

RESPONSE

“IF ONLY WE’RE BRAVE ENOUGH TO BE IT”: HOW JUDGES, LAW ENFORCEMENT, AND LEGISLATORS CAN BE THE LIGHT AGAINST #LWB INCIDENTS

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Thanks to Caroline Koch for the uplift and to my law clerk, Janki Kaswala, for her research and willingness to argue with me on her own time. Special thanks to all the Black judges and ally judges who came before me and sit shoulder to shoulder with me now. They are all Lewis-esque “good trouble[makers].” Scholarship, perseverance, and uplift.

The views expressed in this Response are my own and do not reflect the views of the Maryland Judiciary.

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INTRODUCTION

“Boil it down to its essence so folks like you and me can understand what is really going on. That way we will know if it’s medicine or poison.” That was some of the best advice that I received before I started law school. It wasn’t given to me by a big firm lawyer. It wasn’t wisdom handed down to me by a well-respected judge. I didn’t learn it in class from a prolific published law professor. Instead, it was given to me by a disheveled man sitting two seats in front of me on the Red Line. I didn’t know him. He didn’t know me. He was chatty. I was a bit braggy (as are most law school-accepted students). He reeked of experience, hope, and an old Black man’s weariness of America’s promise. I reeked of lack of experience, uneven hope (whispered to me by others), and petulance about the success my future held for me. We talked for five minutes until we arrived at my stop. I left to get on with the rest of my life. He continued on the train, probably riding to the very end. That was it. A brief and strange connection cut off by a chime, a recorded disembodied voice, and a train door sliding closed.

Living While Black (#LWB)¹ is hard to articulate even for those of us who have received backhanded praise for how articulate and well-

1. See generally Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 870 (2020) (arguing that recent instances of 911 calls reporting Black people for occupying public spaces and engaging in everyday activities follows a tradition of invoking property law concepts of nuisance and trespass to exclude Black people from such spaces). The title “If Only We’re Brave Enough to Be It” refers to the light that each of us can be in the fight to “leave behind a country better than the one we were left.” AMANDA GORMAN, *THE HILL WE CLIMB AND OTHER POEMS* (forthcoming Sept. 2021).

spoken we are. Even the most loquacious poet comes up short in describing its nuance and complexity.² It is difficult because the experiences Black people have in America are as diverse as the shades of their skin. However, when these shared experiences are boiled down to their essence, they tell the story of how others view Black bodies in public spaces as intimidating, and thus respond phrenetically. This view, and unreasonable reactions thereto, are poison, not medicine, for our criminal justice system, children, and entire nation.

Professors Taja-Nia Henderson and Jamila Jefferson-Jones start the process of boiling these #LWB experiences down to their essence in their article *#LivingWhileBlack: Blackness as Nuisance*.³ There, they examine instances where white people have called the police on Black people in public spaces like parks, pools, and running trails because Black bodies are foreign and thought to not belong in the same spaces enjoyed by their white counterparts.⁴ Folks can be comfortable when Black bodies congregate in their “own spaces” because there they can remain Ellison-invisible. But, much like the cultural underpinnings of Jim Crow era laws, public spaces are only as public as those who control them politically and use law enforcement to intentionally keep spaces segregated. This is true in the city park, on a running trail, in the streets, and even in the courtroom. The point of their article is that #LWB means that white people use traditional property law— notions of trespass and nuisance—to keep Black people out of public spaces.⁵ These actions appear legitimate because they are done under the color

2. See DAVE, *Black*, on PSYCHODRAMA (Kobalt Music Publ’g Ltd. 2019). The artist attempts to explain the Living While Black experience:

Look, black is beautiful, black is excellent/
 Black is pain, black is joy, black is evident/
 It’s workin’ twice as hard as the people you know you’re better than/
 ‘Cause you need to do double what they do so you can level them/
 Black is so much deeper than just African-American/
 Our heritage been severed, you never got to experiment/
 . . .
 The blacker the berry the sweeter the juice/
 A kid dies, the blacker the killer, the sweeter the news/
 And if he’s white you give him a chance, he’s ill and confused/
 If he’s black he’s probably armed, you see him and shoot.

Id.

3. See Henderson & Jefferson-Jones, *supra* note 1.

4. *Id.* at 867–68.

5. *Id.* at 870.

of law and in concert with police enforcement.⁶ But in reality, permutations of systematic racism are seen both in the context of #LWB and access to justice for people of color.⁷

Absent from Henderson's and Jefferson-Jones's article is a pragmatic discussion on how actors who are pivotal to the criminal justice system can become complicit in this systematic racism because of their unconscious bias, privilege, prejudice, and/or fear. Those pivotal actors include local judges, law enforcement, and prosecutors. The purpose of this Response is not to vilify, shame, or "cancel"⁸ these actors. Instead, this Response seeks to ignite a conversation about what role, if any, these necessary actors have in a particular type of #LWB moment: when the police are called on innocent Black people just living life. Additionally, it seeks to provoke a discussion among ordinary folks, both inside and outside the legal system, as to pragmatic solutions that both honor safety and avoid the careless treatment of Black bodies in public spaces.

These suggestions are offered and viewed through the lens of judges as community leaders, as opposed to judges as siloed, detached, slow moving, and well-meaning Ents.⁹ Judges should follow the rule of law, listen to the parties with an open mind, and interpret the law fairly. Judges should also seek to resolve #LWB issues pragmatically and thoughtfully and with stakeholder input and professional impatience.¹⁰

6. *Id.* at 872, 878, 880.

7. *Id.* at 870–71.

8. "Canceled" is defined by Merriam Webster as "removing . . . support for public figures in response to their objectionable behavior or opinions." *What It Means to Get 'Canceled'*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/cancel-culture-words-were-watching> [<https://perma.cc/Y2JG-P485>].

