affronts to the public by Blacks in shared space. In both instances, the callers claimed that the targets of their calls were not a part of the collective.<sup>42</sup> Their own words, where available, articulate a shared perception of property harms associated with Black proximity.<sup>43</sup>

1. "BBQ Becky"

With the exception of the Starbucks incident, perhaps the most notorious #LivingWhileBlack incident of 2018 was the #BBQingWhileBlack occurrence in Oakland, California.<sup>44</sup> In late April,

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37. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 789 (4th ed. 2018).

38. *Id.* at 68.

39. *Id.* at 787. Most nuisance claims are private in nature. *See id.* at 787–88.

40. RESTATEMENT (SECOND) OF TORTS, *supra* note 34, § 821B(1).

41. *Id.* § 821B(2)(a).

42. *See infra* notes 45, 53 and accompanying text.

43. *See supra* notes 14–22 and accompanying text. The species of nuisance (public or private) invoked in 911 calls by #LivingWhileBlack antagonists does not always correlate with the type of space (public, private, or "third") to which these callers claim superior rights. Rather, complainants consistently mix public and private nuisance concepts in their calls to law enforcement.

44. Although the Starbucks incident was the first to be widely reported by the mainstream media and social media users during the spring and summer of 2018, the incident at Lake Merritt Park arguably became the better known event because of the

in a public park abutting Oakland's Lake Merritt,<sup>45</sup> Jennifer Schulte called 911 to report that two Black male park visitors were "illegally using a charcoal grill in a non-designated area."<sup>46</sup> Schulte, who became known in the Twitterverse and elsewhere as "BBQ Becky," initially told the 911 dispatcher that she was calling to report the alleged illegal charcoal grill usage and requested that it be "dealt with immediately so that coals don't burn more children and we have to pay more taxes."<sup>47</sup>

Schulte's casting of her call for assistance as one on behalf of the greater public may have been an attempt to controvert eyewitness reports that Schulte was actually the instigator in the incident, and that she had harassed the group of barbecuers, even using a racial slur.<sup>48</sup> Witnesses reported to media outlets that, during her hours-long confrontation with the group of barbecuers, Schulte had threatened the group, saying "ya'll [sic] are going to jail."<sup>49</sup> With her allusions to child burn victims and overburdened taxpayers, Schulte held herself out to law enforcement as simultaneously both hero and victim.

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length of the eyewitness video and the availability of the audio recordings of the successive 911 calls. Schulte's conduct inspired a spoof on "Saturday Night Live" and a host of BBQ Becky memes. See *'Saturday Night Live' Pokes Fun at Oakland's 'BBQ Becky'*, NBC BAY AREA (May 21, 2018, 11:21 PM), <https://www.nbcbayarea.com/news/local/Saturday-Night-Live-Pokes-Fun-at-Oaklands-BBQ-Becky-483276851.html> [<https://perma.cc/79UD-T3EU>]; see also *BBQ Becky Crying Meme Generator*, IMGFLIP (2019), <https://imgflip.com/memegenerator/138869936/BBQ-Becky-Crying> [<https://perma.cc/WG4Q-37JD>]; "BBQ" *Becky Memes & GIFs*, IMGFLIP (2019), <https://imgflip.com/tag/bbq+becky> [<https://perma.cc/3KMA-ZFYQ>]; Catie Keck, *15 Hilarious "BBQ Becky" Memes*, INVERSE (May 18, 2018), <https://www.inverse.com/article/45011-best-bbq-becky-woman-on-the-phone-memes> [<https://perma.cc/B8PW-B2GJ>].

45. Aponte, *supra* note 6.

46. *Id.*

47. *Id.* Interestingly, the only news story that we found about a child being burned by coals in Lake Merritt/Lakeside Park is one that was filed in 2015 and reported on long-time Black residents of Oakland calling on police to cite rowdy white barbecuers who were not residents of the neighborhood. See Darwin BondGraham, *Oakland Police Threaten to Cite Residents for Barbecues by Lake Merritt*, EAST BAY EXPRESS (May 19, 2015), <https://www.eastbayexpress.com/SevenDays/archives/2015/05/19/oakland-police-threaten-to-cite-residents-for-barbecues-by-lake-merritt> [<https://perma.cc/QX22-TPBN>].

48. At one point during Schulte's call to 911, a woman in the background could be heard saying, "You [Schulte] are the one harassing people!" See Aponte, *supra* note 6. The woman who could be heard in the background was Michelle Snider, the wife of the Black man on whom Schulte called the police. *Id.* Snider is also a white woman. *Id.*

49. Tom Cleary, *Jennifer Schulte, 'BBQ Becky': 5 Fast Facts You Need to Know*, HEAVY (June 23, 2018, 5:54 PM), <https://heavy.com/news/2018/05/jennifer-schulte-bbq-becky> [<https://perma.cc/SLP5-6N5X>].

Schulte's initial attempt to position herself as the guardian of the public's interest in park safety was unsuccessful: the 911 dispatcher, sensing the oddity of the call, rated Schulte's complaint as low-priority.<sup>50</sup> With the failure of her initial strategy, Schulte changed her approach: after her initial 911 call resulted in no police being dispatched to the scene, Schulte then attempted to intimidate the group of barbecuers with claims that the park was her *private* property and that she, therefore, had the right to make them leave.<sup>51</sup> Having laid claim to the immense public parcel as "hers," Schulte was articulating a recognizable and enforceable entitlement vesting her with the power to exclude others from the space. The barbecuers, by now, were no longer merely causing a nuisance and posing a danger with their hot barbecue coals; now, the barbecuers were trespassers and therefore criminals.<sup>52</sup>

## 2. "Permit Patty"

Alison Ettel, a.k.a. "Permit Patty," adopted many of the same rhetorical strategies of intimidation, exclusion, and feigned victimhood as Schulte. Ettel, too, sought to exclude Black presence in a decidedly public space when she called the police on an eight-year-old girl selling water on a public sidewalk directly across from San Francisco's AT&T Stadium.<sup>53</sup> In video captured by the child's mother, Erin Austin, Ettel calls 911, telling the dispatcher that the child was "illegally selling water

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50. See Aponte, *supra* note 6.

51. Schulte's call confounded the 911 dispatcher, prompting the dispatcher to inquire whether Schulte herself resided in the park and, therefore, felt as if she could not leave the area. Schulte answered that the park was not her home. Despite her admission to the dispatcher that she did not have, nor believe herself to have, any special claim on the park, Kenzie Smith, one of the barbecuers about whom Schulte originally complained, claimed that Schulte told him that Lake Merritt Park was "her park" and that Smith should leave. See *'Bringing the Whole City Out: BBQing While Black at Lake Merritt Draws Diverse Crowds*, FOX KTVU (May 21, 2018), <https://www.ktvu.com/news/bringing-the-whole-city-out-bbqing-while-black-at-lake-merritt-draws-diverse-crowds> [<https://perma.cc/X65P-FJLU>].

52. In California, trespass is a misdemeanor, punishable by fine. Cal. Penal Code § 602 (West 2016). Trespass is discussed in more detail in Section I.B.

53. Kiki Intarasuwan & Marianne Favro, *#PermitPatty: Woman Calls Police on Black Girl Selling Water Near AT&T Park*, NBC BAY AREA (June 23, 2018, 11:36 PM), <https://www.nbcbayarea.com/news/local/Mother-Speaks-Out-After-PermitPatty-Video-Went-Viral-486366841.html> [<https://perma.cc/U3ED-H8LM>].

without a permit.”<sup>54</sup> The video captures a moment during Ettel’s 911 call during which Austin can be heard stating that she and her daughter are “on my [Austin’s] property.”<sup>55</sup> The video then shows Ettel making an obscene gesture before retorting, “It’s not your property.”<sup>56</sup> Curiously, the area in question was not Ettel’s property either: at the time of the incident, Ettel and the Austin family all resided in the same apartment building, adjacent to the sidewalk on which the incident occurred.<sup>57</sup>

Ettel’s rebuff of Austin’s claim of use rights vis-a-vis the sidewalk in front of their shared apartment building suggests an attempt to disclaim Black rights to public space. When Austin stated, “[I am] on my property,”<sup>58</sup> rather than correcting Austin by claiming a shared and equal interest in the sidewalk (an interest shared with all other members of the public), Ettel rejected the notion that Austin and her daughter had *any* interest in the sidewalk (“It’s not your property.”)<sup>59</sup> Moreover, Ettel emphasized her rejection of Austin’s claim with what a court in an unrelated nuisance case referred to as “the universal sign of disrespect”<sup>60</sup>—her middle finger.

Later, in a television news interview, Ettel claimed that she had been working from home and that the child’s voice—calling out to stadium passersby about the bottled waters for sale—was loud and disturbed her.<sup>61</sup> She apologized for calling the police, but also claimed that her response was “taken out of context,”<sup>62</sup> an apparent attempt to deflect blame for invoking police authority to claim dominion over public space. When confronted with the suggestion that her actions were motivated by race, Ettel responded, “All I heard was the yelling. How could it possibly be racism?”<sup>63</sup> This casting of the dispute as a “pure”

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54. *Woman Faces Backlash for Calling Police on Young Girl*, CNN, <https://www.cnn.com/videos/us/2018/06/26/permit-patty-san-francisco-woman-calls-police-on-8-year-old-simon-dnt.cnn> [<https://perma.cc/5S7L-9BDN>].

55. Niraj Chokshi, *White Woman Nicknamed “Permit Patty” Regrets Confrontation Over Black Girl Selling Water*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/permit-patty-black-girl-water.html>.

56. *Id.*; *Woman Faces Backlash for Calling Police on Young Girl*, *supra* note 54.

57. Chokshi, *supra* note 55.

58. *Id.*

59. *Id.*

60. *Echard v. Kraft*, 858 A.2d 1018, 1021 (Md. Ct. Spec. App. 2004). The court, however, did not find that showing one’s contempt for another “by greeting him with a raised middle finger” is a nuisance. *Id.* at 1024.

61. *Woman Faces Backlash for Calling Police on Young Girl*, *supra* note 54.

62. *Id.*

63. *Id.*

noise complaint obscures the fact that Ettel did not call the police from inside the apartment to report the noise disturbance; it was only after she had gone outside and personally confronted the mother and eight-year-old child that she determined that police intervention was warranted.<sup>64</sup>

Ettel and Schulte both used the mechanism of the 911 emergency services line to craft narratives of victimhood and heroism in the face of threats to the public (in Schulte's case, wayward coals, and in Ettel's case, irksome noise). This imagined public, though, is one that is exclusive. This exclusive claim to space is particularly fraught in the San Francisco Bay Area, which has the highest housing costs in the nation.<sup>65</sup> Schulte confronted Black parkgoers in Oakland, which has long been a majority-minority enclave in the Bay Area, but is rapidly gentrifying.<sup>66</sup> Ettel's dispute with Erin Austin and Austin's young daughter occurred in San Francisco, which has seen its Black

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64. While Ettel may have cast her actions as benign and "race neutral," the targets of her 911 call did not agree. Austin summed up her anger and frustration at the incident in this way: "I think [Ettel's] a bully. Just the fact that she called the police on a child. That's evil. But, to call on a child of color, knowing that police have been killing Black kids, that says to me that you don't care about my child's life." *Id.* Austin was likely referring to a number of highly-publicized police shootings of unarmed Black youth, such as eighteen-year-old Michael Brown in Ferguson, Missouri in 2014, twelve-year-old Tamir Rice in Cleveland, Ohio in 2014, seventeen-year-old Laquan McDonald in Chicago, Illinois, in 2014, and seventeen-year-old Antwon Rose in Pittsburgh, Pennsylvania in 2018. See Christina Caron, *East Pittsburgh Police Kill Antwon Rose, Unarmed 17-Year-Old, as He Flees*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/pittsburgh-police-shooting.html>; Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), <https://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html> (describing the police shooting of Tamir Rice); Polly Mosendz, *Chicago Officials Release Video of White Police Officer Shooting Black Teenager*, NEWSWEEK (Nov. 24, 2015, 5:05 PM), <https://www.newsweek.com/chicago-police-officer-charged-murder-black-teenager-398031> (describing the police shooting of Laquan McDonald); Jon Swaine, *Michael Brown Shooting: "They Killed Another Young Black Man in America,"* GUARDIAN (Aug. 12, 2014, 4:46 PM), <https://www.theguardian.com/world/2014/aug/12/ferguson-missouri-shooting-michael-brown-civil-rights-police-brutality> [<https://perma.cc/GL5T-JR7H>].

65. See Dan Burrows, *20 Most Expensive U.S. Cities to Live in*, KIPLINGER (Apr. 26, 2019), <https://www.kiplinger.com/slideshow/real-estate/T006-S001-most-expensive-u-s-cities-to-live-in-2019/index.html> [<https://perma.cc/B7A2-LHUB>]; Madeline Wells, *The Most Expensive Counties to Rent in the US Are All in the Bay Area*, SFGATE (June 19, 2019, 2:27 PM), <https://www.sfgate.com/expensive-san-francisco/article/most-expensive-renters-apartments-homes-bay-area-14019249.php> [<https://perma.cc/6JR6-KTM9>].

