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## Race Has Everything to Do with It: A Remedy for Frivolous Race-Based Police Calls

Yazmine C'Bona Levonna Nichols

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# RACE HAS EVERYTHING TO DO WITH IT: A REMEDY FOR FRIVOLOUS RACE-BASED POLICE CALLS

*Yazmine C'Bona Levonna Nichols\**

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## INTRODUCTION

In the past few years, viral videos and commentaries have shed light on a long-existing but previously under-recorded problem — frivolous race-based police calls. For example, in Philadelphia, police arrested two Black men, Donte Robinson and Rashon Nelson, in a Starbucks after a White manager called 911 because the men did not order anything immediately upon entering the establishment.<sup>1</sup> In Oakland, a White woman called the police on a Black family barbecuing.<sup>2</sup> In a different incident in San Francisco, a White woman called the police on a Black mother and her eight-year-old child because the two were selling water outside, apparently without a permit.<sup>3</sup> Another White woman physically assaulted a fifteen-year-old Black boy and threatened to call the police on him at a local pool in South Carolina.<sup>4</sup>

In addition to these alarming events, a White student called the police on a Black Yale student, Lolade Siyonbola, for sleeping in a Yale University common room.<sup>5</sup> A DoubleTree Hotel in Portland decided to fire two White workers who called the police on Jermaine

1. Hayley Miller, *Black Men Arrested at Starbucks Said They Were There For 2 Minutes Before 911 Call*, HUFFINGTON POST (Apr. 19, 2018), [https://www.huffingtonpost.com/entry/black-men-speak-out-starbucks-arrest\\_us\\_5ad8809fe4b0e4d0715dc393](https://www.huffingtonpost.com/entry/black-men-speak-out-starbucks-arrest_us_5ad8809fe4b0e4d0715dc393) [https://perma.cc/WS84-LDZC].

2. Christina Zhao, ‘BBQ Becky,’ *White Woman Who Called Cops on Black BBQ, 911 Tapes Released: ‘I’m Really Scared! Come Quick!’*, NEWSWEEK (Sept. 4, 2018), [www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057](http://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057) [https://perma.cc/3GT8-TBKG].

3. Doreen St. Felix, *The Summer of Coupon Carl, Permit Patty, and the Videos That Turn White Privilege into Mockable Memes*, NEW YORKER (July 21, 2018), [www.newyorker.com/culture/culture-desk/the-summer-of-coupon-carl-permit-patty-and-the-videos-that-turn-cop-callers-into-mockable-memes](http://www.newyorker.com/culture/culture-desk/the-summer-of-coupon-carl-permit-patty-and-the-videos-that-turn-cop-callers-into-mockable-memes) [https://perma.cc/4GU9-67GF].

4. Jessica McBride, *Stephanie Sebbv-Stremmel, ‘Pool Patrol Paula’: 5 Fast Facts You Need to Know*, HEAVY (July 3, 2018), [heavy.com/news/2018/06/stephanie-sebbv-stremmel/](http://heavy.com/news/2018/06/stephanie-sebbv-stremmel/) [https://perma.cc/MA5G-2XMC].

5. 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), [www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html](http://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html) [https://perma.cc/2EA6-XF2F].

Massey, a Black man who was a guest at the hotel.<sup>6</sup> And, more recently, a White woman called the police on a Black man, Devin Myers, claiming that he looked at her “suspiciously.”<sup>7</sup> In a more proximate incident in New York City, a White woman called the police on Jesse Hamilton, a Democratic state senator campaigning in Brooklyn.<sup>8</sup> Explaining the reason for her call, the woman stated — “I support Trump, and I see the difference between Democrat and Republican — and I see the difference between you and Trump . . . .”<sup>9</sup> She then censured Hamilton for giving out pamphlets and “fighting back” against Trump.<sup>10</sup>

These occurrences, which this Note terms “frivolous race-based police calls” (FRBPCs), have a long history within the United States, and comport with Katheryn Russell-Brown’s notion of the “racial hoax.”<sup>11</sup> Racial hoaxes occur “[w]hen someone fabricates a crime and blames it on another person because of his race *or* when an actual crime has been committed and the perpetrator falsely blames someone because of his race.”<sup>12</sup> Russell-Brown argues that White-on-Black racial hoaxes are based on White people’s “imaginary” inventions of Black people.<sup>13</sup> She notes that “[h]oax perpetrators are most frequently charged with filing a false police report,” but that “the number of racial hoaxes suggests that false police report statutes do not operate as effective deterrents.”<sup>14</sup>

Russell-Brown locates the genesis of racial hoaxes within the external and internal images that the media creates through a

6. Soo Youn, *DoubleTree Portland Hotel Fires 2 Workers for Calling Police on Black Hotel Guest*, ABC NEWS (Dec. 29, 2018), [abcnews.go.com/US/doubletree-portland-hotel-fires-workers-calling-police-black/story?id=60066428](https://abcnews.go.com/US/doubletree-portland-hotel-fires-workers-calling-police-black/story?id=60066428) [<https://perma.cc/E6MG-SAR9>].

7. Marina Pitofsky, *White Woman Calls Police on Black Man Looking for Parking, Says He Looked ‘Suspiciously’ at Her*, HILL (Aug. 16, 2019), <https://thehill.com/blogs/blog-briefing-room/news/457673-white-woman-calls-police-on-black-man-looking-for-parking-says> [<https://perma.cc/GE2N-EHRX>].