9. See Brooke Boriack, *Names as Stories: Language and Meaning in J.R.R. Tolkien's, The Lord of the Rings*, TRANSPOSITIONS (Sept. 19, 2016), <http://www.transpositions.co.uk/names-as-stories-language-and-meaning-in-j-r-r-tolkiens-the-lord-of-the-rings> [<https://perma.cc/MGA7-7GPT>] (explaining that in the fantasy writings of J.R.R. Tolkien, Ents are ancient "tree-herding creatures" that are known for engaging in slow, deliberative speech and thinking before taking action).

10. See MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 4 (AM. BAR ASS'N 2020) ("Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all."); see also *id.* at r. 1.2 cmt. 6 ("A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.").

Otherwise, the judicial system will be unable to fulfill its gatekeeping responsibility due to low public confidence and lack of perceived fairness.

Despite these suggestions not being required by law and perhaps even being difficult to incorporate, attempting to implement the forthcoming suggestions in your community is worthwhile because the harms of #LWB incidents are real, articulable, and detrimental.¹¹

This Response argues that, within their own legal lane, judges, law enforcement, and legislators are in the best position to stifle #LWB scenarios to keep folks safe. Part I recounts recent #LWB moments that pervert the law’s intent. Part II encourages judges to lead the justice system in rooting out systematic racism and making the judiciary an uncomfortable venue for #LWB false calls to police. Part III suggests what law enforcement can do in these types of scenarios. Part IV suggests legislative fixes that may be available in #LWB instances through a survey of states.

I. RECENTLY REPORTED #LWB MOMENTS

Since 2018, #LWB incidents in which white people have called the police on Black people doing ordinary things have been overwhelming. The calls have occurred when Black people were merely living their lives in some of the following ways: a Yale student napping in her own dorm’s common rooms between classes;¹² a college student eating lunch on campus;¹³ a customer returning purchases to Hobby Lobby;¹⁴ a neighbor smoking cigarettes;¹⁵ a former White House staffer moving into his

11. For an excellent explanation of intangible harms stemming from #LWB activities, including “Expressive Harms,” “Dignitary Harms,” “Citizenship Harms,” and “Targeting Harms,” see Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 368, 370, 375, 377, 381 (2019).

12. See 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>.

13. See Victor Daniel, *‘All I Did Was Be Black’: Police Are Called on College Student Eating Lunch*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/black-smith-college-student-oumou-kanoute.html>.

14. See Bill Hutchinson, *Hobby Lobby Employees Called Cops on Black Customer Who Apparently Looked like a Crime Suspect*, ABC NEWS (May 17, 2018, 4:07 PM), <https://abcnews.go.com/US/hobby-lobby-employees-called-cops-customer-apparently-looked/story?id=55230358> [<https://perma.cc/XT9Y-M6HH>].

15. See Monique Judge, *#NewportNancy Wants Black Neighbor Evicted for Smoking Cigarettes in the Parking Lot*, ROOT (July 3, 2018, 1:06 PM), <https://www.theroot.com/newportnancy-wants-black-neighbor-evicted-for-smoking-1827320227>.

apartment;¹⁶ and a family eating at a Subway restaurant.¹⁷ Incidents like these continue unabated, as the following anecdotes illustrate.

A. *Montclair, New Jersey—Permit*

In July of 2020—at the heart of the Black Lives Matter protests in response to the killing of George Floyd—a family consisting of two lawyers and their two young sons, all people of color, were reportedly making improvements to their home in Montclair, New Jersey when a #LWB incident occurred and was captured on video.¹⁸ The video shows a portion of an argument between them and their neighbor, a white woman named Susan, in which the latter yelled at the couple to stop working.¹⁹ She interrogated the couple about what permits they had and whether they had the right to make improvements to their house.²⁰ The couple refused to answer her questions and told her to get off their property.²¹ Then, Susan called the police and claimed that the husband pushed her arm and assaulted her.²²

The video further shows Susan walking around to onlooking neighbors, seeking their help in confirming her version of the events.²³ Norrinda Brown Hayat, the parent and lawyer involved in the incident, can be heard in the video telling her husband to bring their children inside so they did not have to witness the encounter or see the police

16. See Eli Rosenberg, *A Black Former White House Staffer Was Moving into a New Apartment. Someone Reported a Burglary*, WASH. POST (May 2, 2018, 10:12 PM), https://www.washingtonpost.com/news/post-nation/wp/2018/05/01/a-black-former-white-house-staffer-was-moving-into-a-new-apartment-someone-reported-a-burglary/?utm_term=.2823dc07c572.

17. See Rikki Klaus, *Family Says Subway Employee Called Police on Them Because of Race*, WSB-TV (July 3, 2018, 11:32 PM), <https://www.wsbtv.com/news/local/family-says-subway-employee-called-police-on-them-because-of-race/782480259> [<https://perma.cc/4G79-LFG3>].

18. Stephanie Guerilus, *Montclair ‘Permit Karen’ Calls Police on Black Neighbor for Assault*, GRIO (July 1, 2020), <https://thegrio.com/2020/07/01/montclair-permit-karen-police> [<https://perma.cc/39HH-62KX>]; Natalie Heard Hackett, *Former Montclair Councilor Baskerville Calls for Action, Involvement of DOJ in Response to ‘Permit Karen’ Calling Police on Black Family*, TAP INTO MONTCLAIR (July 10, 2020, 11:55 PM), <https://www.tapinto.net/towns/montclair/sections/law-and-justice/articles/former-montclair-councilor-baskerville-calls-for-action-involvement-of-doj-in-response-to-permit-karen-calling-police-on-black-family> [<https://perma.cc/7ZSM-WQFQ>].

19. Guerilus, *supra* note 18.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; Hackett, *supra* note 18.

respond.²⁴ Onlookers rejected Susan’s version of events and stated that the husband never assaulted her.²⁵ To date, the Montclair couple has not sued Susan, and local authorities have not charged or otherwise sanctioned her for calling and providing false information to the police.