66. Kathleen Richards, *The Forces Driving Gentrification in Oakland*, EAST BAY EXPRESS (Sept. 19, 2018), <https://www.eastbayexpress.com/oakland/the-forces-driving-gentrification-in-oakland/Content?oid=20312733> [<https://perma.cc/HS93-XTYP>].

population dwindling in recent decades. In 2015, Black residents comprised only six percent of the city's population, placing San Francisco "near the bottom in the share of black residents" among the nation's largest cities.<sup>67</sup> Rapidly shifting demographics, coupled with economic pressures, have left Black and Latino residents marginalized and vulnerable in the greater Bay Area.<sup>68</sup> In the context of large-scale Black displacement in the region, coupled with multiple high-profile instances of local police misconduct,<sup>69</sup> whites' efforts to leverage public resources in order to oust Black people from public space takes on new valence. In such cases, 911 callers can arguably be said to be asserting property rights common to a *white* general public—rights that are exclusive of Black people and Black presence. The manner in which they do so works to weaponize the language of nuisance—here, public nuisance—while reinforcing white racial entitlements.<sup>70</sup>

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67. Maura Dolan, *S.F. Police Scandal Focuses Attention on Dwindling Number of Blacks*, L.A. TIMES (May 9, 2015), <https://www.latimes.com/local/crime/la-me-sf-police-20150509-story.html> [<https://perma.cc/N5SZ-936A>].

68. Darwin BondGraham, *The East Bay's Changing Demographics*, EAST BAY EXPRESS (Feb. 14, 2018), <https://www.eastbayexpress.com/oakland/the-east-bays-changing-demographics/Content?oid=13262928> [<https://perma.cc/TL6N-CTNM>].

69. On New Year's Day in 2009, a Bay Area Regional Transit (BART) police officer shot and killed Oscar Grant while Grant was handcuffed and lying face down with his hands behind his back on a station platform. Jesse McKinley, *Officer Guilty in Killing That Inflamed Oakland*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2010/07/09/us/09verdict.html>. In May 2019, an Internal Affairs report was made public in which BART determined that the police officers who detained and killed Grant lied to investigators, instigated the confrontation with Grant, and used the n-word during the encounter. Alex Emslie & Dan Brekke, *BART Releases Report with New Details of Officers' Roles in Oscar Grant Killing*, KQED NEWS (May 1, 2019, 4:00 PM), <https://www.kqed.org/news/11744106/bart-releases-report-with-new-details-of-officers-roles-in-oscar-grant-killing> [<https://perma.cc/V45D-QGXF>]. Another scandal rocked the San Francisco Police Department in 2015, as court records revealed that a group of officers had exchanged virulent racist and homophobic texts, including multiple texts containing the n-word and likening African-Americans to animals. See Government's Opposition to Defendant Furminger's Motion for Bail Pending Appeal at 3–4, *United States v. Furminger*, 2015 WL 13357655 (N.D. Cal. Mar. 13, 2015) (No. CR 14-0102); Timothy Williams, *San Francisco Police Officers to Be Dismissed Over Racist Texts*, N.Y. TIMES (Apr. 3, 2015), <https://www.nytimes.com/2015/04/04/us/san-francisco-police-officers-to-be-dismissed-over-racist-texts.html>.

70. In 2015, comedian W. Kamau Bell walked up to the Elmwood Café in Berkeley, California, and joined his wife and her friends in the outside seating area. An employee of the restaurant noticed Bell talking to the group of women (all of whom are white, while Bell is African-American), and banged on the restaurant's picture window, telling him to "scram." Tracey Taylor & Frances Dinkelspiel, *Comedian W. Kamau Bell Reports Being Victim of Racism at Berkeley's Elmwood Café*, BERKELEYSIDE (Jan. 29, 2015, 4:21

*B. Blackness as Trespass*

The use of criminal law regimes to enforce racial boundaries and property entitlements has a long history in the United States. During the Civil Rights Movement, police were summoned throughout the Jim Crow South for the express purpose of forcibly removing Black sit-in demonstrators and their white allies from lunch counters and other public accommodations segregated by law or practice.<sup>71</sup> In tandem with the racialized crime of “vagrancy,”<sup>72</sup> criminal trespass was the predicate for the arrest and imprisonment of thousands<sup>73</sup> of young people across the South during Freedom Summer. Local leaders

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PM), <https://www.berkeleyside.com/2015/01/29/comedian-w-kamau-bell-reports-being-subject-of-racism-at-berkeleys-elmwood-cafe> [<https://perma.cc/TRA8-DUXB>]. According to Bell, the employee later revealed that she had assumed he “might be trying to sell something.” *Id.*

71. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157–58 (1970) (holding summary judgment inappropriate because a genuine issue of material fact existed as to whether a Hattiesburg, Mississippi lunch counter manager signaled to police in order to effect the 1964 arrest of a white schoolteacher seeking lunch service while accompanied by black students).

72. Vagrancy laws, which until 1972 existed in all states and the District of Columbia, criminalized a broad range of behaviors and statuses such as “being idle, poor, immoral and dissolute, wandering about with no apparent purpose, being a habitual loafer or disorderly person and more.” Risa L. Goluboff, *Starbucks, LA Fitness and the Long, Racist History of America’s Loitering Laws*, WASH. POST (Apr. 20, 2018, 6:00 AM), [https://www.washingtonpost.com/news/post-nation/wp/2018/04/20/starbucks-la-fitness-and-the-racist-history-of-trespassing-laws/?utm\\_term=.6b1cc\\_d90fdb2](https://www.washingtonpost.com/news/post-nation/wp/2018/04/20/starbucks-la-fitness-and-the-racist-history-of-trespassing-laws/?utm_term=.6b1cc_d90fdb2); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28 (2012). The author states:

Nine Southern states adopted vagrancy laws—which essentially made it a criminal offense not to work and were applied selectively to blacks—and eight of those states enacted convict laws allowing for the hiring-out of county prisoners to plantation owners and private companies. Prisoners were forced to work for little or no pay. One vagrancy act specifically provided that “all free negroes and mulattoes over the age of eighteen” must have written proof of a job at the beginning of every year. Those found with no lawful employment were deemed vagrants and convicted. Clearly, the purpose of the black codes in general and the vagrancy laws in particular was to establish another system of forced labor.

*Id.*

73. ZOE A. COLLEY, *AIN’T SCARED OF YOUR JAIL: ARREST, IMPRISONMENT, AND THE CIVIL RIGHTS MOVEMENT* 22–23 (2013) (“The African American college students who dominated the sit-in protests were ready and willing to be arrested, and thousands were. Never before had the South seen its jails filled to bursting with defiant protesters.”); see also Frank E. Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U. L. REV. 779 (1961) (chronicling sit-in cases before state and federal courts in late 1950s and early 1960s).

throughout the region resolved to quell the sit-in movement using purportedly ‘color-blind’ policing strategies.<sup>74</sup> Since criminal trespass typically requires only that a rights holder has refused entry to a nonrights holder, the crime could be used by local law enforcement to intimidate, stigmatize, and terrorize activists into giving up the fight against Jim Crow.<sup>75</sup> State legislatures responded to successive sit-in demonstrations with increasingly severe criminal sanctions for trespass, vagrancy, and disorderly conduct.<sup>76</sup> In her extensive account of how local law enforcement officers terrorized Freedom Riders with false arrests and imprisonment, Mary Hamilton recalled that police in New Orleans arrested her and two other women at the city’s bus terminal and charged them (falsely) with vagrancy:

Although I had \$15, and am a housewife; and the other Rider had \$20, and is a student, and the third one of us lives, and is employed, in New Orleans, we were nonetheless picked up on charges of (1) vagrancy, and no visible means of support; and (2) loitering. Where else can you catch a bus except at a bus stop? I don’t know. But in New Orleans that was called “loitering.”<sup>77</sup>

When perceived racial differences underpin a dispute over property, the complaining litigant is arguably asking the court to both set and enforce an entitlement to racial/racist stratification and hierarchy. In the #LivingWhileBlack incidents catalogued here, 911 callers requesting the assistance of law enforcement are, arguably, demanding that police set and enforce an entitlement to racial stratification in the form of a white right to exclude. It is largely irrelevant whether #LivingWhileBlack antagonists explicitly articulate any racist beliefs; the right to exclude, which each of them has self-assumed, is necessarily racialized to the extent that callers are, literally and figuratively, policing Black physical proximity.

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74. DAN BERGER, *CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA* 46 (2018) (“Second, arrests would be made on color-blind pretenses, such as trespassing, rather than for violating Jim Crow laws.”).

75. MARY HAMILTON ET AL., *FREEDOM RIDERS SPEAK FOR THEMSELVES* 34 (1961) (“They were trying to make us feel like real criminals.”).

76. COLLEY, *supra* note 73, at 27 (“[T]he Georgia legislature passed a new anti-trespass law making far more severe penalties available to the courts. Louisiana followed a similar path: laws against disorderly conduct, criminal mischief, and trespass were revised to allow for more punitive sentences. The crime of disturbing the peace now included those acts which ‘did, or might ‘forseeably,’ disturb or alarm the public.’ These measures were clearly aimed at sit-in protesters.”).

77. HAMILTON, *supra* note 75 at 32–33 (“They were trying to make us feel like real criminals.”).

In these incidents, even the common law of trespass is racially coded, typically in terms of “belonging.” Whether in private, public, or “third places,” antagonists in these incidents have sought to leverage local law enforcement to police Black belonging in ways strikingly similar to earlier efforts to criminalize civil rights activists as “vagrants.”<sup>78</sup> As Risa Goluboff has argued, “Vagrancy laws are gone, but treating African Americans like vagrants continues.”<sup>79</sup>

1. *#LivingWhileBlack and private property*

*#LivingWhileBlack* incidents on private property best illustrate how principles of trespass have been, and continue to be, used to restrict or circumscribe Black access to property and space. Not surprisingly, several of these incidents have occurred at sites with long histories of racial exclusion and contestation—namely, universities and swimming pools.

a. *Universities*

American universities, and elite universities specifically, have a shameful history of excluding Black persons from their hallowed halls.<sup>80</sup> Racial subjugation built the nation’s earliest institutions of higher learning.<sup>81</sup> In the North and the South, colleges bought and sold enslaved people’s labor.<sup>82</sup> While the labor of enslaved men,

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78. See generally, RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 4 (2016).

79. Goluboff, *supra* note 72.

80. Leslie M. Harris, *The Long, Ugly History of Racism at American Universities*, NEW REPUBLIC (Mar. 26, 2015), <https://newrepublic.com/article/121382/forgotten-racist-past-american-universities> [<https://perma.cc/G2VZ-SEA9>] (“In fact, colleges and universities historically have supported hierarchies of race and other forms of difference from their founding in the colonial era through the civil rights struggles of the late-twentieth century.”). See generally, CRAIG STEVEN WILDER, *EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA’S UNIVERSITIES* (2013) (describing the history of the United States’ elite universities, their connections to slavery, and the systematic exclusion of Black Americans from their ranks).

81. See LEMON PROJECT STEERING COMM., WM. & MARY UNIV., *THE LEMON PROJECT: A JOURNEY OF RECONCILIATION: REPORT OF THE FIRST EIGHT YEARS* 39 (2019), [https://www.wm.edu/sites/lemonproject/\\_documents/the-lemon-project-report.pdf](https://www.wm.edu/sites/lemonproject/_documents/the-lemon-project-report.pdf) [<https://perma.cc/F96V-FGWZ>] (“The African American experience at William & Mary was complex and contradictory, but one thing is clear—for most of the institution’s 325-year history, it treated black people as inferior and with disdain.”).

82. See, e.g., LOLITA BUCKNER INNISS, *THE PRINCETON FUGITIVE SLAVE: THE TRIALS OF JAMES COLLINS JOHNSON* (2019) (chronicling the life of James Collins Johnson, a fugitive from slavery living in and around Princeton, New Jersey in the mid-nineteenth century); see also Wilder, *supra* note 80.

women, and children helped secure the financial footing of these colleges,<sup>83</sup> these same institutions excluded Black students from admission.<sup>84</sup> In rare instances where Black students were granted admission, they were often barred from living on-campus among their white peers.<sup>85</sup> The first Black student to attend Yale, James Pennington, “was not allowed to speak, ask questions, use the library or even earn an official degree from Yale despite attending classes at the Divinity School.”<sup>86</sup> This painful history of exclusion surfaced when, in May 2018, a white graduate student at Yale called campus police to have a Black graduate student forcibly removed from a dormitory common room.<sup>87</sup> During final exams, Lolade Siyonbola fell asleep in the Hall of Graduate Studies common room.<sup>88</sup> She was subsequently awakened by

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83. See BROWN UNIV., SLAVERY AND JUSTICE: REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE 13 (2006), [http://brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf) [<https://perma.cc/L828-6UVU>] (“But there is no question that many of the assets that underwrote the University’s creation and growth derived, directly and indirectly, from slavery and the slave trade.”).