8. Dominique Mosbergen, *NY Lawmaker Wants to Make Calling Cops on Innocent Black People a Hate Crime*, HUFFINGTON POST (Aug. 20, 2018), [www.huffingtonpost.com/entry/911-discrimination-law-jesse-hamilton-new-york\\_us\\_5b796dbfe4b0a5b1febc2632](http://www.huffingtonpost.com/entry/911-discrimination-law-jesse-hamilton-new-york_us_5b796dbfe4b0a5b1febc2632) [<https://perma.cc/4XYB-3H6G>].

9. *Id.*

10. *Id.*

11. See generally KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1998) [hereinafter RUSSELL-BROWN, *THE COLOR OF CRIME*].

12. *Id.* at 70 (emphasis added).

13. *Id.*

14. *Id.*

fictionalized reality about Black people.<sup>15</sup> She points out that, on the one hand, “Blacks are regularly portrayed as lawyers, doctors, nurses, police officers, and best friends.”<sup>16</sup> On the other hand, several trends have emerged other trends that “revert to crude one-dimensional images of Blackness.”<sup>17</sup> Russell-Brown notes — as images of fictionalized Black deviancy — talk shows that portray Black people as amoral buffoons; sitcoms that portray the “comical relief” caricature of Black manhood; “reality” police television programs that showcase Black criminals; and the news.<sup>18</sup> Russell-Brown analyzes more than 100 racial-hoax cases beginning in 1987, identifying stark disparities among hoax perpetrators.<sup>19</sup> Approximately two-thirds of hoax perpetrators are White, she writes.<sup>20</sup> She also points out that “[p]eople carry out racial hoaxes for all sorts of reasons — serious, mundane, or even silly.”<sup>21</sup> For this Note’s purposes, it is important to take note of the racial disparities that Russell-Brown highlights and to limit the scope of analysis to White-on-Black FRBPCs.

In line with Russell-Brown’s analysis, this Note takes seriously the cultural and social mechanisms by which Blackness is converted into a symbol of deviance and criminality. This Note also considers the *structural* legal mechanisms by which Black people are policed as deviant and criminal. However, this Note departs from Russell-Brown by positing that, unlike racial hoaxes, frivolous race-based police calls do not always require: (1) fabricating a crime; or (2) falsely blaming an actual crime on someone else because of the person’s race.<sup>22</sup> Instead, this Note asserts that FRBPCs occur simply when a person calls the police on an individual because of that individual’s *real or perceived racial identity*, when said individual is engaged in *quodidian activities* — everyday tasks such as sleeping,

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15. *Id.* at 1.

16. *Id.*

17. *Id.*

18. *Id.* at 2.

19. Katheryn Russell-Brown, *As Racial Hoaxes Go, Jussie Smollett’s Case Is a Strange One*, ATLANTIC (Feb. 25, 2019) [hereinafter Russell-Brown, *As Racial Hoaxes Go*], <https://www.theatlantic.com/ideas/archive/2019/02/jussie-smollett-and-long-history-racial-hoaxes/583498/> [<https://perma.cc/9WPW-RRCK>].

20. *Id.*

21. *Id.*

22. RUSSELL-BROWN, THE COLOR OF CRIME, *supra* note 11, at 70.

walking, and playing in the park — that, under most circumstances, would not be considered criminal.<sup>23</sup>

It is also worth highlighting that this Note’s focus is distinct from the recent, and now-infamous, alleged racial-hoax incident involving Hollywood celebrity Jussie Smollett.<sup>24</sup> The Smollett incident is different because, although Smollett was accused of perpetrating a Black-on-White hoax,<sup>25</sup> his initial allegations referred to general, unidentified White people. White-on-Black frivolous race-based police calls, by contrast, aim to regulate the lives of specific, individual Black people. White-on-Black FRBPCs are particularly dangerous because they are rooted in acts of flagrant and subtle

23. See, e.g., Erin E. Evans & The Associated Press, *Black Attorney Says Deputy Thought He Was a Suspect and Detained Him at Court*, NBC NEWS (Mar. 27, 2019), <https://www.nbcnews.com/news/nbcblk/black-attorney-says-deputy-detained-him-court-because-he-thought-n988111> [<https://perma.cc/E86U-75CN>] (reporting that a Maryland Sheriff’s Deputy detained a Black lawyer in County Courthouse because the deputy thought the lawyer was a suspect). Although this incident does not involve a private citizen making a frivolous race-based call, it is important to note that such incidents are equally reprehensible and reinscribe the notion that Black people are criminal. *Id.*

24. See Dorany Pineda, *A Timeline of How the Jussie Smollett Case Unfolded*, L.A. TIMES (Feb. 21, 2019), <https://www.latimes.com/entertainment/la-et-jussie-smollett-timeline-of-events-20190221-story.html> [<https://perma.cc/U3DA-G9YY>] (noting that Jussie Smollett was arrested by police after allegedly faking a hate crime against himself in Chicago). Smollett is biracial, gay, and a prominent actor, who until recently, was known for his activism and justice work. *Id.* The alleged attack on Smollett initially gained widespread media attention after he claimed that two people yelling racial and homophobic slurs approached him as he was walking in Chicago’s Streeeterville neighborhood at 2 a.m. *Id.* Smollett claimed that the men hit him, poured an unknown chemical substance on him and wrapped a rope around his neck. *Id.* He further claimed that the attackers referred to “MAGA country” during the attack, an apparent invocation of Donald Trump’s “Make America Great Again” campaign slogan. *Id.*