B. Ottawa, Canada—Quick Rest on a Bridge

In Ottawa, Canada,²⁶ in early July of 2020, police apologized to a young Black man after a white passerby racially profiled him on a public trail.²⁷ Ntwali Bashizi rides his bicycle a few times a week on Stonebridge Trail, a wide trail that allows people to walk and ride bicycles while still safely adhering to social distancing guidelines under COVID-19 mandates.²⁸ On one Monday afternoon, Bashizi stopped his bicycle on the side of a bridge to take in the natural view and rest.²⁹ A white woman then approached him from behind and demanded that he move off the bridge, which was the same width as the trail, so she could cross.³⁰ When Bashizi responded that there was plenty of space for her to cross safely, the woman called 911.³¹ She accused Bashizi of intimidating her and requested that an officer come remove him from the bridge.³² On Bashizi’s video capturing the event, the 911 dispatcher can be heard agreeing with the woman’s account of the situation and accusing Bashizi of intimidating her without inquiring further.³³ The video also shows that once she hung up with the dispatcher, the woman finally walked past Bashizi and continued her way across the bridge.³⁴

24. Guerilus, *supra* note 18.

25. Hackett, *supra* note 18; Julia Martin, *Montclair Police: Witnesses Saw No Physical Contact in ‘Permit Karen’ Incident*, NORTHJERSEY.COM (July 2, 2020, 3:09 PM), <https://www.northjersey.com/story/news/essex/montclair/2020/07/02/permit-karen-montclair-nj-police-investigating/5364843002> [<https://perma.cc/CG3A-VUDJ>].

26. Although this did not occur in the United States, the author believes that it is instructive on law enforcement reactions to #LWB situations.

27. Shaamini Yogaretnam, *Ottawa Police Apologize to Black Man Who Had Woman Call 911 on Him for Standing on a Bridge*, OTTAWA CITIZEN (July 10, 2020), <https://ottawacitizen.com/news/local-news/ottawa-police-apologize-to-black-man-who-had-woman-call-911-on-him-for-standing-on-a-bridge> [<https://perma.cc/CTK7-6EAH>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

The Ottawa Police Service later investigated the incident after the encounter was posted to social media.³⁵ As a result, Deputy Chief Mark Ford apologized to Bashizi and his family for the actions of the dispatcher.³⁶ Ford acknowledged that there are many perspectives involved in a single incident and that it was a mistake to have validated only one person's perspective in Ntwali's situation—the perspective of the white person.³⁷

C. York, Pennsylvania—Slow-Playing Golfers

In April 2018, Sisters of the Fairway, a band of female golfers of color in York County, Pennsylvania, were only two holes into their first golf game as members of the Grandview Golf Club when the club owner called the police to remove them from the course.³⁸ There were five women in the group, one of whom was an attorney and all of whom were experienced golfers.³⁹ As they began their morning game, another group of golfers ahead delayed the procession around the holes for about five minutes.⁴⁰ The Sisters, who are Black, were waiting their turn when they were approached by the club's co-owner, Steve Chronister, who is a white man.⁴¹ Chronister, along with his entourage of white men, accused the women of golfing too slowly, and, unbeknownst to the Sisters, had called the police before speaking with them.⁴²

When the police arrived, Chronister sent them away.⁴³ He told them the women had picked up their pace and there was no need to talk to them.⁴⁴ However, when the women "slowed down" again a few holes later, Chronister called the police a second time.⁴⁵ Officers arrived,

35. *Id.*

36. *Id.*

37. *Id.*

38. Joel Beall, *Police Were Called on Five African-American Women for Playing Too Slow. The Women Allege the Crime Was "Golfing While Black."* *Inside a Two-Year Fight for Justice*, GOLF WORLD (Apr. 30, 2020), <https://www.golfdigest.com/story/police-were-called-on-five-african-american-women-for-playing-too-slow-the-women-allege-the-crime-was-golfing-while-black-inside-a-two-year-fight-for-justice> [<https://perma.cc/5TK2-LNRK>].

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

checked the Sisters’ IDs, and asked their group to leave.⁴⁶ The Sisters obliged.⁴⁷

The next day, the Sisters shared a video recording that showed how Chronister and the other white men aggressively and unfairly treated them.⁴⁸ Other golfers defended the women, saying they had never been in the wrong.⁴⁹ The police ultimately did not file charges, but the Pennsylvania Human Relations Commission launched an investigation that granted the “Grandview Five” the right to sue Chronister and his golf club.⁵⁰ Almost two years after the April 2020 incident, two of the women filed a racial and gender discrimination lawsuit in the U.S. District Court for the Middle District of Pennsylvania. As of publication, the case is currently pending and has been briefed before Judge Sylvia H. Rambo.⁵¹

D. Central Park, New York City—Bird Watching

In May 2020, Chris Cooper, a Black man who was an avid birdwatcher, saw a white woman, Amy Cooper (unrelated), walking her dog in the “semi-wild” section of Central Park in New York City.⁵² Ms. Cooper’s dog was unleashed at the time.⁵³ When Mr. Cooper asked her to follow the law and leash her dog, she refused.⁵⁴ She then called the police and falsely claimed Mr. Cooper had threatened her life.⁵⁵ Specifically, she said, “I am being threatened by a man in the Ramble,

46. *Id.*

47. *Id.*

48. *Id.*; see also Sandra Thompson, *4/21/2018 Racial and Gender Discrimination at Grandview Golf Club*, YOUTUBE (Apr. 22, 2018), <https://www.youtube.com/watch?v=DHip22RrEj8>.

49. Beall, *supra* note 38.

50. *Id.*; see also Liz Evans Scolforo, *State HRC Closes Case After Grandview Five File Lawsuits in York County, Federal Court*, YORK DISPATCH (Apr. 28, 2020, 3:33 PM), <https://www.yorkdispatch.com/story/news/local/2020/04/28/state-hrc-closes-case-after-grandview-five-file-lawsuits-york-county-federal-court/3040099001> [<https://perma.cc/MP68-KKGJ>].