84. See Harris, *supra* note 80.

85. For example, although Smith College admitted Black students as early as the 1890s, it was not until 1913 that the College began housing black students in on-campus housing, in close proximity to white peers. See ADELAIDE M. CROMWELL, MY MOTHERING AUNT: OTELIA CROMWELL, SMITH COLLEGE CLASS OF 1900 53 (2010) (describing the university’s efforts to bar Carrie Lee from campus housing in 1913). Previously, Black students were required to live off-campus in order to attend the school. *Id.*

86. Dixe Schillaci, *Here’s How Yale University Honored Its First Black Student*, USA TODAY (Oct. 7, 2016, 4:16 PM), <https://www.usatoday.com/story/college/2016/10/07/heres-how-yale-university-honored-its-first-black-student/37422629> [<https://perma.cc/W4YY-B256>].

87. Griggs, *supra* note 20. In 2018, numerous other Black university students and employees also had the police called on them for innocuous lawful behavior on campus. See, e.g., Nichole Chavez, *Smith College Student Who Was Racially Profiled While Eating Says the Incident Left Her So Shaken She Can’t Sleep*, CNN (Aug. 3, 2018, 2:33 PM), <https://www.cnn.com/2018/08/03/us/smith-college-student-police-trnd/index.html> [<https://perma.cc/F5TZ-5A6R>] (reporting that a Black female student at Smith College had police called on her by a white college employee while she was eating lunch and napping in a card-accessed common room); Travis Gettys, *Cops Grill Black University of Massachusetts Employee After Caller Reports Him for Walking to Work*, RAW STORY (Sept. 17, 2018), <https://www.rawstory.com/2018/09/cops-grill-black-university-massachusetts-employee-caller-reports-walking-work> [<https://perma.cc/5RY3-3UKT>] (reporting that police were called because a Black University of Massachusetts employee allegedly looked “agitated” while walking to work). These incidents were not caught on video.

88. Griggs, *supra* note 20. A “common room” is “a lounge available to *all members* of a residential community.” Common Room, MERRIAM WEBSTER, <https://>

Sarah Braasch, who told her, “You’re not supposed to be sleeping here. I’m going to call the police.”<sup>89</sup> In cellphone video captured by Siyonbola as the incident unfolded, Braasch can be heard claiming “I have every right to call the police. You cannot sleep in that room.”<sup>90</sup>

When the university’s police arrived, their assessment of the situation centered around whether Siyonbola “belonged” in the space in question: one of the responding officers told Siyonbola, “She [Braasch] called us [and] said there’s somebody who appeared they weren’t . . . *where they were supposed to be*.”<sup>91</sup> Even after Siyonbola produced her room key and used it to open the door to her room, another officer demanded that Siyonbola present her identification declaring, “You’re in a Yale building and we need to make sure that you *belong* here.”<sup>92</sup>

This common refrain of “belonging” suggests that something more than public safety is being enforced here. When sites are racialized via racially exclusionary policies or practices, those sites communicate a cultural norm of racial hierarchy.<sup>93</sup> Elite universities like Yale are not immune to this phenomenon; in fact, educational institutions have perpetrated egregious harm against Black applicants and students, as described above.

As coresidents of the same graduate students’ dormitory, Siyonbola and Braasch had equal rights to use, enjoy, and even nap in the

[www.merriam-webster.com/dictionary/common%20room](http://www.merriam-webster.com/dictionary/common%20room) [<https://perma.cc/32WZ-U589>] (emphasis added).

89. Griggs, *supra* note 20. Interestingly, the website for a different graduate student common room at Yale specifically lists napping as an activity for which the common room can be used. *The McDougal Common Room & Coffee Lounge, 135 Prospect Street, YALE UNIV.*, <https://gsas.yale.edu/life-yale/mcdougal-graduate-center/common-room-mcdougalgraduate-center> [<https://perma.cc/RFY8-7AB6>].

This was not the first time that Braasch had called police because she believed that a Black graduate student did not belong in the graduate student dormitory. See Dakin Andone, *This Allegedly Wasn’t the First Time This White Yale Student Called the Cops on a Person of Color*, CNN (May 12, 2018, 11:44 AM), <https://www.cnn.com/2018/05/11/us/yale-second-black-student-sarah-braasch/index.html> [<https://perma.cc/7LMC-TCP2>]. After the video of Siyonbola’s confrontation with Braasch went viral, a Black male Yale grad student came forward to reveal that Braasch had also called the police on him. *Id.* His confrontation with Braasch occurred when he went to the Hall of Graduate Studies for a meeting with Siyonbola and other Black graduate students. *Id.*

90. Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>.

91. Griggs, *supra* note 20 (emphasis added).

92. *Id.* (emphasis added). The responding officers never explained their repeated requests that Siyonbola justify her presence in the common area by producing identification after she had used her room key to open her room door. *Id.*

93. See Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 409 (2010).

common room, as did other building residents. Consequently, neither woman had the right to exclude the other from the common room space; neither woman had the right to proscribe the activities for which the space could be used. Yet, through her actions, Braasch, like Ettel (“Permit Patty”) eschewed the possibility that a Black person might have equal standing with a white person in a dispute over the use and enjoyment of space.<sup>94</sup>

*b. Pools*

Like colleges and universities, swimming pools have a long history as racially contested spaces in the United States.<sup>95</sup> Though pools were initially public, communal, and rather egalitarian spaces, over time, these sites became more likely to be private and racially segregated.<sup>96</sup> Pools are intimate spaces: patrons are side-by-side in various stages of undress, sharing bathing waters.<sup>97</sup> Unsurprisingly, swimming pools have a fraught history as the sites of violent efforts to uphold and reinforce racist cultural norms.

At least in the North, swimming was not initially a racially segregated activity.<sup>98</sup> Rather, gender and class segregation were the norm.<sup>99</sup> Over time, as gender integration became more permissible, racial integration became *impermissible*. “Whites in many cases quite literally beat blacks out of the water at gender-integrated pools because they

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94. See *supra* notes 80–86 and accompanying text.

95. See generally JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 1–2 (2007).

96. In the northern United States, in the decades between the proliferation of the first municipal pools in the late 1880s and the early 1950s, pools “transformed from austere public baths—where blacks, immigrants, and native-born white laborers swam together, but men and women, rich and poor, and young and old did not—to leisure resorts, where practically everyone in the community except black Americans swam together.” *Id.* at 2.

97. See Niraj Chokshi, *Racism at American Pools Isn’t New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018) <https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html> (quoting Greg Carr, the Chair of Afro-American Studies Department at Howard University as saying “[t]hat’s the most intimate thing . . . I’m in this water, you’re in this water, it’s in me, on me”); Jeff Wiltse, *America’s Swimming Pools Have a Long, Sad, Racist History*, WASH. POST (June 10, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/10/americas-swimming-pools-have-a-long-sad-racist-history> (describing how the earliest public pools in northern cities “served mostly poor and working-class boys (both black and white), and reveal the class prejudices of the time”).

98. *Id.*

99. *Id.*

would not permit black men to interact with white women at such intimate public spaces.”<sup>100</sup> As one writer noted:

This white fear, created around a mythology of dangerous, hypersexual black men and vulnerable, precious white women in need of protection, is one that held particularly dangerous meaning for black people in the south, where the mere interaction of black men or boys with white women was sometimes the cause for terror lynchings.<sup>101</sup>

In the South, the Civil Rights Movement included aquatic “dive-ins” alongside the better-remembered student sit-ins.<sup>102</sup> One such dive-in took place in 1964 at a motel pool in St. Augustine, Florida.<sup>103</sup> Images of Black and white protestors jumping into the pool together appeared in newspapers nationwide.<sup>104</sup> There were also widely circulated photographs of police jumping into the pool to arrest the protestors and of the motel manager dumping muriatic acid into the pool while Black teens were still in the water.<sup>105</sup> These shocking images were the subject of an urgent telephone call made by President Lyndon B. Johnson to congressional leaders.<sup>106</sup> On the recorded line, Johnson warned the lawmakers, “Our whole foreign policy and everything else could go to hell over this.”<sup>107</sup> At his urging, on the same day of his

100. Wiltse, *supra* note 95, at 4. In 1931, in one particularly notorious case, which was widely-reported in national newspapers, at the newly-opened Highland Park pool in Pittsburgh, Pennsylvania, mobs of whites violently attacked Black male residents who were seeking admission to the city pool. *Id.* at 125–26. A similar incident occurred at Fairgrounds Park in St. Louis in 1949: when Blacks attempted to assert their rights over this public pool space, whites greeted them with violence. *Id.* at 170.

101. Rose Hackman, *Swimming While Black: The Legacy of Segregated Public Pools Lives On*, *GUARDIAN* (Aug. 4, 2015, 12:41 PM), <https://www.theguardian.com/world/2015/aug/04/black-children-swimming-drownings-segregation> [<https://perma.cc/YAF5-AS33>].

102. Chokshi, *supra* note 97.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* President Johnson’s statement supports Professor Derrick Bell’s theory of interest convergence. Bell argued “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980). Bell argued that civil rights victories, such as school desegregation under *Brown v. Board of Education*, were the result of their convergence with the interests of white Americans in the post-War struggle against communism. *Id.* This ongoing conflict between American anti-communist foreign policy and American racial segregation is reflected in Johnson’s statement and the ultimate success of the passage of federal civil rights legislation. *Id.* at 524.

telephone call, the United States Senate passed a compromise bill prohibiting discrimination in the workplace, at public facilities, polling places, and elsewhere.<sup>108</sup> That bill was signed into law by Johnson as the Civil Rights Act of 1964.<sup>109</sup>

When northern Blacks successfully won integration of municipal pools, whites responded by opening racially restricted private pools.<sup>110</sup> As a result, “By the 1970s and 1980s, tens of millions of mostly white middle-class Americans swam in their backyards or at suburban club pools, while mostly African and Latino Americans swam at inner-city municipal pools.”<sup>111</sup> As social historian Jeff Wiltse notes, “America’s history of socially [and racially] segregated swimming pools thus became its legacy.”<sup>112</sup> So while the enactment of the Civil Rights Act of 1964 ended de jure segregation at pools (both public and those privately-owned, but located at places of public accommodation, like hotels), the Act did not end de facto public pool segregation. Many southern municipalities closed their public pools, filling them with dirt or cement and even bulldozing them rather than allowing integrated swimming.<sup>113</sup>

De facto segregation in private pools also persisted, even after passage of the Civil Rights Act. Famed civil rights attorney and MacArthur “Genius Grant” recipient Bryan Stevenson recalls how, on a family summer vacation in the early 1970s, he and his sister were called the n-word by white pool-goers at a South Carolina hotel pool.<sup>114</sup> When Stevenson and his sister jumped into the pool, the white bathers began screaming and scrambling to get out of the waters that had now been made unacceptable by the entry of the two children.<sup>115</sup> Notwithstanding that the Stevenson family and the white families were guests of the same hotel, the white guests refused to share the pool with the Stevenson children.<sup>116</sup>

The pool-related #LivingWhileBlack incidents of the summer of 2018 echo this earlier history of pools as “contested waters.” In one

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108. Chokshi, *supra* note 97.

109. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

110. WILTSE, *supra* note 95, at 2.

111. *Id.*

112. *Id.*

113. Hackman, *supra* note 101.

114. Lydialyle Gibson, *Bryan Stevenson on the Shadow of White Supremacy*, HARV. MAG. (Dec. 13, 2017), <https://www.harvardmagazine.com/2017/12/bryan-stevenson-tanner-lecture-white-supremacy-slavery> [<https://perma.cc/9TH5-7DGY>].

115. *Id.*

116. *Id.*

such incident, Stephanie Sebby-Strempel, a white woman, physically assaulted and used racial slurs against a Black teenager who was an invitee at a pool in a residential community in South Carolina.<sup>117</sup> During the assault, Sebby-Strempel insisted that the boy leave the pool because he “didn’t belong.”<sup>118</sup> On video, she can be heard yelling at him, “Get out! Get out! Get out now! There’s three numbers I can dial: 9-1-1. Ok? Get out. Little punks.”<sup>119</sup> Although she threatened to do so, Sebby-Strempel did not actually call the police.<sup>120</sup> Instead, the police were called on Sebby-Strempel by the boy’s mother, and officers arrived at her home with an arrest warrant two days later.<sup>121</sup> Sebby-Strempel’s concerns about the teen centered entirely on his presence—not his conduct—thereby echoing the violent tactics of early twentieth-century white pool-goers to police Black proximity.<sup>122</sup>

A second #LivingWhileBlack pool incident occurred in Winston-Salem, North Carolina.<sup>123</sup> After Jazmine Abhulimen, a Black woman, entered her community’s private pool with her young son, she was accosted by Adam Bloom, who demanded that she present identification.<sup>124</sup> At the time, Abhulimen and her son were the only

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117. *White Woman Dubbed “Pool Patrol Paula” Pleads Guilty to Assaulting Black Teen at Pool*, CBS (Dec. 11, 2018, 11:29 AM), <https://www.cbsnews.com/news/stephanie-sebby-strempel-pool-patrol-paula-pleads-guilty-to-assaulting-black-teen-at-pool> [<https://perma.cc/RWH5-3FPC>].

118. Maya Eliahou & Christina Zdanowicz, *A White Woman Allegedly Hit a Black Teen, Used Racial Slurs and Told Him to Leave a Pool. Then She Bit a Cop*, CNN (June 29, 2018), <https://www.cnn.com/2018/06/29/us/pool-patrol-paula-south-carolina-trnd> [<https://perma.cc/SXC4-CGCT>].