25. John Blake, *Jussie Smollett’s Race Card Is about to Be Declined*, CNN (Feb. 24, 2019), <https://www.cnn.com/2019/02/24/us/smollett-race-blake-analysis/index.html> [<https://perma.cc/3369-7SL7>] (comparing Jussie’s performance of Blackness to the likes of O.J. Simpson and other celebrities). Blake writes, “Simpson was able to rally support for himself during and after his murder trial by ‘deciding to become a black man.’” *Id.* He adds:

Smollett . . . claimed [to be the] victim of white racism and gained initial support from black leaders. But in a new era where Donald Trump is in the Oval Office, Bill Cosby is in jail and R&B singer R. Kelly is headed to court, Smollett may soon learn that the rules have changed for black celebrities caught in deep legal trouble.

*Id.* (citing Avis Thomas-Lester, *O.J.? Oh, Brother! I Can’t Believe Black Folks Are Still Falling for This Con*, WASH. POST (Sept. 1, 1996), <https://www.washingtonpost.com/archive/opinions/1996/09/01/oj-oh-brother-i-cant-believe-black-folks-are-still-falling-for-his-con/be49d1a7-ec3a-439e-a27f-155faf8204fe/> [<https://perma.cc/S962-P5BM>]).

exclusion that ultimately relegate Black individuals to geographical confinement.

This Note posits that White supremacy and anti-Blackness function both as *psycho-spiritual* and *structural* evils. The term “structural” refers to historical and contemporaneous legal mechanisms — including statutes, ordinances, formal and informal policies, and judicial decisions — that have caused legal harm and physical loss to Black people by denying them access to full citizenship and humanity under U.S. law. The term “psycho-spiritual” refers to a particular type of theological harm that extends beyond the psychological impacts of racial stigma cited by cases such as *Brown v. Board of Education*.<sup>26</sup> The term “psycho-spiritual” encompasses the spiritual and psychological injury caused by exclusionary White theological customs, culture, and spaces, which separately and cumulatively work to deny Black people access to divinity.

In order to remediate the problem, the law must do more than challenge legalized White space. It must challenge the theological deification of White bodies. Examining the theological treatment of Whiteness as sacred helps to illuminate why FRBPCs are so difficult to address and how the deification of White bodies is embedded in America’s moral and civic national identity. A theological examination also lays the groundwork for devising a civil action that addresses the *psycho-spiritual* component of White supremacy and anti-Blackness. Incorporating theological analysis more effectively highlights the group-based injury that Black people experience as a result of FRBPCs and can help to eradicate the imprisoning remnants of White supremacy and anti-Blackness. Additionally, crafting a legal remedy that recognizes the need for *psycho-spiritual* “repentance”<sup>27</sup> affirms Black people’s humanity and their divinity, and works to divest White people of “their subjugating control over non[W]hite bodies.”<sup>28</sup> In the event that such a law is not frequently enforced, its

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26. See 347 U.S. 483, 494 (1954).

27. *2 Corinthians* 7:10–11 (New International Version) (“Godly sorrow brings repentance that leads to salvation and leaves no regret, but worldly sorrow brings death. See what this godly sorrow has produced in you: what earnestness, what eagerness to clear yourselves, what indignation, what alarm, what longing, what concern, what readiness to see justice done.”).

28. KELLY BROWN DOUGLAS, *STAND YOUR GROUND: BLACK BODIES AND THE JUSTICE OF GOD* 69 (2015) (“By entering into the white space, and perhaps even thriving in it, a free black body contests the very notion of white supremacy. The ideology of white supremacy is maintained to the extent that white bodies continue their subjugating control over nonwhite bodies. The moment that this controlling relationship is subverted, the ideology of white supremacy is fractured.”).

aspirational quality suffices as a source of empowerment for Black people, and affirms their inherent value.

Part I of this Note will discuss the longstanding history of White supremacy and anti-Blackness in the United States. Part II will discuss the legal construction of White space as protected space. Part III will discuss the theological construction of White bodies as protected bodies. Part IV will examine the efficacy of current New York State law governing false police reports and hate crimes. Part V will propose a remedy that includes theological discourse and draws on civil law principles, incorporating aspects of critical legal theory. The Note will emphasize the signaling power of the law, the need for normative policy, and the significance of White repentance and contrition. Furthermore, the Note asserts that viewing the law as aspirational<sup>29</sup> can serve public education purposes, address explicit and implicit biases, and has the potential to remedy omitted contexts and selective enforcement.

## I. ANTI-BLACKNESS AND WHITE SUPREMACY AS CONTEXT

Part I focuses on anti-Blackness and White supremacy in the United States. Section I.A provides meaningful definitions of the two terms. Section I.B provides helpful anecdotes of racialized exclusion that resulted in Black geographical confinement.