51. Beall, *supra* note 38; Complaint at 1–2, *Ojo v. Brew Vino LLC*, No. 1:20-cv-00666-SHR (M.D. Pa. April 20, 2020).

52. Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html>.

53. *Id.*

54. *Id.*

55. *Id.*

please send the cops immediately!”⁵⁶ However, Mr. Cooper recorded the incident and could prove her claim was dishonest.⁵⁷ She had made it up. Amy Cooper’s complaint and the video were released to the public, which ignited dismay and anger.⁵⁸ It is yet another story of #LWB.⁵⁹

II. WHAT CAN THE JUDICIARY DO?

It is easy to agree with Alexander Hamilton that the judiciary is the weakest branch of government⁶⁰ The legislative branch controls the judiciary’s purse strings, and the executive branch handles enforcement of judicial rulings. That is especially true in cases of #LWB false reports to police because courts rarely get the opportunity to rule on the merits of those cases. Yet, these cases cause real harm to notions of fairness and equality in the judicial system.

Nevertheless, the judiciary is the heart of our system of government. It uplifts the Constitution and has the ability to protect against unequal treatment. It often speaks truth to power without a public relations firm to correct every armchair critic with a Google law degree and domain name. It requires leadership not supported by enforcement or money, but rather by winning hearts and minds and untying deep social knots created by the birth of this nation.

State and federal judges should follow the rule of law, listen to the parties with an open mind, and interpret the law fairly. Additionally, judges should lead the effort to root out systematic racism, including the #LWB calls discussed herein, publicly and boldly. To be sure, over the years state and federal judges have not been shy about criticizing #LWB incidents and false police calls. As the First Circuit recognized in 1987, calling the police on innocent Black people can have devastating consequences.⁶¹ The emotional harms that result from a mistaken and wanton imputation of criminality against a Black person who is simply

56. *Id.*

57. *See id.*

58. *See id.*

59. *See* Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. F. 213, 213–14 (2020) (noting that #LWB encounters are frequent and often based on norms that only apply to Black individuals).

60. THE FEDERALIST NO. 78 (Alexander Hamilton).

61. *See* Hall v. Ochs, 817 F.2d 920, 921–22, 927 (1st Cir. 1987) (describing the psychological toll Hall experienced after being arrested due to the color of his skin).

existing are real, deep, and troubling.⁶² Thirty-three years later, in 2020, the Fourth Circuit continued the tradition established by the First Circuit to condemn systematic racism and #LWB incidents.⁶³ Not only is it dangerous for officers and people of color during the incident, but it erodes Americans’ faith in the justice system’s ability to be fair in a case, *ab initio*.

Recently, the highest courts in several states issued statements of varying degrees regarding systematic racism.⁶⁴ For example, Chief Justice Cheri Beasley from North Carolina Supreme Court admitted that “[i]n our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty.”⁶⁵ Additionally, Clemens A. Landau, the presiding judge of Utah’s Salt Lake City Justice Court, wrote, “[w]e are painfully aware that municipal courts like ours have historically been situated on, or at least very near, the tip of systemic racism’s spear.”⁶⁶ Courts like those in Maryland have set up large commissions with sweeping authority to scrutinize every part of their systems to identify and root out systematic racism and

62. *See id.* at 927 (“[T]he memory of this experience, in which the color of his skin triggered a chain of events that left him handcuffed, face down on the ground, will remain with him . . . [T]hat such an incident of racial discrimination could happen to him . . . while sitting in his car reading the paper and waiting . . . has to have had a profound and lasting effect . . .”).

63. *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (en banc) (Gregory, C.J., concurring) (lamenting #LWB: “But we know that many of our fellow citizens already feel insecure regardless of their location. In a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, it is still within their own communities—even those deemed ‘dispossessed’ or ‘disadvantaged’—that they feel the most secure”).

64. *See* Jesse Wegman, *We Are Part of the Problem They Protest*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/state-supreme-courts-racial-justice.html> (reporting that either the chief justices or full high courts in the following states issued statements on bias and racism in the justice system: Louisiana, North Carolina, Massachusetts, Oregon, Washington, Kentucky, Indiana, Georgia, Alaska, New Jersey, California, Connecticut, Maryland, New York, Hawaii, Maine, and the District of Columbia).

65. Jess Bravin, *Breaking with Tradition, Some Judges Speak out on Racial Injustices; State Supreme Courts Pledge to Root out Bias in Judicial System and Heal ‘Raw Wounds of Racism,’* WALL ST. J. (June 13, 2020, 11:00 AM), <https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400>.

66. Wegman, *supra* note 64.

bias.⁶⁷ These efforts, if authentic, can make a real difference in the overall tone and perception of the justice system, especially as it relates to the #LWB incidents cited herein. The rights set forth in the United States Constitution are the floor and not the ceiling of protections to be afforded to people. This includes notions of fairness and equal protection. Judges are, and remain, the keys to ensuring those protections in both letter and spirit.

III. WHAT CAN LAW ENFORCEMENT DO?

Law enforcement is one of the hardest professions in America. Hundreds of thousands of police officers in the United States bear the burden of protecting communities, assisting those in need, and running toward incidents that the average person runs from; specifically, “[e]very day, the United States’ 800,000 police officers, deputies, troopers, and agents shoulder responsibility for keeping our communities safe, helping those in need, and running toward incidents that the average person runs from.”⁶⁸ It is a profession that requires excellence every day and, unlike most others, there is little, *if any*, room to have a bad day. Police officer deaths have risen twenty-eight percent in 2020, with thirty-two officers killed in the line of duty between January 1, 2020 and July 13, 2020.⁶⁹ Policing takes a toll on the minds and emotions of officers, yet their mental wellness is often

67. See Press Release, Maryland Cts., Maryland Judiciary Forms Committee on Equal Justice to Address Systemic Inequalities (June 25, 2020), <http://mdcourts.gov/media/news/2020/pr20200625> [<https://perma.cc/SW33-WVFF>] (announcing the formation of a Committee on Equal Justice within the Maryland Judicial Council that “will make recommendations on strategies to dismantle any discriminatory behaviors in . . . the Judiciary’s functions” and “identify necessary improvements, resources, and support services and develop educational opportunities for . . . engagement in the pursuit of equal justice for all”).