119. *Id.*

120. *Id.*

121. *Id.* Sebby-Strempel had, apparently, struck the boy multiple times in the face and chest. See Brendan Cole, *‘Pool Patrol Paula’ Who Assaulted Black Teenager at South Carolina Pool Evades Prison, Fined \$1000*, NEWSWEEK (Dec. 11, 2018, 8:10 AM), <https://www.newsweek.com/pool-patrol-paula-who-assaulted-black-teenager-south-carolina-pool-evades-1253243> [<https://perma.cc/42HK-QPMJ>]. She ultimately pled guilty to battery, and paid a \$1000 fine. *Id.*

122. See *supra* note 118 and accompanying text.

123. Karen Zraick, *Man Labeled “ID Adam” Is Fired After Calling the Police on a Black Woman at Pool*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/pool-racial-profiling-white-man.html>.

124. *Id.* In both this incident and the one that took place at Yale, the insistence that the Black person involve present identification to prove that she was “where she belongs” is reminiscent of slaves having to show passes or of free Blacks having to show their “free papers” to confirm that they were free (and, thus, where they belonged). See, e.g., Justin S. Conroy, *“Show Me Your Papers”: Race and Street Encounters*, 19 NAT’L BLACK L.J. 149, 153 (2006) (noting that in antebellum Virginia, “[a]ll travel [by Blacks]

Black people at the pool, and the only people approached by Bloom.<sup>125</sup> Bloom—who social media users subsequently dubbed “ID Adam”—was, at the time, a member of the homeowners association’s board of directors where he also served as “pool chairman.”<sup>126</sup> Bloom continued to demand identification from Abhulimen, even after she presented her pool access card that had been distributed by the association to residents.<sup>127</sup> Abhulimen refused to accede to the demand for identification, and Bloom called 911, telling the dispatcher that Abhulimen was not a resident and was refusing to show ID.<sup>128</sup> When police arrived, they confirmed that Bloom was trying to enforce a nonexistent rule and that Abhulimen had a right to access the pool area.<sup>129</sup>

Like other white antagonists in #LivingWhileBlack scenarios, both Sebby-Stempel and Bloom used 911 (or the threat of a 911 call) to enforce their notions of racial belonging within a shared space. Sebby-Stempel and Bloom also leveraged their perceptions of “belonging” (or more precisely, not belonging) to insinuate that a criminal trespass had occurred, warranting the intervention of law enforcement and perpetuating social norms of swimming pools as racially exclusive venues.

## 2. #LivingWhileBlack and public accommodations

Over the course of 2018 and early 2019, #LivingWhileBlack incidents transpired at three types of public accommodations: retail establishments, hotels, and gyms/health clubs.<sup>130</sup> The Civil Rights Act of 1964 bars such establishments—those that serve the public and whose operations arguably affect interstate commerce<sup>131</sup>—from discriminating against patrons on the basis of race.<sup>132</sup> Notwithstanding the protections of the Act, places of public accommodation are *privately* owned and operated, allowing owners and their agents to wield the

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was contingent on ‘certificates,’ either in the form of passes given by masters or freedom papers received upon manumission”); Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 177, 198–200 (2016) (chronicling colonial and early American legislation requiring free Blacks to carry “free papers” and to register with local authorities).

125. Zraick, *supra* note 123.

126. *Id.* It remains unclear how the Glenridge Homeowners Association defines the roles and responsibilities of its “pool chairman.”

127. *Id.*

128. *Id.*

129. *Id.*

130. *See infra* notes 134–37, 144–58.

131. 42 U.S.C. § 2000a(b) (2000).

132. *Id.* § 2000a(a).

weapon of trespass law against unwanted patrons, causing their forcible removal and arrest by law enforcement.<sup>133</sup> In 2018, white employees of public accommodations uniformly used trespass law, sometimes along with allegations of theft, to justify excluding Blacks from their establishments.

*a. Retail establishments*

Two of the notable 2018 #LivingWhileBlack incidents took place in retail stores, quintessential places of public accommodation. In these incidents, white store employees used accusations of theft or fraud to justify invoking trespass law and police force against Black patrons.

One retail establishment #LivingWhileBlack incident that garnered national media attention took place at a CVS drugstore in Chicago.<sup>134</sup> A store manager, Morry Matson, called 911 after Camilla Hudson, a Black woman, attempted to use a manufacturer's coupon to pay for her purchases.<sup>135</sup> Matson, who has since been dubbed "Coupon Carl," claimed to be unfamiliar with the coupon and accused Hudson of forging it.<sup>136</sup> Rather than simply refusing to honor the coupon, Matson asked her to leave the store; Hudson repeatedly asked for an explanation for why the manager asked her to leave the store over use of a coupon.<sup>137</sup> After Hudson refused to leave without first receiving the desired explanation, Matson called 911.<sup>138</sup> In a cellphone video of the incident, Matson can be seen visibly shaking as he calls 911.<sup>139</sup>

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133. Sprankling & Coletta, *supra* note 37, at 50. ("Under English common law, any intentional and unprivileged entry onto land in the possession of another person was a trespass. As Restatement (Second) of Torts § 158 reflects, modern American law still follows this approach: 'One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so . . . .'").

134. *CVS Fires Employees for Calling Cops on Customers*, CNN (July 16, 2018), <https://www.cnn.com/videos/us/2018/07/16/cvs-manager-calls-police-on-customer-over-coupon-mxp-vpx.hln> [<https://perma.cc/YJ92-CCLJ>].

135. *Id.*

136. Angela Helm, "Coupon Carl" Calls Cops on Black Woman at CVS for Allegedly Using a Forged Coupon, but Was Busted Himself for Forgery Less Than 2 Years Ago, ROOT (July 15, 2018, 12:40 PM), <https://www.theroot.com/coupon-carl-calls-cops-on-black-woman-at-cvs-for-alle-1827610838> [<https://perma.cc/L6LV-2HHW>].

137. *Id.*

138. *Id.* Matson told Hudson that his first attempt to call 911 was thwarted when the call was disconnected. *Id.* Hudson then encouraged him to call again. *Id.*

139. *Id.* Matson describes Hudson as "African-American" in his 911 call, after which she can be heard interjecting, "Black. No, I'm not African-American, I'm Black. Black

Reflecting on the causes of the incident, Hudson mused, “Race, possibly gender, I don’t know, but issues that were not related to anything I said or did or any way I functioned in that space as a customer, there were other issues at play.”<sup>140</sup>

Like other white antagonists in #LivingWhileBlack incidents, Matson used devices from the toolbox of racist tropes to exclude and police Hudson. In claiming to be intimidated, and in revoking the customer’s right of access, Matson wrapped his customer service failure in the cloak of trespass law—a legally cognizable property harm that can be and, historically, has been, used in illegitimate, discriminatory ways. Under Illinois law, “A person commits criminal trespass to real property when he or she . . . knowingly and without lawful authority . . . remains within . . . a building; . . . [or] remains upon the land of another, after receiving notice from the owner or occupant to depart.”<sup>141</sup> Once Matson, an agent of the owner/occupant CVS, requested that Hudson leave the CVS, she no longer had the legal right to be present.

Although broad, trespass laws do not allow the operators of public accommodations to discriminate against members of protected classes on the basis of their protected status, as this would be antithetical to civil rights law.<sup>142</sup> Rather, in places of public accommodation, trespass laws should be used for legitimate, nondiscriminatory purposes, such as excluding persons who are shoplifting (or who have a history of shoplifting). Researchers have documented the prevalence of consumer racial profiling,<sup>143</sup> noting that unscrupulous retail establishments and their employees use allegations of shoplifting and threats of police force to exclude unwanted Black patrons from their establishments.<sup>144</sup>

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isn’t a bad word.” Bill Hutchinson, *CVS Health Apologizes After Manager Called Police on Black Customer over Coupon*, ABC NEWS (July 16, 2018, 1:52 PM), <https://abcnews.go.com/US/cvs-apologizes-black-customer-employees-involved-911-call/story?id=56623820> [<https://perma.cc/FB6W-KTEL>].

140. *CVS Fires Employees for Calling Cops on Customers*, *supra* note 134. The coupon in question, offering free incontinence products, was later confirmed to be authentic. *Id.*

141. 38 ILL. COMP. STAT. 21-3 (2019).

142. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 2 U.S.C., 28 U.S.C., and 42 U.S.C.). Title II of the Civil Rights Act of 1964 provides equal access to public accommodations “without discrimination or segregation on the ground of race, color, religion, or national origin.” *Id.*

143. Jerome D. Williams, Geraldine R. Henderson & Anne-Marie Harris, *Consumer Racial Profiling: Bigotry Goes to Market*, THE CRISIS 22 (2001) (describing empirical research of racial targeting in retail and coining the term “shopping while black”).

144. See Cassi Pittman, “*Shopping While Black*”: *Black Consumers’ Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 J. CONSUMER CULTURE, 2017, at 6, 7

This type of “retail racism”<sup>145</sup> was on full display at a suburban St. Louis clothing store in May of 2018. Three Black teenage boys who were shopping for school prom outfits noticed that multiple employees of the Nordstrom Rack in Brentwood, Missouri were following them around the store.<sup>146</sup> As one of the boys later explained, “Every time we moved, they moved.”<sup>147</sup> When the boys left the store, they were immediately surrounded in the parking lot by police.<sup>148</sup> Officers responding to the store employees’ 911 call determined that the boys had committed no crime; the teens had, in fact, even made a purchase while in the store.<sup>149</sup>

Both the CVS and Nordstrom Rack incidents highlight the use of pretext as a tool for racial exclusion from spaces that are ostensibly open to the public. In both instances, the Black patrons were unjustly accused of theft and dishonesty—attempting to pass a fraudulent coupon and shoplifting—as pretext for ejection or removal. While the language of “belonging” did not feature prominently in either of these examples, the conduct of these retail employees communicated an *ethos* of exclusion. In both instances, “retail racism” was used to signal to Hudson at CVS and the teens at Nordstrom Rack that they were unwanted in those places of public accommodation.

This practice is not the exclusive province of retail workers. Employees at other places of public accommodation—namely hotels and gyms/health clubs—have similarly deployed the law of trespass to illegitimately exclude Black customers.

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(finding that 80% of surveyed African-American shoppers reported having shopping experiences during which they were affected by racial stigma and stereotyping with 59% having been accused of shoplifting or stealing); *see also* GERALDINE ROSA HENDERSON ET AL., CONSUMER EQUALITY: RACE AND THE AMERICAN MARKETPLACE 91–104 (2016); James L. Fennessy, Comment, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549, 603–04 (1999) (on the use of criminal trespass as a cover for invidious discrimination).

145. Pittman, *supra* note 144, at 16.

146. Aaron Smith & Martina Baldacci, *Nordstrom Rack Apologizes for Falsely Accusing Black Teens of Stealing*, CNN (May 8, 2018, 10:46 PM), <https://money.cnn.com/2018/05/08/news/companies/nordstrom-rack-shoplifting/index.html> [<https://perma.cc/LN3T-D5F9>].

147. Matthew Haag, *Nordstrom Rack Apologizes to Black Teenagers Falsely Accused of Stealing*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/business/nordstrom-black-men-profiling-shopping.html>.

148. *Id.*

149. *Id.* Moreover, per company policy, Nordstrom Rack employees were only supposed to “call the police in emergency situations.” *Id.* (quoting a Nordstrom Rack spokeswoman).

*b. Hotels*

An example of the use of trespass to exclude a legitimate Black hotel patron took place in Oregon. Jermaine Massey, an African-American man who was a guest at the Doubletree by Hilton Portland in Portland, Oregon decided to make a cellphone call while in the lobby.<sup>150</sup> He was approached by a white security guard who asked him his room number.<sup>151</sup> At the time, Massey could not remember his room number but produced his hotel room key, which was in a keyholder bearing the room number and the dates of his stay.<sup>152</sup> Undeterred, the security guard instructed hotel staff to call the police to have Massey ejected from the premises.<sup>153</sup> When police arrived, Massey was given the option of leaving or being arrested for trespassing.<sup>154</sup> He had to be escorted by police to his room in order to retrieve his belongings.<sup>155</sup> Massey noted that no other patrons were approached in the lobby by security guards.<sup>156</sup>

Hotel lobbies are not only open to hotel guests, but they are usually open to other members of the public who may congregate in the lobby itself or in an adjacent bar or restaurant.<sup>157</sup> The guard's singling out of Massey for questioning suggests that racial profiling was at work. Even once it was apparent that Massey was a guest (he had a room key and had already placed his belongings into his assigned room), his guest status did not protect him from being summarily ejected from the hotel as a trespasser.

*c. Health clubs and gyms*

Pools are not the only recreational facilities at which white patrons or employees have tried to police the presence of Black patrons. In New Jersey, the white employees of an LA Fitness health club called

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150. Keith Allen, *Hotel Employees Who Asked Black Guest to Leave Fired*, CNN (Dec. 29, 2018, 4:54 PM), <https://www.cnn.com/2018/12/28/us/portland-hotel-police-black-guest-trnd> [<https://perma.cc/A2XR-65FH>].