### A. Definitions

In order to fully understand the meaning of frivolous race-based police calls — which often occur in spaces that are not exclusively White, but are fertile ground for White dominance — it is necessary to contextualize the calls within a larger system of White supremacy and anti-Blackness. Here, White supremacy refers to:

[Not] the self-conscious racism of [W]hite supremacist hate groups[] . . . [but] instead to a political, economic and cultural system in which [W]hites overwhelmingly control power and material resources, conscious and unconscious ideas of [W]hite superiority and entitlement are widespread, and relations of White dominance and non-White subordination are daily reenacted across a broad array of institutions and social settings.<sup>30</sup>

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29. See generally Mauricio Garcia-Villegas, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 FLA. J. INT'L L. 133 (2004) (discussing aspirational constitutionalism in Latin America).

30. Frances Lee Anslev, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

Anti-Blackness here refers to the definition offered by Charlene Carruthers, founding National Director of Black Youth Project 100,<sup>31</sup> who defines anti-Blackness as “a system of beliefs and practices that destroy, erode, and dictate the humanity of Black people.”<sup>32</sup> The Note uses the terms “White supremacy” and “anti-Blackness” to indicate the way that the two phenomena have combined historically and contemporaneously to effectuate racial subordination and hierarchy.<sup>33</sup>

### B. Anecdotes: Exclusion Resulting in Black Geographical Confinement

Rightly understood, both White supremacy and anti-Blackness have always had a geographical dimension, working to the detriment and degradation of Black people. Early on in her career, Ida B. Wells had a personal encounter with anti-Blackness’s and White supremacy’s geographical component. In 1883, Wells was forcibly removed from a train car because she refused to sit in the smoking car with other Blacks on her way to visit family in Woodstock.<sup>34</sup> Dr. Emilie Townes writes that Wells hired a lawyer and sued the railroad for damages in 1884.<sup>35</sup> Although Wells was initially awarded damages by a state court, the Supreme Court ultimately overturned the verdict, ostensibly because Wells’s suit was not made in “good faith.”<sup>36</sup> Wells’s forcible ejection exemplifies anti-Black geographical confinement in its most visible form because she was physically removed from what was legally designated as a White space.

W. E. B. Du Bois articulates a different iteration of geographical confinement in *The Souls of Black Folk*, writing, “[b]etween me and

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31. *Full Biography*, CHARLENE CARRUTHERS (2017), <https://www.charlenecarruthers.com/about> [<https://perma.cc/U97A-HXQW>].

32. CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS x (2018).

33. Although this Note focuses on frivolous race-based police calls that are committed against Black people, it recognizes that White supremacy results in other forms of discrimination, violence, exclusion, and confinement directed toward people of color who share common, immutable characteristics. Furthermore, this Note recognizes and disavows all forms of discrimination, violence, exclusion, and confinement that are committed because of a person’s ethnic background, sexual orientation, gender identity, religion, color, nationality, ancestry, or language. See Tanya K. Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of ‘Racially Motivated Violence’*, 99 YALE L. J. 845, 846 n.6 (1990).

34. EMILIE M. TOWNES, WOMANIST JUSTICE, WOMANIST HOPE 8 (1993).

35. *Id.*

36. *Id.* at 9 (citing DOROTHY STERLING, BLACK FOREMOTHERS: THREE LIVES 76–77 (1979)).

the other world there is ever an unasked question: . . . how does it feel to be a problem?”<sup>37</sup> According to Du Bois, “the problem of the twentieth century [was] the problem of the color line,”<sup>38</sup> which functioned as a literal and figurative marker of the boundaries and limits of Black existence. Du Bois reflects on his first encounter with anti-Black confinement, when a little White girl would not accept a card from him simply because he was Black.<sup>39</sup> He writes, “[t]hen it dawned upon me with a certain sadness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil.”<sup>40</sup> The “shutting out” to which Du Bois refers is not an anomalous experience but is rather the common result of anti-Black exclusion framed as subtle rejection.

Malcolm X described similar experiences of anti-Black geographical confinement when he encountered White administrators at his reform school in Michigan in the late 1930s. X states, “[t]hey all liked my attitude . . . . They would talk about anything and everything with me standing right there hearing them, the same way people would talk freely in front of a pet canary. They would talk about me, or bout ‘niggers,’ as though I wasn’t there . . . .”<sup>41</sup> Although X is permitted to physically inhabit the same space as White people, he is treated as if he was not actually present.

Wells’s, Du Bois’s, and X’s personal stories highlight the adaptability<sup>42</sup> of anti-Blackness and White supremacy as tools of oppression that survive by way of “preservation through transformation.”<sup>43</sup> Both tools ultimately further racial subordination and enforce boundary demarcation. These three narratives provide further insight into how subtle exclusion works in tandem with

37. W. E. B. DU BOIS, *The Souls of Black Folk*, in WRITINGS 363 (1986).

38. *Id.* at 372.

39. *Id.* at 364.

40. *Id.*

41. MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X: AS TOLD TO ALEX HALEY* 30–31 (2d ed., 1999) (1965).

42. See generally Elise Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016) [hereinafter Boddie, *Adaptive Discrimination*]. Boddie criticizes the assumption in constitutional law that racial discrimination is siloed, static, and time limited. *Id.* Boddie argues instead that “discrimination is systemic, dynamic, and intergenerational due to its adaptive nature.” *Id.* Boddie further contends that discrimination adapts to law and to social norms that prohibit intentional discrimination. *Id.*; see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

43. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 21 (2010).

explicit line-drawing in order to reinforce the invisible “color line”<sup>44</sup> in geographical terms. These anecdotes are helpful for excavating the historical and contemporary function of anti-Blackness and White supremacy in regulating individual and collective Black life. They demonstrate flagrant and tacit forms of exclusion that work to geographically confine Black people. White-on-Black frivolous race-based police calls, this Note argues, are essentially new iterations of these age-old problems.