68. *Policing: A Noble Profession, a Stressful Job*, CMTY. POLICING DISPATCH (May 2019), <https://cops.usdoj.gov/html/dispatch/05-2019/lemhwa.html> [<https://perma.cc/6MAL-ZRMP>].

69. Bill Hutchinson, *Police Officers Killed Surge 28% This Year and Some Point to Civil Unrest and Those Looking to Exploit It*, ABC NEWS (July 22, 2020, 5:03 AM), <https://abcnews.go.com/US/police-officers-killed-surge-28-year-point-civil/story?id=71773405> [<https://perma.cc/4RX9-9EPH>]; *Law Enforcement Officers Killed and Assaulted (LEOKA) Program*, FBI, <https://www.fbi.gov/services/cjis/ucr/leoka> [<https://perma.cc/NJ88-GNLW>].

overlooked.⁷⁰ With the added scrutiny of the BLM movement and its allies, the pressure on officers to “get it right” has tightened.⁷¹ Responding to #LWB incidents is another added level of responsibility for officers that, while necessary, can be daunting and must be done without perfect information.

Even to the most casual observer, #LWB incidents and the BLM movement are intertwined. Trying to separate one from the other is a fool’s errand because both involve the careless treatment of Black bodies in America. When police encounter #LWB situations, as set out above and in Taja-Nia Henderson and Jamila Jefferson-Jones’s Article, they set the tone for, and have the ability limit the injury to, people of color.⁷² However, these authorities have ample discretion and room to better approach #LWB incidents while keeping communities safe. Specifically, law enforcement can (1) better train dispatchers receiving complaints and (2) civilly charge callers who lodge fraudulent claims.⁷³

A. *Better Train Dispatchers—Ottawa Example*

For law enforcement, the first point of contact when responding to incidents is usually the 911 dispatcher. The U.S. 911 system handles approximately 500,000 calls daily and 183 million calls annually.⁷⁴ In these types of situations, law enforcement’s decision on how to respond starts with the dispatcher. The dispatcher can transfer the call to a non-emergency operator, send police, try to resolve the incident over the phone with the caller, or provide instruction to the callers to flee and keep themselves safe. In the case of #LWB, the majority of calls are “exaggerated calls”—where “callers intentionally exaggerate the

70. DEBORAH L. SPENCE ET AL., LAW ENFORCEMENT MENTAL HEALTH AND WELLNESS ACT: REPORT TO CONGRESS 1 (2019). “[T]he current state of support for officer wellness nationally is disjointed and faces both cultural and logistical obstacles.” *Id.*

71. See John Eligon, *Black Police Chiefs, Feeling Squeezed, Face Criticism on All Sides*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/black-police-chiefs-reform.html> (focusing on the particular pressures that Black police officers experience).

72. See Henderson & Jefferson-Jones, *supra* note 1, at 914; *supra* note 11 and accompanying text.

73. Whether or not there should be less scrutiny on callers who call a non-emergency number as opposed to 911 is beyond the scope of this Response. However, under the lens of how it contributes to #LWB and Black bodies being pushed out of public places, the difference appears legible.

74. RANA SAMPSON, MISUSE AND ABUSE OF 911 3 (2004).

seriousness of an emergency to get a quicker police response.”⁷⁵ Recognizing, redirecting, and rooting out these types of calls are important functions of a dispatcher. When the dispatcher successfully recognizes these calls, they are less likely to dispatch officers and put them in harm’s way, the weaponized fear of the caller loses its authority, and focus is redirected to whether the behavior itself is intimidating—rather than the alleged perpetrator’s demographics.

In the Ottawa biker example above, the initial response of the dispatcher was to ask to be placed on speakerphone and to request that the Black man leave the bridge because his presence was intimidating to the white caller.⁷⁶ While it is true that a dispatcher may have imperfect information in handling a 911 call, the dispatcher in this case failed to get any information from the alleged perpetrator before ordering the man, who had done nothing wrong, to leave.⁷⁷ Recognizing their error, the Ottawa police quickly tweeted an apology regarding the incident.⁷⁸ Specifically, they stated: “We are fully reviewing this incident. At this point it is clear that this was not an appropriate use of the 911 system and the Service did not act appropriately in handling the call.”⁷⁹

In this instance, it was not problematic that the dispatcher tried to de-escalate the situation. What makes this a #LWB issue is that the dispatcher immediately took the side of the white caller, did not consider the perspective of the Black man, and then accused him of being intimidating merely because of his presence—his Black body. When the dispatcher told the Black man that he was intimidating the white woman, that decision “was a validation of the one person’s perspective” over another person’s.⁸⁰ This is the essence of #LWB.

75. *See id.* at 6 (“[A] caller may falsely report ‘shots fired’ when calling about a dispute or assault. Such 911 misuse is difficult to prove because the caller might simply claim, for instance, that he or she heard shots but did not actually see a gun fired. In other words, the caller knows there is enough room for ‘caller error’ that he or she cannot be charged (or prosecuted) for the exaggerated 911 call.”).

76. *See supra* notes 24–37 and accompanying text.

77. *See supra* notes 24–37 and accompanying text.

78. Ottawa Police (@OttawaPolice), TWITTER (July 9, 2020, 6:35 PM), <https://twitter.com/OttawaPolice/status/1281356425491558400>.