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* In Oregon, "A guest commits the crime of criminal trespass in the second degree if that guest intentionally remains unlawfully in a transient lodging after the departure date of the guest's reservation without the approval of the hotelkeeper." OR. REV. STAT. § 164.243 (2017). Thus, once the hotel management decided to revoke Massey's license, he was transformed from "guest" to "trespasser."

155. Allen, *supra* note 150.

156. *Id.*

157. See Sara J. Welch, *Let's Meet in the Lobby*, N.Y. TIMES (May 2, 2006) <https://www.nytimes.com/2006/05/02/business/02lobby.html>.

the police on a club member and his guest, both of whom are Black men.<sup>158</sup> LA Fitness clubs are public accommodations and are open to anyone who can pay the membership fee; the club provides members with key cards used to access the facility upon entry.<sup>159</sup> On the day in question, Rachid Maiga, who had been a member of the gym for eight years, swiped his card and then waited for his guest Tshyrad Oates to check in using a club-issued four-day guest pass.<sup>160</sup> Upon entering, the two men began a game of basketball.<sup>161</sup> Several minutes later, the white female front desk clerk (who had checked Oates in) approached the pair and accused Maiga of not being a member of the gym.<sup>162</sup> She directed the men to leave or she would call the police.<sup>163</sup> Maiga and Oates refused to leave, insisting that they had a right to be there, and the club employee called 911.<sup>164</sup>

Upon arrival of the police, Maiga presented his valid membership card so that it could be rescanned.<sup>165</sup> He also began video-recording the altercation.<sup>166</sup> The rescanning confirmed that Maiga was a member and that Oates was his guest.<sup>167</sup> The pair returned to the basketball court, and the two responding officers left.<sup>168</sup> Shortly after Maiga and Oates resumed playing basketball, a white male manager came to the court and, according to Maiga, said, “You guys need to go. You guys need to go, or else you’re out of here in handcuffs.”<sup>169</sup> Maiga protested that he was a member and did not have to leave. At this point, the manager told him that his membership had been terminated.<sup>170</sup> Maiga

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158. Sarah Wallace & Michelle Kim, *I-Team: Black Men at Center of Viral Video Showing Them Getting Kicked out of LA Fitness Detail “Humiliating” Encounter*, NBC N.Y. (Apr. 26, 2018, 7:38 PM), <https://www.nbcnewyork.com/news/local/LA-Fitness-Black-Men-Police-Video-480830041.html> [<https://perma.cc/JT9N-7WK4>].

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

and Oates once again refused to leave.<sup>171</sup> Police were once again called.<sup>172</sup> This time, five officers responded to the scene.<sup>173</sup>

The police officers attempted to mediate a resolution with the manager, but according to Maiga, when the manager observed that Maiga recording him, he used that as a pretext to terminate Maiga's membership and eject him from the premises.<sup>174</sup> According to Maiga,

He [the manager] was like, "You can't record in here," and he tried to make that the reason why they were terminating me . . . . Like, "Now you definitely have to go because you're recording and breaking rules." Even police asked him for an explanation [of the termination and removal], and he had nothing to tell police.<sup>175</sup>

Alicia Demedici, a white female LA Fitness employee who was one of three employees fired as a result of the incident, tellingly referred to her firing as "humiliating," "disgusting," and "appalling."<sup>176</sup> She claimed to have been a victim of the incident, casting Maiga and Oates as villains: "I hope *they* look at how this has ruined *our* lives."<sup>177</sup> Moreover, Demedici claimed that she called police because her front desk employee felt threatened by the men.<sup>178</sup>

The incident illuminates how #LivingWhileBlack antagonists wield the law of trespass as both sword and shield in the service of maintaining racially exclusive spaces. It also, troublingly, evokes the specter of white female vulnerability and Black male violence, a trope we discuss further in Section III.C., *infra*. When presumed (or falsely accused) Black criminality underpins an emergency call to 911, a disproportionate police response may follow, as happened with the five officers dispatched to LA Fitness, or the swarm of officers dispatched to Nordstrom Rack for the shopping teenagers.

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171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

### 3. *#LivingWhileBlack and third places*

Some of the spaces in which #LivingWhileBlack incidents took place, though they may legally be private property, are also what are known as “third places.” Sociologist Ray Oldenburg coined the term “third place” to describe “distinctive informal public gathering places.”<sup>179</sup> Such places—the iconic cafes of Paris, Florence’s piazzas, the fabled Valois restaurant in Chicago’s Hyde Park neighborhood,<sup>180</sup> Boston’s Faneuil Hall—are so commonplace, so widely used, so *typical*, that they come to define “the city.”<sup>181</sup> One commenter called such places “a community’s living room.”<sup>182</sup> Third places invigorate and instantiate civic life, providing opportunities for members of a community to express preferences and air and resolve conflict. Such spaces provided a corrective for Americans’ overreliance on automobiles in the postwar era,<sup>183</sup> bringing residents together for daily activities without associated costs. While third places have traditionally included cafes, bars, hair salons, and barbershops, modern third places may also include fitness centers, bookstores, and community centers—wherever people congregate: “A cohort of regulars is what makes a third place.”<sup>184</sup>

Third places are crucibles for participatory citizenship, whereby individuals and groups have an opportunity to mobilize around beliefs and experiences, whether shared or disparate.<sup>185</sup> As one commenter noted, “[g]ood third spaces are abuzz with conversation and yield spontaneous relationships between people from different social and economic backgrounds.”<sup>186</sup> Such “spontaneous relationships” have, in the United States at least, been mitigated by decades of *de jure* and *de*

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179. RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANDOUTS AT THE HEART OF A COMMUNITY* xxviii (3d ed. 1999).

180. Jeremy Lindenfeld et al., *Here’s Hyde Park: We Asked Three University of Chicago Students to Break Down the Best of the Famous South Side Neighborhood*, DOMAIN REALTY, <http://domainchicago.com/heres-hyde-park-asked-three-university-chicago-students-break-best-famous-south-side-neighborhood> [<https://perma.cc/7TZP-87MC>] (“Valois is as affordable as it gets, and it welcomes a true cross-section of the local community at any given time.”).

181. Oldenburg, *supra* note 179, at xxviii.

182. Diana Budds, *It’s Time to Take Back Third Places*, CURBED (May 31, 2018, 5:21 PM), <https://www.curbed.com/2018/5/31/17414768/starbucks-third-place-bathroom-public> [<https://perma.cc/Y3R2-VDMS>].

183. *Id.*

184. *Id.*

185. RANJITA MOHANTY & RAJESH TANDON, *PARTICIPATORY CITIZENSHIP: IDENTITY, EXCLUSION, INCLUSION* 10–11 (2006).

186. Budds, *supra* note 182.

facto racial segregation.<sup>187</sup> The laws and customs that seared a racial dividing line in the nation's culture also precluded Blacks from entering into the same third places as whites on the same terms. As one urban planner noted, "There is a reason there was such a strong fight over lunch counters in the civil rights movement."<sup>188</sup> Those who sought to integrate those lunch counters and those who sought to maintain them as segregated third places were fighting over position, access, and, ultimately, power in the physical public sphere.

Third places began to disappear after World War II, as suburbs expanded and urban residential areas with communal gathering places diminished.<sup>189</sup> Establishments like Starbucks, the very place where 2018's spate of #LivingWhileBlack incidents began, endeavored to reestablish the "third place" in American society. Starbucks has taken on this identity whole cloth, branding itself as "America's 'third place,'"<sup>190</sup> "the most important social space after home and work."<sup>191</sup> By doing so, the corporation has made clear that it intends for its stores to function as de facto public spaces.<sup>192</sup>

Notwithstanding this corporate branding initiative, critics, including Oldenburg, have noted that Starbucks is a mere "facsimile of a third place."<sup>193</sup> Critics point out that as a multinational, publicly held corporation, Starbucks is more a harbinger of gentrification and displacement than of an organic, grounded democratic ideal. It is, at best, a third-place imposter providing only "safer social spaces for certain demographic groups."<sup>194</sup> Sociologist Tressie McMillan Cottom has further articulated the racial exclusivity of the corporatized third place:

[T]his space is supposed to be made by the culture. Starbucks said, "Oh no, we will make it about consumption." And black people are always going to lose in that version of a third space, because the right to transact is lost when all the ideas of property and police become a tool for a basic-ass cup of coffee. The Starbucks third space is a place where white people can consume an idea that they're being in a diverse public,

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187. *Cf. id.* (describing declining relevance of third places due to several factors including separation into suburbs).

188. *Id.* (quoting Justin Garret Moore, executive director of New York City's Public Design Commission).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

while their \$5 coffee buys them the safety of a barista who can call the police on someone to keep the space safe *for them*.<sup>195</sup>

In this context, the Starbucks #LivingWhileBlack incident takes on new meaning as the catalyzing #LivingWhileBlack incident of 2018. It illustrates that, even when a space is intentionally designed to be inclusive, perceived entitlements to racial exclusivity may diminish the potential of the space as a crucible for democracy and equity and may even impart actual violence in the lives of those seen as not belonging.

## II. HISTORICAL ROOTS OF BLACKNESS AS NUISANCE: LIVING AND DYING WHILE BLACK

Although the moniker is new, as is the dissemination of #LivingWhileBlack incidents via cellphone footage and social media, #LivingWhileBlack and Blackness-as-Nuisance clashes themselves are not new. In fact, such encounters between and among Black and non-Black neighbors have long been the subject of civil litigation. Commencing in the years following Reconstruction, white litigants began pursuing property law claims sounding in nuisance in an attempt to police and arrest Black proximity.<sup>196</sup> This is evidenced by nuisance claims over African-Americans' proximity to whites stretching as far back as 1882.<sup>197</sup> An examination of #LivingWhileBlack civil disputes in the late nineteenth and early twentieth century confirms that, while courts frequently accepted as valid the social undesirability of Black proximity, that presumptive undesirability did not always result in the granting of nuisance relief.<sup>198</sup> While jurists in some cases explicitly admitted racial bias and struggled to reconcile their personal social preferences with the ostensibly race-neutral common law of nuisance, others evinced no such struggle, stridently ruling against litigants alleging that racial proximity warranted judicial relief.<sup>199</sup> The point here is not to suggest that the courts, as then comprised, did not harbor anti-Black views;<sup>200</sup> to the contrary, in each of the cases

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195. *Id.*

196. *Id.*

197. *See infra* notes 203–06 and accompanying text.

198. *See, e.g.,* Lancaster v. Harwood, 245 S.W. 755, 756–57 (Tex. Civ. App. 1922) (acknowledging that the judges agreed with the plaintiff's anti-Black views but were confined to the law and thus required to dismiss the claim).

199. *See, e.g.,* Hallman v. Atlanta Child's Home, 130 S.E. 816, 819 (Ga. 1925) (concluding, *in dicta*, this line evincing the court's own beliefs in racial hierarchy: "Negroes are, *in the main*, useful and desirable citizens" (emphasis added)).

200. *Id.*

recounted below, ideas about racial inferiority feature prominently. Notwithstanding those anti-Black beliefs, courts across the South and West frequently held nuisance law above those racist ideals.

A. *Living While Black and Historical Blackness as Nuisance*

Throughout the late 19th century, state courts rejected nuisance claims sounding in race, even as attempts to curtail Blacks' physical proximity were pressed in courts throughout the country.<sup>201</sup> These cases are emblematic of efforts by whites in the Jim Crow era to alternately establish or preserve "racial exclusivity" in the face of perceived Black property incursions.<sup>202</sup>

For example, in 1882, James Falloon, an attorney in Hiawatha, Kansas brought suit against his neighbor Adam Schilling claiming that Schilling's construction of tenement houses along the lot line shared with Falloon's property was a nuisance solely because the tenants were Black.<sup>203</sup> In a clear nod to the social construction of whiteness, Falloon included in his pleadings that he and his family "did in no manner associate themselves with colored people . . . [he] and his family being white people."<sup>204</sup>

According to the court, the allegation that Schilling leased the tenements to persons the plaintiff termed "worthless negroes" was unavailing in this nuisance action for two reasons: first, because, as the court uncritically noted, the tenants included a minister and his family who were not "worthless negroes."<sup>205</sup> Second, the court noted, "[a] negro family is not, *per se*, a nuisance; . . . As long as that neighbor's

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201. Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 507 (2006) (noting that, in the majority of these "race-nuisance" cases, "the white plaintiffs lost").

202. *Id.*

203. Falloon v. Schilling, 29 Kan. 292, 294 (1883). It is unsurprising that the first of these "race nuisance" cases emerged in Kansas in the early 1880s. In a single decade, between 1870 and 1880, the Black population in Kansas more than doubled, in part as a result of the millenarian "Exoduster" movement of formerly enslaved men and women into the state. KAN. HIST. SOC'Y, *Exodusters*, (June 2011), <https://www.kshs.org/kansapedia/exodusters/17162> [<https://perma.cc/L4W5-N87V>] (noting that, in 1870, the Black population in Kansas numbered 17,108, and by 1880, the population had increased to 43,107). This demographic shift threatened white racial exclusivity and catalyzed efforts to rigidly limit black residential patterns. *Id.* On the Exoduster movement, see generally NELL IRVIN PAINTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (Norton 1993) (1976).