## II. THE LEGAL CONSTRUCTION OF WHITE SPACE AS PROTECTED SPACE

This Part examines the *structural* mechanisms of the law, including statutes, ordinances, formal and informal policies, and judicial decisions which are used to maintain White supremacy and create White-only space. Section II.A discusses the early iterations of the Slave Codes and the Black Codes. Section II.B discusses the Jim and Jane Crow era. Finally, Section II.C analyzes the post-Jim and Jane Crow legal and extra-legal mechanisms<sup>45</sup> that work to maintain race-based boundary enforcement.

### A. The Slave Codes and the Black Codes

White-on-Black FRBPCs occur, in part, because the law has constructed White space as protected space.<sup>46</sup> From 1619 to 1865, the Slave Codes — a combination of criminal and procedural law — “prescribed the social boundaries for slaves — where they could go, what types of activities they could engage in, and what types of contracts they could enter into.”<sup>47</sup> The Slave Codes created a caste

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44. DU BOIS, *supra* note 37, at 372.

45. Historical extra-legal mechanisms included lynching, intimidation, and Jim Crow segregation. Modern extra-legal practices include blockbusting and predatory lending. See Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 322 (1983) (documenting that, in Baltimore, threats included claims of building code violations if one tried to integrate neighborhoods, and violent actions by local populations). Power argues that local governments effectively sanctioned such threats and actions by choosing not to police them. *Id.*; see also NAT’L CMTY. REINVESTMENT COAL., HOMEOWNERSHIP AND WEALTH BUILDING IMPEDED: CONTINUING LENDING DISPARITIES FOR MINORITIES AND EMERGING OBSTACLES FOR MIDDLE-INCOME AND FEMALE BORROWERS OF ALL RACES (Apr. 2006), <https://ncrc.org/wp-content/uploads/2008/09/ncrc-oa-prrac%20report%204-06.pdf> [<https://perma.cc/VH8M-4ZZG>] (finding “persistent fair lending disparities for minorities” in home loan data).

46. See generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

47. RUSSELL-BROWN, *THE COLOR OF CRIME*, *supra* note 11, at 14–15.

system under which Whites, Blacks, and Mulattoes were accorded separate legal status and sanctions.<sup>48</sup> Beginning in 1865, new laws, called the Black Codes, gave newly freed slaves the right to marry and to enter into contracts, but conversely imposed job licensing requirements, criminalized activities such as gathering after dark, and effectively granted legal exoneration to White supremacist groups like the Ku Klux Klan.<sup>49</sup> Under the Slave Codes and the Black Codes, White supremacy had the full force of law.

### B. Jim and Jane Crow

Later, in the Jim and Jane Crow era, anti-Blackness and White supremacy reared their ugly heads in the form of strict segregation laws that regulated Black private and public life and imposed “racial etiquette” requirements that required Black subordination to White authority at all times. In addition to using formal Jim and Jane Crow laws to restrict Black living, White people also used private contracts called restrictive covenants to prevent Blacks from buying homes in White neighborhoods. First introduced in the 1920s, restrictive covenants soon became the norm, and after World War II, many suburban communities required all residential subdivisions to have such covenants.<sup>50</sup> One California covenant stated, “[n]o [N]egro, [J]apanese or [C]hinese or any person of [A]frican or [M]ongolian descent shall own or occupy any part of said premises.”<sup>51</sup>

In *Shelley v. Kraemer*, the Supreme Court opined that racially restrictive covenants did not in and of themselves violate the Fourteenth Amendment, declaring that the covenants were a creative means by which to privatize acts of discrimination and circumvent the constitution.<sup>52</sup> At the time, the reality of restrictive covenants would have been consonant with the Court’s holding in *Plessy v. Ferguson*,<sup>53</sup> which established the constitutionality of “separate but equal” public accommodations.<sup>54</sup> The covenants would have also been consistent

48. *Id.*

49. *Id.* at 19–20.

50. See James Loewen, *Was Your Town a Sundown Town?: How to Find out If Your Community Intentionally Excluded African Americans*, UU WORLD MAG. (Feb. 18, 2008), <https://www.uuworld.org/articles/was-your-town-sundown-town> [<https://perma.cc/2J8X-U2UC>].

51. *Id.*

52. 334 U.S. 1, 22 (1948).

53. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

54. *Plessy*, 163 U.S. at 544–52.

with federal agency policy that permitted racial segregation. For example, in the 1940s, the Federal Housing Act's Underwriting Manual "praised restrictive covenants as 'the surest protection against undesirable encroachment' of 'inharmonious racial groups.'"<sup>55</sup> Remarkably, in a departure from the racial attitudes of the time, the Court in *Shelley* found that, in granting judicial enforcement of restrictive covenants, the state courts violated the Equal Protection Clause of the Fourteenth Amendment.<sup>56</sup>

Despite the Court's wisdom in *Shelley*, the covenants and other legal and extralegal mechanisms<sup>57</sup> cumulatively confined Blacks to urban ghettos. Black families that attempted to escape the ghetto were forced to deal with "Improvement Associations," which were founded to resist "the invasion of White residence districts by the Negroes."<sup>58</sup> Ta-Nehisi Coates writes that the borders of the ghetto were patrolled not just by government policy, but by the willingness of individual White citizens to resort to violence.<sup>59</sup> The ghettoization<sup>60</sup> of the city of Chicago, for example was not primarily the result of poverty, nor of individual choice, but was instead "the product of [W]hite hostility . . ."<sup>61</sup> As during Jim and Jane Crow, White-on-Black frivolous race-based police calls, much like processes of segregation and ghettoization, rely on White citizens' continued use of privatized force. Private uses of force are given legitimacy by law when White citizens enlist the police to enforce racial boundaries, and when the government actively participates in such boundary-drawing.<sup>62</sup>

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55. Ta-Nehisi Coates, *Trayvon Martin Was a Victim of Black on Black Crime*, ATLANTIC (Sept. 16, 2013), <https://www.theatlantic.com/national/archive/2013/09/trayvon-martin-was-a-victim-of-black-on-black-crime/279691/> [<https://perma.cc/AFZ2-XDY8>].

56. *Shelley*, 334 U.S. at 22–23.

57. Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 455 (2007).

58. Coates, *supra* note 55.

59. *Id.*

60. See Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 192 (2015). Depleted cities, the Foreclosure Crisis, and racial disparities in housing are not the "natural" results of a free market, but "inevitable results of a century's worth of deliberate policy choices, all of them aimed at inscribing a particular societal structure — the white nuclear family — into the physical landscape of American housing." *Id.* at 188.

61. Coates, *supra* note 55 (citing BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009)).

62. See Gupta, *supra* note 60, at 194 ("The reframing of extensive government regulation and resource expenditure as merely supporting (rather than creating) the [housing] market has served . . . to obscure the huge role the government has always

### C. Post-Jim and Jane Crow

Post-Jim and Jane Crow, exclusionary zoning developed as a legal method used to construct distinctive, all-White, spaces and to enforce race-based boundaries. Moreover, judicial enforcement is one of the primary modes of keeping the system of geographical imprisonment alive. In one of the most infamous exclusionary zoning cases, *Village of Arlington Heights*,<sup>63</sup> the Court held that the Village's denial of a zoning request to create low-and-moderate income housing did not violate the Fourteenth Amendment's Equal Protection Clause, in part because the Metropolitan Housing Development Corporation "ha[d] no racial identity and [could not] be the direct target of the petitioner's alleged discrimination."<sup>64</sup> The Court conceded that the Village's zoning denial would likely have a disparate impact on Black residents, but found that there was insufficient evidence to establish racially discriminatory intent or purpose.<sup>65</sup>

In another case, *City of Memphis v. Greene*, Black residents filed an action against the City of Memphis and various officials, alleging that the City's decision to close the north end of a street (West Drive), which traversed a White residential community (Hein Park), violated the Equal Protection Clause of the Fourteenth Amendment.<sup>66</sup> The plaintiffs also alleged that the erection of the barrier violated their rights to access their property under a federal civil rights statute<sup>67</sup> and that the closure was "a badge of slavery"

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played in exclusion in housing."); see also Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J. (Aug. 14, 2009), <http://online.wsj.com/article/SB10001424052970204409904574350432677038184.html> [<https://perma.cc/O6BH-43PK>] ("It seemed that segregation was just the natural working of the free market, the result of the sum of countless individual choices about where to live. But the houses were single — and their residents white — because of the invisible hand of government.").

63. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), *superseded by statute*, Voting Rights Act of 1965, 42 U.S.C. § 1972 (1965) (amended 1982), *as recognized in* *Chapman v. Nicholson*, 579 F. Supp. 1504, 1507 (N.D. Ala. 1984) (finding that "the Voting Rights Act and the legislative history surrounding its passage suggest that Congress intended to allow a cause of action based on Section 2 of the Act (42 U.S.C. § 1973) without the requirement of a finding of purposeful or intentional discrimination").

64. *Vill. of Arlington Heights*, 429 U.S. at 263.

65. *Id.* at 265–71.

66. *Memphis v. Greene*, 451 U.S. 100, 129 (1981).

67. See *Greene*, 451 U.S. at 102; see also 42 U.S.C. § 1982 (1972) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

under the Thirteenth Amendment.<sup>68</sup> The lower court held the street closing invalid because it adversely affected the Black respondents' ability to hold and enjoy their property.<sup>69</sup> The Supreme Court later reversed on the grounds that the record did not support a finding of "racial animus or an intent to discriminate on the basis of race."<sup>70</sup>

As *Arlington Heights* and *Greene* show, legally constructed White space as protected space is inherently tied to the idea of property.<sup>71</sup> In *Arlington Heights*, the Court reinforced the notion that the Village's single-family housing restriction was not only permissible, but was the most desirable form of residential arrangement.<sup>72</sup> Furthermore, the Court completely dismissed the racial undertones embedded in the Village's claim that rezoning would cause a measurable drop in property value. While the Village attributed its fear of a decline in property value to structural incompatibility, its argument implicitly suggested that allowing non-White and/or low-income residents into the community would cause property depreciation. Given that the zoning denial disproportionately affected Black people,<sup>73</sup> the implication is that Black-inhabited property is unmarketable and worthless, a commonly used racist trope.<sup>74</sup> In *Greene*, the Court relied on similarly faulty logic that ignored the reality of racial segregation and the deployment of harmful racial tropes.<sup>75</sup> In both cases, the Court erroneously relied on the faulty premise that anti-Blackness and White supremacy

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68. *Greene*, 451 U.S. at 124.