79. *Id.*

80. *See* Yogaretnam, *supra* note 27 (“When the dispatcher told Bashizi that he was intimidating the woman that ‘was a validation of the one person’s perspective,’ and it’s for that police are apologizing.”).

Police departments should train dispatchers not to send officers to respond to questionable calls with minimal information and without critical thinking. The more information, the better. For example, when a caller reports a “suspicious person,” the dispatcher should probe further about what makes the person suspicious. Oftentimes, the description of the person is the same as what the caller identifies as their “suspicious” quality.⁸¹ That should be a red flag for dispatchers. The goal of the dispatcher should be to determine if there is criminal activity that warrants sending an officer. Thus, dispatchers “should have the discretion to tell the caller that they will not dispatch an officer without a legitimate basis” when it “becomes clear that the caller is simply being racist rather than vague or inarticulate.”⁸²

Additionally, dispatchers should explain and contextualize the situation in detail to responding officers. If dispatchers suspect the call is like the #LWB incidents stated above, they should inform the officer before the officer arrives. That way, the officer does not validate a white caller’s complaint over a Black person’s perspective of the situation from the beginning. Doing so affects how the officer initially treats the Black person.

B. Educate, Charge, and Refer to Prosecutors—New York Example

Most states have laws that allow for prosecution of people who file false police reports or intentionally make false non-emergency 911 calls.⁸³ Those laws are rarely, if ever, charged or prosecuted.⁸⁴ This is partly because states do not want to punish folks who make honest mistakes and risk

81. Cf. 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> (explaining the experience of being a dispatcher and frequently receiving racist 911 calls).

82. 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/S2HV-57FQ>].

83. See, e.g., CAL. PENAL CODE § 148.3 (West 2020) (“Any individual who reports . . . that an ‘emergency’ exists, knowing that the report is false, is guilty of a misdemeanor.”); IOWA CODE § 718.6 (2020) (“A person who telephones an emergency 911 communications center knowing that the person is not reporting an emergency or otherwise needing emergency information or assistance commits a simple misdemeanor.”).

84. See Sampson, *supra* note 74, at 21 (“Generally, prosecutors file on 911 offenses in only the most egregious cases unless a different arrangement is agreed upon between the police and the prosecutor.”).

detering others from seeking help when needed.⁸⁵ The real question is whether prosecution actually reduces the number of incidents. That answer is unclear: maybe. However, there is evidence to suggest that when law enforcement educates the public, charges the complainant, and refers the case to prosecutors, these #LWB incidents can be exposed publicly, acted upon in the criminal justice system, and resolved by applying some mix of deterrence, rehabilitation, punishment, and restorative justice.⁸⁶

For instance, in the New York birdwatching case, local authorities charged “Ms. Cooper with filing a false report, [which is] a misdemeanor punishable by up to a year in jail.”⁸⁷ In his statement, the Manhattan District Attorney proclaimed that:

Today our [o]ffice initiated a prosecution of Amy Cooper for [f]alsely [r]eporting an [i]ncident in the [t]hird [d]egree. Our office will provide the public with additional information as the case proceeds. At this time I would like to encourage anyone who has been the target of false reporting to contact our [o]ffice. We are strongly committed to holding perpetrators of this conduct accountable.⁸⁸

As a result, Ms. Cooper apologized, admitting that she “reacted emotionally and made false assumptions about his intentions.”⁸⁹ She further atoned:

[Mr. Cooper] had every right to request that I leash my dog in an area where it was required . . . I am well aware of the pain that

85. See Ransom, *supra* note 52 (“People are rarely charged with filing a false police report, legal experts said, because the authorities do not want to discourage the reporting of crimes and because it can be difficult to prove that a person made a false report knowingly.”).

86. See BRYCE THERRIEN & NADIA-ELYSE HARRIS, CRIMINALIZING HATE: AMERICA’S LEGISLATIVE RESPONSE TO BIAS CRIMES 7–12 (2011) (explaining how the five theories of punishment play out in the context of hate crimes and that hate crimes “damage[] [society] more than when crimes happen for other reasons”); 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> (addressing the importance of bringing public attention to #LWB incidents).

87. Ransom, *supra* note 52.

88. Press Release, Cy Vance, Manhattan Dist. Att’y, Statement from Manhattan D.A. Cy Vance, Jr. On Incident in Central Park Ramble on May 25, 2020 (July 6, 2020), <https://www.manhattanda.org/statement-from-manhattan-d-a-cy-vance-jr-on-incident-in-central-park-ramble-on-may-25-2020> [<https://perma.cc/V3UG-DJDW>].

89. Frank Miles, *Amy Cooper Charged in Central Park Confrontation Seen in Viral Video*, FOX NEWS (July 6, 2020), <https://www.foxnews.com/us/amy-cooper-charged-central-park-confrontation> [<https://perma.cc/WU2C-NCV7>].

misassumptions and insensitive statements about race cause and would never have imagined that I would be involved in the type of incident that occurred with Chris.⁹⁰

While some folks will never accept her apology and will find it too convenient and hollow,⁹¹ Mr. Cooper accepted it.⁹² He stated on ABC’s *The View*: “I do accept her apology. It’s a first step. I think she’s got to do some reflection on what happened.”⁹³ Additionally, he has chosen to educate the public by writing a graphic novel about his experience, race, and #LWB.⁹⁴ He said “the aim is to weave together” his personal experiences and the experiences of other Black people into a “more powerful statement of humanity.”⁹⁵ It’s this restorative justice that makes an authentic difference, shapes attitudes, and lessens the sting of #LWB incidents. Through improvements to training, education, and prosecutorial practices, law enforcement can likewise contribute to restorative justice.