204. Brief for the Petitioner at 8–9, Falloon v. Schilling, 29 Kan. 292 (1883) (on file with authors).

205. Falloon, 29 Kan. at 295 (emphasis in original); Brief for the Petitioner, *supra* note 204, at 13.

family is well behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts.”<sup>206</sup>

In *Snyder v. Cabell*,<sup>207</sup> another late-nineteenth-century case, the West Virginia Supreme Court of Appeals took pains to include in its decision a detailed explanation of the reasons it reinstated a lower court’s injunction of a skating rink in close proximity to residential tenements.<sup>208</sup> Responding to the defendants’ arguments and witness testimony that the plaintiffs sought an injunction on the putatively illegitimate reason that defendants and their customers were Black, the court in *Snyder* noted that the injunction was appropriate, not because of race, but because of the clamorous nature of skating and the acoustic disturbances likely to be visited upon the neighboring tenement homes:

There is nothing in this record to show that a skating-rink would be more obnoxious if operated by colored people than if run by white people. The colored people have the same right, and no more, to erect and operate a skating-rink that white people have. But every person, whether white or colored, has the right not to be disturbed in his home. He has the right to rest and quiet, and not to be materially disturbed in his rest and enjoyment of home by loud noises.<sup>209</sup>

On similar reasoning, an attempt to enjoin dancing at a Pennsylvania social club located in a neighborhood described by the court as “not strictly residential” was likewise rejected, even as plaintiffs alleged in their complaint that the club’s patrons “are colored people” and that the club’s neighborhood, “but not this street,” had in recent years become populated by “a large number” of Black residents.<sup>210</sup>

Decades later, courts continued to reject claims of Blackness as nuisance, even as some judges openly expressed their own distaste for Black proximity. For example, in *Lancaster v. Harwood*,<sup>211</sup> the Texas Court of Civil Appeals reversed a lower court’s refusal to vacate a temporary restraining order against a construction plan that would have resulted in situating a servant’s house for Black domestic workers

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206. *Falloon*, 29 Kan. at 297. See Godsil, *supra* note 201, at 511 (“The determination that the family ‘behaved well’ likely was based upon norms of behavior arising from the dominant white community.”). As Godsil notes, the *Falloon* decision was swiftly incorporated into treatises on nuisance, thereby influencing subsequent nuisance decisions involving white aversion to Black proximity. *Id.* at 517, n.56.

207. 1 S.E. 241 (W. Va. 1886).

208. *Id.* at 251.

209. *Id.*

210. *Thoenebe v. Mosby*, 101 A. 98, 98–99 (Pa. 1917) (per curiam).

211. 245 S.W. 755 (Tex. Civ. App. 1922).

adjacent to the property line of a neighboring parcel occupied by white residents.<sup>212</sup> Plaintiffs in *Lancaster* had explicitly used Black proximity to articulate their harm, claiming that “the close proximity of the negroes sleeping 10 feet away would be intolerable”<sup>213</sup> and that “the effect of building this negro servant’s house within 10 feet of the sleeping quarters of white people would put the negro sleeping quarters in such close proximity to the Harwood residence as would be objectionable and would constitute a nuisance.”<sup>214</sup> In their petition for an injunction, Plaintiffs-Appellees had alleged, *inter alia*, that “negroes were ordinarily loud, boisterous, coarse, noisome, and immodest,” that “negroes are ordinarily musical,” and that “the odor from negroes’ living quarters is . . . offensive at a distance of 10 or 15 feet to white persons of ordinary sensibilities.”<sup>215</sup> Reliance on racist tropes in the pleadings, in *Lancaster* and elsewhere, however, yielded no nuisance victories.

In *Lancaster*, the judges of the Texas Court of Civil Appeals noted that while their own “personal sentiments” were “wholly with the appellee,” in the absence of a violation of law, no nuisance could be found simply on the basis of Black proximity.<sup>216</sup> Despite making clear its own bias in the case, the court insisted upon the need for law to be racially neutral:

But we, as a court, must follow, as our only guide, the rules of law applicable alike to all, bearing in mind that the law is no respecter of persons and was not made to apply to one caste to the exclusion of another. We feel constrained to say that the record in this case discloses the inefficacy of the law to prevent all acts of injustice from being inflicted, and that, where the law is powerless in its application to prevent such injuries, the observance of the ‘Golden Rule’ can only be looked to as a panacea in that portion of our country where there exists a just and a well-defined impassable gulf between the white element of its population and the negro race.<sup>217</sup>

The court thus offered a salve dipped in white supremacist beliefs, clearly communicating to plaintiffs the inadequacy of the nuisance canon to provide relief in disputes over Black proximity.<sup>218</sup>

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212. *Id.* at 755–57.

213. *Id.* at 756.

214. *Id.*

215. *Id.* at 755.

216. *Id.* at 756–57.

217. *Id.* at 757. The court wrote, “[w]e earnestly deprecate the inexorable mandate of the law forbidding us the privilege of following our personal sentiments.” *Id.* at 756.

218. See, e.g., Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/>

In addition to affirming white landowners' rights to use their land for the benefit of Black tenants or customers, courts in these "race nuisance" cases also affirmed the rights of Black landowners to freely use their own land. In 1924, white petitioners sought to enjoin the Spencer Chapel Methodist Episcopal Church—a Black church—from rebuilding after a devastating fire, on the grounds that church leaders "were attempting to build a negro church in a white community, which would constitute a nuisance."<sup>219</sup> Reviewing the allegations regarding Black proximity and its alleged harms, the Oklahoma Supreme Court reversed petitioners' previously successful bid to obtain a permanent injunction.<sup>220</sup> The court reasoned that the core of plaintiffs' argument was a concern over Black proximity, a concern, the court noted, that was in part plaintiffs' own creation.<sup>221</sup> Here, the court noted that plaintiffs had "bought property and established their residences in what was a negro community."<sup>222</sup> This long-standing Black community had the church at its core: relying on stereotypes reminiscent of those undergirding the opinion in *Lancaster*, the court continued, "The negro is of a social and religious nature . . . . The church is their social or community center."<sup>223</sup> Notwithstanding the anxiety of (newcomer) white neighbors over the proximity of this historic Black community, rebuilding a Black church on its original site was not unreasonable, and thus could not sustain a nuisance claim.<sup>224</sup>

In Maryland, the state supreme court tackled similar questions regarding proximity and racial exclusivity in *Diggs v. Morgan College*.<sup>225</sup> In *Diggs*, plaintiffs challenged the plans of Morgan College<sup>226</sup>—a historically Black post-secondary institution—to develop lands recently purchased by the College into a residential subdivision marketed to Black residents.<sup>227</sup> Neighboring white landowners challenged the plan,

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understanding-exclusionary-zoning-impact-concentrated-poverty [https://perma.cc/DE9F-N9MW] (describing the racial origins of exclusionary zoning laws).

219. *Spencer Chapel Methodist Episcopal Church v. Brogan*, 231 P. 1074, 1075 (Okla. 1924).

220. *Id.* at 1076.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. 105 A. 157, 157–58 (Md. 1918).

226. See *History of Morgan State University*, MORGAN STATE UNIV., <https://www.morgan.edu/about/history.html> [https://perma.cc/R3KT-AJV8] (Morgan College is now known as Morgan State University and is part of the University of Maryland System).

227. *Diggs*, 105 A. at 157.

arguing that the acquisition of the seventy-acre tract was “vastly in excess” of the College’s needs.<sup>228</sup> The *Morgan* plaintiffs argued that the plan to establish “a residential negro colony” in proximity to their own homes exceeded the authority of the College under its own charter, resulting in a public nuisance.<sup>229</sup> According to plaintiffs, the surrounding neighborhood “was an entirely white residential one”<sup>230</sup> and the plan to subdivide the tract for purchase by Black landowners would cause “irreparable” harm to their property.<sup>231</sup> The court rejected the notion that the plan, on its face, created a nuisance: “[I]t is clear that the improvement of land as a colored residential neighborhood is not of itself a public nuisance.”<sup>232</sup> In Maryland, as in Kansas, Oklahoma, and Texas, Black residential proximity alone, in the absence of other relevant facts about unreasonable land uses, was insufficient to support white plaintiffs’ nuisance claims.

In addition to claims that Blacks going about the tasks of daily living were a nuisance, Jim Crow-era white complainants also claimed that proximity to deceased Black people was a nuisance. As in the race nuisance cases, courts in this period similarly found “dying while Black” nuisance claims to be without merit.

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228. Brief on Behalf of Appellants at 2, *Diggs v. Morgan Coll.*, Maryland Court of Appeals, October Term, 1918 (on file with authors).

229. *Id.* Plaintiffs linked their land use claim to the College’s charter, which provided that:

Said Morgan College shall have the power to found, establish and maintain a school or schools of educational learning and training, establish and maintain scholarships, professorships, lectureships, chairs of instruction and auxiliary schools, and to have, hold and acquire by gift, grant, purchase, devise or any other mode, land and property, both real and personal, for the purpose of supporting such schools, scholarships, professorships, lectureships and chairs and for the purpose of investing the finds of said corporation and carrying on its work and plans.

*Id.*

230. *Id.*

231. *Id.* (citing *Seattle Gas & Elec. Co. v. Citizens Light & Power*, 123 F. 588, 595 (N.D. Wa. 1903) to link their own standing to sue this purported public nuisance and stating “where a private suitor complains of unlawful transactions creating a public nuisance, and causing special and irreparable injury to him, the courts have no right to refuse relief”).

232. *Diggs v. Morgan Coll.*, 105 A. 157, 159 (Md. 1918).

B. *Dying While Black and Historical Blackness as Nuisance*

As many as ninety percent of private cemeteries across the nation may have operated under racially restrictive statutes, rules, and regulations in the first six decades of the twentieth century.<sup>233</sup> Public cemeteries were similarly restricted. In Atlanta, an 1882 ordinance barred the city from burying or allowing to be buried Black residents in cemeteries “set apart for or used for the burial of white persons.”<sup>234</sup> Thus, in life and in death, racial segregation was the law of the land. Despite this de jure segregation of the dead, courts were reluctant to declare the mere presence of Black burial places to be a nuisance.

In Georgia, in 1925, the state supreme court reversed a lower court decision granting injunctive relief to a neighboring white landowner over a proposed “colored” cemetery.<sup>235</sup> In that case—*Hallman v. Atlanta Child’s Home*<sup>236</sup>—the Atlanta Child’s Home and several of its neighbors sought an injunction against the Fulton County Board of Commissioners of Roads and Revenues, on the grounds that a planned public cemetery for Blacks would create a nuisance.<sup>237</sup> Plaintiffs’ petition in *Hallman* centered on the asymmetry between the racial composition of the surrounding homes and that of the cemetery’s interrees: “[T]he community is distinctly a white section, and the environment and surroundings do not naturally permit the location of a colored cemetery in their midst; [and] that colored cemeteries should be located in communities that are distinctly colored.”<sup>238</sup>

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233. *Rice v. Sioux City Mem’l Park Cemetery, Inc.*, 60 N.W.2d 110, 114 (Iowa 1953) (examining a restrictive cemetery and citing the argument that as many as 90% of private cemeteries have similar restrictions).

234. JOHN B. GOODWIN, *THE CODE OF THE CITY OF ATLANTA: CONTAINING THE CHARTER OF 1874, AND THE AMENDMENTS THERETO, THE ORDINANCES ADOPTED BY THE MAYOR AND GENERAL COUNCIL, AND AN APPENDIX CONTAINING WATER WORKS RULES AND RATES, RULES OF ORDER, SUPPLEMENT, ETC.* § 316 (1886); *see also* Bettye Collier Thomas, *Race Relations in Atlanta, from 1877 Through 1890, As Seen in a Critical Analysis of the Atlanta City Council Proceedings and Other Related Works* 46 (Aug. 1966) (unpublished Ph.D. dissertation, Atlanta University, <http://digitalcommons.auctr.edu/cgi/viewcontent.cgi?article=2694&context=dissertations> (last accessed Nov. 18, 2019)).

In his pioneering sociological study, *The Philadelphia Negro*, W.E.B. Du Bois remarked that racially restricted cemeteries “arose from the curious prejudice of the whites against allowing Negroes to be buried near their dead.” W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 121 (1899, 1996 ed.).

235. *Hallman v. Atlanta Child’s Home*, 130 S.E. 814, 819 (Ga. 1925).

236. *Id.*

237. *Id.*

238. *Id.* at 816.