69. *Id.* (citing *Greene v. Memphis*, 610 F.2d 395 (6th Cir. 1979)).

70. *Id.* at 135.

71. See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); see also DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICAN 9 (2007) (discussing the "supposedly non-ideological market considerations" and investment "protection" purportedly driving White people's desire to live in homogenous neighborhoods).

72. Gupta, *supra* note 60, at 238.

73. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977) (noting that the Seventh Circuit Court of Appeals held that the "ultimate effect" of the rezoning denial was racially discriminatory and that the denial would disproportionately affect Blacks, particularly in view of the fact that the general suburban area was marked by residential segregation).

74. See, e.g., Wilborn P. Nobles III, *Politicians, Pundits, Others Defend Baltimore, Elijah Cummings after Trump's 'Completely Unacceptable' Tweets*, BALTIMORE SUN (July 27, 2019), <https://www.baltimoresun.com/politics/bs-md-pol-trump-baltimore-reactions-20190727-rkn2npfghfgtdm4ikex77szjgm-story.html> [<https://perma.cc/RZ8M-QZUA>] (discussing Donald Trump's statements calling Baltimore "infested").

75. *Greene*, 451 U.S. at 134–35, 144.

require outward manifestations of intent.<sup>76</sup> Rather than considering the not-too-distant history of Jim and Jane Crow, the Court viewed race in an ideological vacuum.<sup>77</sup> Both cases reveal that White property as real property<sup>78</sup> is cherished, and that Black people are thought to destroy such property merely by living in proximity to it.<sup>79</sup>

Cheryl Harris provides critical analysis about the relationship between White identity and property in *Whiteness as Property*.<sup>80</sup> Harris begins with an anecdote about her fair-skinned grandmother, who was able to (tres)pass as White and work at a retail store in Chicago.<sup>81</sup> Harris writes that her grandmother “made herself invisible, then visible again . . . ”<sup>82</sup> and argues that “passing . . . is a feature of race subordination in all societies structured on [W]hite supremacy.”<sup>83</sup> In addition to maintaining that passing for White ensured her grandmother short-term economic returns and long-term security,<sup>84</sup> Harris explicitly states that “American law has recognized a property interest in [W]hiteness.”<sup>85</sup> Moreover, she contends that Whiteness shares some of the central characteristics of property, arguing that both “share . . . a conceptual nucleus . . . [the] right to exclude.”<sup>86</sup>

After describing how Blacks were once themselves considered property, Harris turns to examine modern theories of property. She explains how Whiteness meets the functional criteria of property,<sup>87</sup> stating that, although Whiteness is inalienable (meaning it cannot be transferred), that fact “should not preclude the consideration of

76. *Arlington Heights*, 429 U.S. at 265–66; *Greene*, 451 U.S. at 135.

77. *Arlington Heights*, 429 U.S. at 265–66; *Greene*, 451 U.S. at 135.

78. “Real Property is the category of property that is permanent and that is potentially subject to alienation or inheritance, the most common form of which is the ownership of land or any interest in lands.” *Real Property*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION 2238 (2012).

79. *Arlington Heights*, 429 U.S. at 269 (“The impact of the Village’s decision does arguably bear more heavily on racial minorities.”); *Greene*, 451 U.S. at 127 (“The residential interest in comparative tranquility is also unquestionably legitimate. That interest provides support for zoning regulations, designed to protect a ‘quiet place where yards are wide, people few, and motor vehicles restricted . . . ’ and for the accepted view that a man’s home is his castle.”) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Arlington County Board v. Richards*, 434 U.S. 5 (1977)).

80. See Harris, *supra* note 46.

81. *Id.* at 1710.

82. *Id.* at 1711.

83. *Id.* at 1712.

84. *Id.* at 1713.

85. *Id.*

86. *Id.* at 1714.

87. *Id.* at 1731.

Whiteness as property.”<sup>88</sup> She maintains that Whiteness is functionally property because: (1) it is based on the right to use and enjoyment (Whites use and enjoy Whiteness each time they take advantage of White skin privilege);<sup>89</sup> (2) it is based on reputation and status property (calling a White person Black once constituted defamation);<sup>90</sup> and (3) it features the absolute right to exclude (there are numerous cases where discriminatory policy is accepted as the norm).<sup>91</sup> Harris’s conception of Whiteness and White identity as legally protected property is consistent with the holdings in *Arlington Heights* and *Greene*. Because White identity itself is a kind of property that White people need in order to protect themselves, any and all space that White people occupy becomes bounded.