IV. WHAT CAN LEGISLATORS DO?

As stated in Part III, most states and local governments have general laws against making false reports.⁹⁶ Authorities rarely use or enforce these statutes.⁹⁷ However, recently, after several of these #LWB false reporting cases went viral, many local governments introduced bills to

90. *Id.*

91. See Terina Allen, *3 Things Amy Cooper Did in Central Park to Damage Her Reputation and Career*, FORBES (May 29, 2020, 11:42 PM), <https://www.forbes.com/sites/terinaallen/2020/05/29/3-things-amy-cooper-did-in-central-park-that-destroyed-her-life/#54310b466198> [https://perma.cc/5PQR-H5NC] (reporting that some people reject Ms. Cooper’s apology because she couches herself as a victim of the situation she created).

92. Zack Budryk, *Christian Cooper Accepts Apology from Woman Who Called Police on Him in Central Park*, THE HILL (May 28, 2020, 2:17 PM), <https://thehill.com/blogs/blog-briefing-room/news/499966-christian-cooper-accepts-apology-from-woman-who-called-police> [https://perma.cc/WB8G-YRH9].

93. *Id.*

94. The graphic novel is available online for free through DC Comics. *Represent! (2020)*, DC ENT., <https://www.readdc.com/Represent-2020/comics-series/149518> [https://perma.cc/3PGQ-7X9L].

95. *Central Park Bird Watcher Who Was Victim of Deliberate Act of Racial Bias Writes Graphic Novel About Unjust Killing of Blacks*, CBS N.Y. (Sept. 17, 2020, 6:59 PM), <https://newyork.cbslocal.com/2020/09/17/chris-cooper-central-park-bird-watcher-racial-bias-amy-cooper-its-a-bird-comic-book>.

96. See *supra* note 83 and accompanying text.

97. See *supra* note 84 and accompanying text.

criminalize these raced-based calls.⁹⁸ Some have gone as far as to propose that that legislation should characterize these calls as hate crimes.⁹⁹ The efficacy of these laws is unknown, and the constitutionality of prosecution under them is untested. Only time and a body of case examples will show their overall effectiveness. In any event, below are some examples of what some states and local governments are doing. The intent is to survey the wide spectrum of solutions that legislatures are using to stifle these #LWB instances.

A. *The New Jersey Example*

After the Montclair home-improvement incident,¹⁰⁰ the New Jersey legislature sprang to action to prevent future misuse of 911 calls.¹⁰¹ Legislators introduced a bill that criminalizes using the threat of a 911 call as an intimidation tactic against people of color in the state.¹⁰² The bill is an amendment to an existing statute against creating false public alarm, but takes it one step further by targeting biased or racially-motivated 911 callers who falsely report “criminal” incidents.¹⁰³

In September of 2020, New Jersey Governor Phil Murphy signed the bill into law, claiming that 911 misuses are “an unacceptable, abhorrent form of discrimination” that create a dangerous situation for victims and “erode trust” between minority New Jerseyans and the police.¹⁰⁴ The New Jersey Attorney General added that these callers put law enforcement at risk too and interfere with emergency operators trying to save lives.¹⁰⁵ As such, making a false race-based 911 call will now be criminally prosecuted as a bias crime in New Jersey.

B. *The California Example*

Local governments across the state of California are also introducing legislation to prohibit racially biased 911 calls. In June of 2020, members

98. See, e.g., *infra* notes 107–09, 114–16 and accompanying text.

99. See, e.g., *infra* notes 112–13, 115–16 and accompanying text.

100. See *supra* Section I.A.

101. See Anthony Zurita, ‘Race-Based’ 911 Calls Now Can Be Charged as Bias Crime in NJ, *Murphy Says*, NORTHJERSEY.COM (Sept. 1, 2020, 8:50 AM), <https://www.northjersey.com/story/news/new-jersey/2020/09/01/race-based-9-1-1-calls-now-can-charged-bias-crime-permit-karen-amy-cooper/3454037001> [<https://perma.cc/K99H-VNKG>].

102. N.J. STAT. ANN. § 2C:33-3 (West 2020).

103. See *id.*; Zurita, *supra* note 101.

104. Zurita, *supra* note 101.

105. *Id.*

of the Los Angeles City Council tweeted that they were considering options, such as criminal penalties and the right to bring private civil actions, to deter false race-based 911 reports.¹⁰⁶ Less than a month later, San Francisco Supervisor Shamann Walton introduced the CAREN Act,¹⁰⁷ which stands for Caution Against Racially Exploitative Non-Emergencies, to enforce civil penalties on people who contact law enforcement as a vehicle for racial discrimination.¹⁰⁸ The acronym is a tongue-in-cheek reference to the word “Karen,” which is a pejorative slang term to describe “an obnoxious, angry, entitled, and often racist middle-aged white woman who uses her privilege to get her way or police other people’s behaviors.”¹⁰⁹

Making a false report is already a crime in California that is punishable by up to a year in jail.¹¹⁰ However, there are currently “no consequences by law for people who make fraudulent emergency calls based on race.”¹¹¹ In 2019, California Assemblyperson Rob Bonta hoped to cure that lack of accountability by introducing a bill that creates criminal consequences for race-based 911 calls across the state.¹¹² The bill, which is currently making its way through the California legislature, makes “fabricat[ing] false racially biased emergency reports” a hate crime punishable as either a misdemeanor or felony. The assembly bill for race-based false reports would allow for more severe punishment than general false reporting.¹¹³

106. See Ian Spiegelman, *L.A. Councilman Proposes Making Racially Biased 911 Calls Illegal*, L.A. MAG. (June 18, 2020), <https://www.lamag.com/citythinkblog/racist-911-calls> [<https://perma.cc/A6R6-MNY5>].

107. Evan Nicole Brown, *Will It Take a Clever Acronym to Stop Racially Motivated 911 Calls?*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/briefing/caren-act-911-san-francisco.html>.

108. *Id.*

109. *Karen*, DICTIONARY.COM, <https://www.dictionary.com/e/slang/karen> [<https://perma.cc/H3K6-JQC4>]; see also Brown, *supra* note 107.