The *Hallman* plaintiffs couched their claims in the explicit language of racial inferiority and the undesirability of Black proximity. Black proximity was the defined, nonspeculative harm. Plaintiffs claimed that a Black cemetery in such close proximity to the orphanage would have a decidedly negative impact on the white children residing therein, arguing, “[Black funeral services] will arouse in their little minds a morbid curiosity . . . and they will grow up, having their fears and superstitions unduly accentuated, all of which will work to hurt of their welfare.”<sup>239</sup>

This construction of nuisance claims in the terms of Black proximity was unavailing in court. The Georgia Supreme Court relied upon the Thirteenth Amendment to the United States Constitution to find that the race of the cemetery’s planned interrees was an insufficient basis upon which to grant an injunction.<sup>240</sup> Extolling the principle of the general applicability of the laws—even in Jim Crow Georgia—the court noted that Black burial practices and interments were a necessary inconvenience: “There is as much necessity for the burial of negroes as for the burial of whites.”<sup>241</sup> Two years later, in 1927, Georgia’s Supreme Court reaffirmed its characterization of this same Black cemetery, Lincoln Memorial Park, as “not a nuisance.”<sup>242</sup>

Less than a decade later, white Georgians again attempted to regulate the proximity of deceased Blacks to living whites via the law of nuisance. In *Hall v. Moffett*,<sup>243</sup> petitioners sought to enjoin the use of land as a Black private cemetery, alleging: (1) “that if defendants are permitted to open up a private cemetery on the tract of land at the place where they are seeking to do, that it will be detrimental and injurious to the health, happiness, peace and contentment of your petitioners as well as a great many others”; (2) “that it will greatly depreciate the value of the property adjacent to said private cemetery”; and (3) that “the injury and damage to petitioners’ property and their sense of pride in their community will be irreparable, and cannot be compensated in any kind of an action in a court of law.”<sup>244</sup> In addition

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239. *Id.* at 819.

240. *Id.*

241. *Id.*

242. *Fairview Cemetery Co. v. Wood*, 137 S.E. 761, 762 (Ga. 1927); see also Kitty Rogers, *Integrating the City of the Dead: The Integration of Cemeteries, and the Evolution of Property Law, 1900–1969*, 56 ALA. L. REV. 1153, 1156, 1165–66 (2005) (describing the development of American jurisprudence surrounding the integration of cemeteries and the various methods used to challenge integration).

243. *Hall v. Moffett*, 170 S.E. 192 (Ga. 1933).

244. *Id.* at 193.

to their claims about harms, both pecuniary and emotional, the plaintiffs in *Hall* claimed that the private cemetery was unnecessary because the city already had a public “negro cemetery across Hungry and Hardship Creek” and, in their opinion, had no need for another one.<sup>245</sup>

The court in *Hall* rejected plaintiffs’ claims, opining that private litigants may challenge municipal authorities’ decision to allow the building of additional cemeteries designated for Black interrees only if complainants could establish that such land development gave rise to a nuisance causing irreparable harm.<sup>246</sup> Rejecting plaintiffs’ claim that the area’s Black population already had a segregated public cemetery available for its use, the court noted that the fact of a pre-existing public cemetery for Black interrees did not permanently preempt the development of successive parcels for the same purpose. In a clumsy attempt at humor, the court noted in dicta, “We can see no reason why even a negro should not prefer to rest after death from both hunger and hardship . . . .”<sup>247</sup> On its own, the mere presence of Black people, living or dead, even if undesirable or inconvenient for whites, did not give rise to a nuisance claim.

### III. RACIAL ENTITLEMENTS IN #LIVINGWHILEBLACK INCIDENTS

That both historical and modern spaces have contested racial histories—and therefore contested racial meanings—should come as no surprise. As Elise Boddie has argued, antidiscrimination law should accommodate claims arising from efforts to maintain white spatial exclusivity. “Racial territoriality”—the idea that race is spatial, and that physical space can have a racial identity—supports claimsmaking of this type.<sup>248</sup> Boddie further argues that when the racial identity of that physical space is challenged, stakeholders’ efforts to reinscribe that racial identity ought to be actionable under either the Constitution’s Equal Protection Clause or federal civil rights laws.<sup>249</sup>

Boddie’s theory of racial territoriality might have supported a cause of action, for instance, in the aftermath of Hurricane Katrina when residents of Algiers Point—a white neighborhood in New Orleans<sup>250</sup>—

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245. *Id.* (emphasis added).

246. *Id.*

247. *Id.*

248. Elise Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 403, 450, 462–63 (2010).

249. *Id.* at 406.

250. According to the 2000 United States Census, the white population of Algiers Point was 67.4%, while the white population in New Orleans, was only 26.6%. *Algier’s*

began “stockpiling” military-grade firearms and patrolling the area’s streets for “anyone who simply ‘didn’t belong.’”<sup>251</sup> In such circumstances, there may be little or no available direct evidence that race motivated the exclusionary practice. It is not enough to claim, “well, they responded this way to a group of Black people; therefore, the derogatory treatment was because of race.” Racial territoriality expands our analysis of intent, however, to go beyond speculation about the motivations of individual actors and to consider how the racial identity of a space may motivate human behavior.

In the #LivingWhileBlack incidents discussed in this Article, three phenomena common to several of the incidents considered here implicate Boddie’s theory of racial territoriality and white racial entitlement: (1) whites’ claims of the right to exclude Blacks; (2) white antagonists’ denial of racial animus; and (3) tropes of Black male predation and white female vulnerability.

#### A. *Right to Exclude*

These phenomena are not merely historical: even in recent years, racial territoriality has manifested in instances involving whites presuming a law-enforced right to exclude Black people from shared spaces. One illustrative example is the case of Kevin Yates. On July 4, 2018, as Yates (accompanied by his girlfriend and two unrelated children) lounged in the pool area at his girlfriend’s apartment complex,<sup>252</sup> a woman approached the group claiming to be the development’s property manager. The woman, Erica Walker, warned Yates that he needed to remove his socks (he had been sitting along the edge of the pool with his socked feet in the water) or leave the pool.<sup>253</sup> Surprised by the mandate—in news interviews, the couple noted that other pool-goers also wore nonswim attire into the water,

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*Point Statistical Area*, DATA CENTER, (Apr. 19, 2019), <https://www.datacenterresearch.org/data-resources/neighborhood-data/district-12/algiers-point> [<https://perma.cc/D2TN-23AS>]. Since Hurricane Katrina, Algiers Point has become overwhelmingly white, with the white population between 2013–2017 composing 81.9% of the neighborhood’s population, while the white population of the city of New Orleans has only increased to 30.6%. *Id.*

251. Boddie, *supra* note 248, at 403 n.6 (citing A.C. Thompson, *Katrina’s Hidden Race War*, NATION (Dec. 17, 2008), <http://www.thenation.com/doc/20090105/thompson> [<https://perma.cc/4QEG-7SAF>]).

252. Mervosh, *supra* note 16.

253. According to the couple, Walker claimed that the socks were not “proper pool attire.” *Id.*

including t-shirts and hats, without any interference by Walker<sup>254</sup>—Yates’ girlfriend Camry Porter requested proof that the woman was, in fact, a building employee.<sup>255</sup> Walker refused the request, and when Yates did not comply with the woman’s demand that he remove his socks or leave the pool, she called 911.<sup>256</sup>

According to Yates and Porter, they were the only Black pool-goers in the area on the day in question; the couple also claimed they were the only people targeted for removal for failing to wear “proper pool attire” inside the pool (video of the pool area taken by Porter appears to corroborate the couple’s claim that other pool-goers entered the pool wearing non-swim attire).<sup>257</sup> Moreover, when the responding officer arrived and began inquiring into the events leading up to the 911 call, Walker offered to allow Yates and Porter to go to a different pool in the complex.<sup>258</sup> It was then that Yates had a revelation: “That’s when I finally understand: It’s not the socks, it’s me.”<sup>259</sup>

Walker’s suggestion that the couple visit one of the development’s other pools betrays her motivation. Her primary concern was not whether Yates followed pool decorum or rules; had it been, then she likely would have sought to exclude the socked-feet guest from *all* of the development’s pools. In the act of seeking an alternative pool for the family to use, Walker laid bare the core element of all of the #LivingWhileBlack incidents recounted in this Article: the offending act was not Yates’ conduct; it was his very presence in the same space as the white complainant and other white pool-goers. These acts of “Living While Black” in integrated spaces—while uncomfortable for those seeking to maintain racially exclusive land uses—give rise to no cognizable civil claims, are not criminal, and ought not serve as a predicate for the intervention of law enforcement.

### *B. Denials of Racial Animus*

Perhaps the most pernicious element of #LivingWhileBlack incidents has been the insistence of 911 callers that race “had nothing to do with” or was inconsequential in their decision to summon law enforcement. For instance, when Jennifer Schulte made her follow-up

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

call to 911 about the barbecuers in the park—two hours after her initial call—the dispatcher explained that she needed to know Schulte’s race and other descriptors so that the police could identify her when they arrived.<sup>260</sup> Schulte repeatedly refused to reveal her race to the dispatcher.<sup>261</sup> Twice when the dispatcher asked her race, Schulte declined to answer, insisting, “My race doesn’t matter.”<sup>262</sup> After repeated requests from the dispatcher, Schulte finally identified herself as a white person.<sup>263</sup>

Schulte also denied the relevance of race when asked about her motivations by Michelle Snider, the woman who captured the incident on a cellphone video. In response to Snider’s claim that her 911 call was racially motivated, Schulte responded that she had not called the police because of the race of the barbecuers.<sup>264</sup> In her interactions with both the 911 dispatcher and the group targeted by her 911 call, Schulte sought to deny that racial animus may have played a role in her actions that afternoon or that she was exercising racialized privilege by confronting other parkgoers and claiming that the public park was “hers.” Similarly, across the bay in San Francisco, Ettl had likewise attempted to dismiss any suggestion that her asserting dominance over public space or her calling 911 to forcibly remove her eight-year-old neighbor from the sidewalk was motivated by race.<sup>265</sup>

The denial of race or racial prejudice as a factor in such incidents functions to further instantiate white supremacy as an organizing logic in society. So long as race is successfully denied, then structural racism need not be challenged or eradicated. The denial of racism is, as historian Ibram X. Kendi has argued, “fundamental” to its persistence.<sup>266</sup> When white #LivingWhileBlack antagonists deny the

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260. Aponte, *supra* note 6.

261. *Id.*

262. *Id.*

263. *Id.* It is worth noting that because of her behavior during their call, the dispatcher flagged Schulte for a possible psychological hold. The dispatcher even asked Schulte if she had previously been committed to a psychiatric facility. The responding police officer evaluated Schulte, but determined that she did not meet the requirement to be held in custody for a psychological evaluation. *Id.*

264. Snider, *supra* note 7.

265. See *supra* note 64 and accompanying text.

266. Rob Brunner, *Interview: Ibram X. Kendi Takes a Hard Look at Racism—and Himself*, WASHINGTONIAN (Oct. 23, 2019), <https://www.washingtonian.com/2019/10/23/iibram-kendi-how-to-be-an-antiracist> [<https://perma.cc/EH8N-KYWW>]; see also Glen Adams & Phia S. Salter, *A Critical Race Psychology Is Not Yet Born*, 43 CONN. L. REV. 1355, 1366 (2011) (arguing that “denial of the radicalized character of experience is constitutive of privilege and power”).

operation of race in their decision making, they cast the targets of their 911 calls as wrongdoers. This discursive sleight-of-hand functions to criminalize and further stigmatize Blacks and has the added benefit (for the antagonists) of discouraging future Black incursions into spaces marked as “white” out of fear of harassment (or worse).

*C. Tears for Fears: The Trope of Black Male Predation and White Female Vulnerability*

The strategic use of a “Black violence narrative” is a trope that repeats in #LivingWhileBlack stories. Schulte and Ettl both employed this trope to shore up their claims to decidedly public space. Others have employed it to exclude and police Blacks in public accommodations.

When initially confronted about her choice to call Oakland police to report the Merritt Park barbecuers, Jennifer Schulte displayed steadfastness in the face of her critics, refusing to yield or end her call.<sup>267</sup> Seconds later—once connected with the 911 dispatcher—Schulte began to cry and claimed to have been harassed.<sup>268</sup> Once the dispatched police officers arrived on the scene, Schulte again began to cry, so much so that she was initially unable to communicate with the officers at the scene.<sup>269</sup>

Having aggressively (and unilaterally) initiated a confrontation with the barbecuers, and after threatening “ya’ll [sic] are going to jail,” it was only when she had the attention of the police and emergency personnel that Schulte utilized “white fear”<sup>270</sup> and “damsel in distress”<sup>271</sup> strategies, claiming to be a victim of others’ aggression. In so

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267. Snider, *supra* note 7.

268. *Id.*

269. *Id.*

270. Frank Rudy Cooper defines “white fear” as

[The] fear that blacks will try to change the status quo [of racial subordination] . . . . The logical movement is from ‘othering’ blacks, to knowing they are subordinated, then to knowing that subordination provides blacks with a reason to overthrow the system. Accordingly, whites may subconsciously assume that, if they have it better than blacks, blacks must want to reverse that hierarchy. That thought process is the ultimate source of white fear.

Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 52 (2018). This fear of imagined racial retribution fuels urban “law and order” political discourse and further serves to dehumanize and “other” Black citizens. *Id.*

271. See Zach Sommers, *Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons*, 106 J. CRIM. L. & CRIMINOLOGY 275, 287 (2017) (citing Sarah Stillman, “The Missing White Girl Syndrome”: *Disappeared Women and Media Activism*, 15 GENDER & DEV. 491 (2007)). The “damsel in distress” trope has traditionally been one in which “a helpless girl or woman must be

doing, she cleverly tapped into the long history in this country of white fears of Black male predators. This myth of Black male predation has its origins in the post-Reconstruction era, as white political leaders began to traffic false claims about Black men raping white women to justify mob violence against Black communities in the South and West.<sup>272</sup>

Variations on this trio of discursive strategies recur in several of the #LivingWhileBlack incidents catalogued here. These tropes are antithetical to integration and, together, support the establishment or maintenance of exclusively white spaces under the protection of public law enforcement.

### CONCLUSION

In the past year, there have been multiple calls for redress for the targets of #LivingWhileBlack incidents. These calls for redress have occurred on the federal, state and local levels. For example, after former White House staffer Darren Martin had the police called on him while moving into his Manhattan apartment,<sup>273</sup> Martin and other targets of #LivingWhileBlack 911 calls petitioned the House and Senate Judiciary committees for hearings on racial bias and racial profiling.<sup>274</sup>

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saved by a man." *Id.* Moreover, scholars have acknowledged that only white women are eligible to be considered a damsel in distress. *Id.* at 288. In this case, Schulte was seeking to replace rescue by "a man" with rescue by the male state, in the form of its police. See Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUDIES 7, 12 (1992) ("Second, insofar as state power is, *inter alia*, a historical product and expression of male predominance in public life and male dominance generally, state power itself is surely and problematically gendered.").

272. IDA B. WELLS, SOUTHERN HORRORS 6 (1892). In *Southern Horrors*, journalist Ida B. Wells dated the emergence of this myth squarely in the post-emancipation period, noting that no such hysteria existed in the South during the Civil War when a generation of white men were sent to war, leaving white women alone with black male slaves. *Id.* at 5 ("The thinking public will not easily believe freedom and education more brutalizing than slavery, and the world knows that the crime of rape was unknown during four years of civil war, when the white women of the South were at the mercy of the race which is all at once charged with being a bestial one."); see also DIANNE MILLER SOMMERVILLE, RAPE & RACE IN THE NINETEENTH-CENTURY SOUTH 1, 17 (2004).

273. See Morgan Gstalter, *Black Obama White House Staffer Has Cops Called on Him While Moving into New Home*, HILL (May 2, 2018, 9:40 AM), <https://thehill.com/blogs/blog-briefing-room/news/385807-black-obama-white-house-staffer-has-cops-called-on-him-for> [<https://perma.cc/SC65-578D>]. In Martin's estimation, the neighbors who called 911 did so because he seemed out of place: "Call the police on this Black man who DEFINITELY doesn't live here," he tweeted. See Darren D. Martin (@MartinDarrenD), TWITTER (Apr. 28, 2018, 6:48 AM), <https://twitter.com/MartinDarrenD/status/990180896572665856> [<https://perma.cc/R43Q-M68D>].

274. Cleve R. Wootson Jr., *#LivingWhileBlack Victims Want Congressional Hearing on Racial Profiling*, WASH. POST (June 4, 2018, 7:02 AM), <https://www>.

In April 2019, the city of Grand Rapids, Michigan held public hearings on a possible amendment to the city's municipal human rights code that would prohibit "biased crime reporting."<sup>275</sup> The proposed ordinance would make violations of this section of the code a criminal misdemeanor, punishable under state law. Supporters of the ordinance pointed to a summer 2017 gathering in a local Grand Rapids park "in which police were called to break up a large gathering of African American community members."<sup>276</sup> The park in question, Mulick Park, is designated by the city as a "community and specialty park"—a category of public land uses whose stated purpose is to be the "recreational and social focus of the neighborhood and broader community."<sup>277</sup> Community and Specialty Parks have a broad purpose that is intended to serve all of the city's residents (even those who reside beyond the borders of the parks' immediate vicinity).<sup>278</sup> Thus, per the city's own regulations, the Black parkgoers were rightfully in place, and the 911 caller would have faced punishment under the proposed ordinance.

In July 2019, Oregon enacted legislation to create an individual cause of action for targets of #LivingWhileBlack calls.<sup>279</sup> Under the bill, proposed by the legislature's African-American lawmakers, targets of such calls will be able to sue for civil damages up to \$250.<sup>280</sup> Sponsoring Representative Janelle Bynum, the only African-American member of

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washingtonpost.com/news/post-nation/wp/2018/06/04/they-were-harassed-for-livingwhileblack-now-they-want-congressional-hearings-on-profiling.

275. Justin P. Hicks, *Grand Rapids Could Make It Illegal to Call Police on People of Color for 'Participating in Their Lives'*, MLIVE.COM (Apr. 20, 2019), <https://www.mlive.com/news/grand-rapids/2019/04/grand-rapids-could-make-it-illegal-to-call-police-on-people-of-color-for-participating-in-their-lives.html> [https://perma.cc/89JN-3H9X] ("[N]o person shall make a police report that is based in whole or in part on an individual's membership in a protected class and not on a reasonable suspicion of criminal activity in consideration of all available facts and the totality of the circumstances.").

276. *Id.*

277. *Mulick Park*, CITY OF GRAND RAPIDS, <https://www.grandrapidsmi.gov/Directory/Places/Parks/Mulick-Park> [https://perma.cc/LM5K-VXSL]; *Aberdeen Park*, EXPERIENCE GRAND RAPIDS, <https://www.experiencegr.com/listings/aberdeen-park/7898> [https://perma.cc/GKP6-CDBG].

278. *See Friends in the News*, FRIENDS OF GRAND RAPIDS PARKS, <https://www.friends-of-grparks.org/amenity/city-owned-parks-public-spaces/page/3> [https://perma.cc/9GN4-FEKN] (illustrating difference between Community and Specialty Parks and Neighborhood Parks).

279. *Oregon Bill Cracks Down on Racially Motivated 911 Calls*, NBC NEWS (June 4, 2019, 4:05 PM), <https://www.nbcnews.com/news/nbcblk/oregon-bill-cracks-down-racially-motivated-911-calls-n1013721> [https://perma.cc/CL9P-GWMC].

280. 2019 OR. LAWS Ch. 415.

Oregon's House of Representatives, personally experienced the stigma of #LivingWhileBlack. Over the July 4th weekend in 2018, when Bynum was canvassing door-to-door for reelection in Clackamas County, a woman called 911 to report that Bynum was exhibiting strange behavior.<sup>281</sup> The caller said Bynum was going "house to house," knocking on doors, and that "the weird thing is she just stops at the end of the driveway whether or not she talks to somebody."<sup>282</sup> While the lawmaker's behavior might have looked like electoral canvassing to some, for the 911 caller in this overwhelmingly white county,<sup>283</sup> Bynum's presence looked suspicious.

The efficacy of these reform efforts remains to be seen. With amplified media coverage and local and national legislative attention, these initiatives may increase policymakers' awareness of the issues explored here. The perniciousness of implicit bias means that we will never know for sure what motivated a #LivingWhileBlack antagonist to summon police for assistance. This inability to confirm, except in the rarest of circumstances, will leave triers of fact to rely on their own beliefs and assumptions—their *own* implicit biases—to resolve such disputes. Thus, civil liability schemes like Oregon's are not likely to curb abuse of law enforcement calls.

While the initiatives are highly likely to raise awareness about the costs and risks of unwarranted calls to 911, they are, regrettably, highly unlikely to change human behavior. Each year in the United States, more than 240 million calls are made to 911.<sup>284</sup> Calls requesting emergency assistance already exceed emergency responders' capacity to respond in person.<sup>285</sup> An effective intervention might be to target emergency dispatchers for enhanced training around these and similar

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281. *I Think That It's Just Been Misunderstood: Woman Calls Police on Oregon Legislator*, KGW (July 5, 2018, 11:15 PM), <https://www.kgw.com/article/news/local/i-think-that-its-just-been-misunderstood-woman-calls-police-on-oregon-legislator/283-571092254> [<https://perma.cc/ZZN5-WH2W>].

282. *Id.*

283. See *Clackamas County, OR*, CENSUS REPORTER, <https://censusreporter.org/profiles/05000US41005-clackamas-county-or> [<https://perma.cc/97JS-AWSX>] (showing that 81% of Clackamas County residents are white, and only 1% are Black).

284. See *9-1-1 Statistics*, NATIONAL EMERGENCY NUMBER ASSOCIATION (NENA), <https://www.nena.org/page/911Statistics> [<https://perma.cc/8K25-D58V>] ("An estimated 240 million calls are made to 9-1-1 in the U.S. each year.")

285. Matthew Vann & Gabe Gutierrez, *911 Dispatchers Under Fire After Several Troubling Incidents*, NBC NEWS (Aug. 6, 2015, 7:13 PM), <https://www.nbcnews.com/nightly-news/overwhelmed-work-nations-911-dispatchers-under-scrutiny-n405386> [<https://perma.cc/282Y-468A>].

incidents, implicit bias, and the negative impacts on communities of false police calls. As the American Civil Liberties Union has argued,

Department policies should instruct dispatchers not to unthinkingly send officers to respond to questionable calls with minimal information. When, for example, a caller reports a “suspicious person,” the dispatcher should collect enough information to identify whether the caller has seen possible criminal activity that is worth an officer’s time to investigate. If it becomes clear that the caller is simply being racist rather than vague or inarticulate, the dispatcher should have the discretion to tell the caller that they will not dispatch an officer without a legitimate basis.<sup>286</sup>

Even if dispatchers are better equipped to screen emergency calls and provide relevant information to dispatched officers without compromising public safety, police officers themselves may need enhanced training to respond to such incidents.<sup>287</sup> The failure of local law enforcement agencies to devise departmental policies regarding responding to such calls may itself raise constitutional issues of equal protection.<sup>288</sup> For this reason, in the wake of the Starbucks incident, the Philadelphia Police Department developed new policy around the handling of criminal trespass 911 calls.<sup>289</sup>

Finally, callers themselves may need to be questioned<sup>290</sup> and advised against harassing their Black neighbors and others with whom they are

286. Carl Takei, *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, ACLU (June 18, 2018, 6:00 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated> [<https://perma.cc/76G3-229L>].

287. *See id.* (describing May 2018 incident where white neighbor called police on Black real estate investor inspecting neighboring house (in broad daylight) and where police “explained to the neighbor that [the investor] had the right to be there and warned [the neighbor] not to interfere with his work. She responded by hurling invective at Hayes”). In the May 2018 Yale incident, officers “admonished the complaining student that the other student had *every right to be present*.” Kimberly Goff-Crews, *Message to Graduate Students from VP for Student Life Kimberly Goff-Crews*, YALE NEWS (May 10, 2018) (emphasis added), <https://news.yale.edu/2018/05/10/message-graduate-students-vp-student-life-kimberly-goff-crews> [<https://perma.cc/W2T5-XS73>]. In both instances, the police successfully defused the situation and properly denounced the unjustified call.

288. *See generally* U.S. CONST. amend XIV, § 1 (establishing equal protection under the law).

289. Ethan Sacks, *Philadelphia Police Alter Trespassing Policy After Starbucks Arrests*, NBC NEWS (June 8, 2018, 6:48 PM), <https://www.nbcnews.com/news/crime-courts/philadelphia-police-alter-trespassing-policy-after-starbucks-arrests-n881411> [<https://perma.cc/J8TC-XCH2>].

290. *But see, e.g.*, Deborah Fisher, *Tennessee Lawmaker Seeks to Make 911 Calls Confidential*, TENN. COALITION FOR OPEN GOV’T (Feb. 10, 2019), <http://tcog.info/>

legitimately sharing space.<sup>291</sup> Such an intervention was warranted when a white man in suburban Virginia called 911 after a Black man fouled him in a pickup basketball game at an LA Fitness gym.<sup>292</sup> The complainant, who earned the monikers “Flagrant Freddy” and “Checked Charlie” from social media users,<sup>293</sup> became upset after a hard foul caused him to fall to the floor.<sup>294</sup> He stormed off the court, alerting the group that he was going to call the police.<sup>295</sup> This response—summoning police to resolve benign interpersonal conflicts—comes with risks. In this case, the responding police officer admitted that he thought he was responding to a fight.<sup>296</sup> Law enforcement personnel responding to such calls may over or underestimate the resources (the *force*) required to maintain peace and order.

Rooting out Blackness-as-nuisance emergency services calls will require a comprehensive strategy—one that is aimed at raising awareness and enhancing public safety. Thus, potential 911 callers, 911 dispatchers, and first responders must be educated on the roles that they play in instigating and escalating #LivingWhileBlack incidents. Moreover, where possible, this educative strategy must be coupled with a consideration of how to give those who are actually “living while Black” the means with which to combat racialized territoriality and entitlements to space and place.

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tennessee-lawmaker-seeks-to-make-911-calls-confidential [https://perma.cc/G54T-LGE3] (illustrating how despite concerns in the wake of the Hayes incident, lawmakers in some states, like Tennessee, are considering legislation to make 911 calls anonymous to protect callers; most states, however, maintain 911 calls as public).

291. Takei, *supra* note 286.

292. Aris Folley, *Cops Reportedly Called on Black Man After a Hard Foul in Basketball Game*, HILL (July 17, 2018, 4:30 PM), <https://thehill.com/blogs/blog-briefing-room/news/397498-cops-reportedly-called-on-black-man-after-a-hard-foul-in> [https://perma.cc/PPH2-PYKC].

293. *Id.*

294. *Id.*

295. *Id.*

296. The police officer’s admission suggests that the complainant here may have mischaracterized the incident during the 911 call, resulting in the dispatcher passing along a report of a fight (instead of a report of a hard foul on an indoor basketball court).