110. CAL. PENAL CODE § 148.3 (West 2020).

111. See Miriam Fauzia & N’dea Yancey-Bragg, *Fact Check: San Francisco’s CAREN Act Will Make Racist, Nonemergency 911 Calls Illegal*, USA TODAY (July 10, 2020, 5:00 AM), <https://www.usatoday.com/story/news/factcheck/2020/07/10/fact-check-caren-act-make-illegal-nonemergency-racist-911-calls/5398107002> [<https://perma.cc/G455-H87C>].

112. Press Release, Rob Bonta, Assemblymember, Bonta to Introduce Bill to Add Racially-Motivated 911 Calls to Hate Crime Statute & Provide a Civil Remedy for Victims of Such Discrimination (June 17, 2020), <https://a18.asmdc.org/video/2020-0625-bontas-legislation-stop-discriminatory-911-calls> [<https://perma.cc/93GT-YA68>].

113. See A-B 1550, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (detailing the history of the bill, which passed the assembly and is now in committee in the senate); Matt Haney (@MattHaneySF), TWITTER (July 7, 2020, 6:49 PM), <https://twitter.com/>

C. *The New York Example*

Similarly, in 2020, following a surge of viral incidents catching white callers falsely reporting criminal incidents against people of color, New York legislators introduced a responsive bill.¹¹⁴ The legislation, which was first proposed in 2018, would make false reporting a hate crime if the report is lodged against protected groups of people without any real basis.¹¹⁵ As in California, false reporting is already a crime in the state of New York.¹¹⁶ However, this bill proposes an enhancement to an existing civil-rights law that would give a private right of action to victims targeted for their race, religion, or other protected characteristics.¹¹⁷ Governor Andrew Cuomo is pushing to supplement the legislation with police reform in order to end abuses of emergency services and police response.¹¹⁸

D. *The Oregon Example*

In Oregon, legislators introduced a bill against race-based 911 calls after a state representative found herself on the receiving end of a false report.¹¹⁹ State Representative Janelle Bynum was canvassing during her election when a woman called 911 because she believed Bynum looked “suspicious.”¹²⁰ While the woman eventually apologized for her actions, Representative Bynum realized then that no legal pathway existed to hold people accountable for making such false reports.¹²¹ Representative

MattHaneySF/status/1280635052905373697.

114. Erin Donaghue, *Some False Police Reports Could Be a Hate Crime Under Proposed New York Law*, CBS NEWS (May 28, 2020, 11:28 AM), <https://www.cbsnews.com/news/false-police-reports-hate-crime-proposed-new-york-law-central-park-amy-cooper> [<https://perma.cc/CFU7-8DZA>].

115. *See id.*; S.B. S8492, 2019–2020 Leg., Reg. Sess. (N.Y. 2020) (amending N.Y. CIV. RIGHTS LAW § 79-n (McKinney 2020)), signed by Governor June 12, 2020.

116. N.Y. PENAL LAW § 240.50 (McKinney 2020).

117. *See* N.Y. S.B. S8492.

118. Goeff Herbert, *Cuomo Pushes for NY to Pass ‘Amy Cooper’ Bill Against False 911 Accusations, Along with Police Reform*, SYRACUSE.COM (June 8, 2020), <https://www.syracuse.com/state/2020/06/cuomo-pushes-for-ny-to-pass-amy-cooper-bill-against-false-911-accusations-among-police-reform.html> [<https://perma.cc/P7DZ-XVG5>].

119. *Oregon Bill Aims to Crack down on Racially Motivated 911 Calls*, OR. LIVE (June 3, 2019), <https://www.oregonlive.com/politics/2019/06/oregon-bill-aims-to-crack-down-on-racially-motivated-911-calls.html> [<https://perma.cc/3JBS-N76M>].

120. *Id.*; Max Beller, *Woman Calls Cops on Black Oregon Lawmaker Campaigning in Her District*, ABC NEWS (July 5, 2018, 8:29 PM), <https://abcnews.go.com/US/woman-calls-cops-black-oregon-lawmaker-campaigning-district/story?id=56380571>.

121. *Oregon Bill Aims to Crack down on Racially Motivated 911 Calls*, *supra* note 119.

Bynum, along with two other lawmakers, proposed the bill to offer victims a road to justice that was not yet available during her #LWB incident.¹²² The incident was widely publicized under the hashtag “#CampaigningWhileBlack.”¹²³ Only one senator, Republican Alan Olsen, voted against the bill amid fear that it could result in making communities less safe.¹²⁴ However, Oregon lawmakers did not appear unconvinced of that fear because the bill requires victims to prove that 911 callers intended to discriminate or damage the victim’s reputation when summoning police.¹²⁵ Nonetheless, in many cases authorities may evidence this intent by showing cellphone videos of the event.

CONCLUSION

This Article is aimed at igniting a policy discussion on the role of judges, law enforcement, and legislators. To be sure, none of the suggestions above are required as a matter of law. Some of these recommendations may even be perceived as provocative or difficult to administer. However, the harms of the #LWB incidents discussed above are real. They are not only detrimental to the people directly affected but to a larger degree the justice system and its perceived fairness. More problematic, it erodes trust in the rule of law and interferes with our ability to unite as a country.

122. *Id.*

123. See, e.g., Kristine Phillips, *A Black Lawmaker Was Canvassing Door to Door in Her District. A Constituent Called 911.*, WASH. POST (July 6, 2018, 5:31 AM), <https://www.washingtonpost.com/news/post-nation/wp/2018/07/05/a-black-lawmaker-was-campaigning-door-to-door-in-her-district-a-constituent-called-911>.

124. *Oregon Bill Aims to Crack down on Racially Motivated 911 Calls*, *supra* note 119.

125. H.B. 3216, 80th Leg. Assemb., Reg. Sess. (Or. 2019), OR. REV. STAT. § 30.845 (2020).