Angela Onwuachi-Willig’s *Policing the Boundaries of Whiteness* underscores this point.<sup>92</sup> Onwuachi-Willig maintains that the Emmett Till and Trayvon Martin cases are similar because of “their shared basis in policing the boundaries of [W]hiteness.”<sup>93</sup> In both cases, policing occurred in a variety of forms, including: (1) maintaining White racial separation; (2) facilitating cross-class, White racial solidarity; (3) articulating Blackness, and specifically Black maleness, as a threat; and (4) regulating the presence and movement of Blacks in what sociologist Elijah Anderson has defined as “the [W]hite space.”<sup>94</sup> In a similar fashion, White-on-Black FRBPCs are enacted by private White citizens, but are premised on the underlying assumption that all non-White people who pass and/or trespass on White space must be excluded, punished, confined, or killed.

### III. THE THEOLOGICAL CONSTRUCTION OF WHITE BODIES

Part III examines the theological treatment of Whiteness and explores how the deification of White bodies is embedded in the

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88. *Id.* at 1733–34.

89. *Id.* at 1734.

90. *Id.* at 1736.

91. *Id.* at 1736; see also Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1125 n.52 (2017).

92. See Onwuachi-Willig, *supra* note 91, at 1113.

93. *Id.* at 1119.

94. *Id.* at 1119 n.24 (citing Elijah Anderson, *The White Space*, 1 SOC. RACE & ETHNICITY 10, 10 (2015) (describing “the white space” in part as “overwhelmingly white neighborhoods, restaurants, schools, universities, workplaces, churches and other associations, courthouses, and cemeteries . . . that reinforce[d] a normative sensibility in settings in which black people are . . . not expected, or marginalized when present”)).

United States' moral and civic national identity. This theological examination lays the groundwork for devising a civil remedy that addresses the *psycho-spiritual* component of White supremacy and anti-Blackness, highlighting the group-based injury that Black people experience. Section III.A reckons with Whiteness wielded as theological power. Section III.B confronts Whiteness used as sacred identity.

### A. Interrogating Whiteness as Theological Power

Much like the law constructs White identity and White space as protected, theology and Christian doctrine construct White bodies as sacred. Such constructions of the White body rely on Whiteness as a kind of theological power. Reverend Dr. James Hal Cone articulated the reality of White theological supremacy, arguing that White theology is “an axiological perspective that contradicts the divine will to liberate the poor and the downtrodden.”<sup>95</sup> According to Cone, White theology is “the predominant paradigm out of which both unconverted [W]hites and acquiescing [B]lacks work . . . . It identifies with the [W]hite community, seemingly placing God’s approval on [W]hite oppression of [B]lacks.”<sup>96</sup> Because of White people’s domination in the development of Christian thought, Black theologians are tasked with challenging White theology, which has been, and continues to be, on the side of the strong and the powerful, and against the weak and the oppressed.<sup>97</sup>

White theology reinforces White power because it uses images and ideas to “dominate Christian religious life and the intellectual life of theologians, reinforcing the ‘moral’ right of [W]hites to dominate people of color economically [and] politically.”<sup>98</sup> Although Black theologians have consistently written about the harms of White theology and have invented subversive theologies of their own, evidence of White theological dominance is apparent in the twenty-

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95. JAMES H. CONE, *GOD OF THE OPPRESSED* 84 (rev. ed., Orbis Books 1997) (1975).

96. Marguerite L. Spencer, *Subsidiarity and Environmental Law: Environmental Racism and Black Theology: James H. Cone Instructs Us on Whiteness*, 5 U. ST. THOMAS L.J. 288, 299 (2008) (citing JAMES H. CONE, *A BLACK THEOLOGY OF LIBERATION* 6 (20th anniversary ed.) (1996)).

97. HOWARD THURMAN, *JESUS AND THE DISINHERITED* 12–15 (rev. ed., Beacon Press Books 1996) (1949).

98. Spencer, *supra* note 96, 300 (citing JAMES H. CONE, *FOR MY PEOPLE: BLACK THEOLOGY AND THE BLACK CHURCH, WHERE HAVE WE BEEN AND WHERE ARE WE GOING?* 64 (1984); JAMES H. CONE, *RISKS OF FAITH: THE EMERGENCE OF A BLACK THEOLOGY OF LIBERATION* 130–31 (1999)).

first century. For example, Kelly Brown Douglas recalls the controversy that surrounded President Barack Obama's 2008 campaign when the Reverend Doctor Jeremiah Wright, Obama's pastor at the time, was publicly lambasted for preaching against White supremacy and the mythical innocence of White America.<sup>99</sup> She writes, "[d]uring that controversy the [B]lack church as well as [B]lack theology came under attack. Both were essentially accused of not being Christian mainly because they called into question the very narrative of America's exceptionalism."<sup>100</sup> The 2008 campaign controversy revealed that White theology is centered on the belief that White people have the unspoken right to determine what is good and what is not; what is Christian and what is not.<sup>101</sup> It also revealed that White theology is centered on the belief that White power is God-power. Stated differently, White people historically and contemporaneously have not just claimed the power to name God,<sup>102</sup> but have equated themselves to God.<sup>103</sup> This tradition of equating Whiteness with God-ness is perhaps most evident in Protestant and Catholic iconography, which often portrays Jesus as White.<sup>104</sup>

### B. Interrogating Whiteness as Sacred Identity

The theological construction of White sacred identity begins with what Kelly Brown Douglas calls the White Anglo-Saxon myth. Douglas traces the origins of the myth to the United States' founding, pointing out that Thomas Jefferson had almost a fanatical obsession with Anglo-Saxon language, culture, and systems of government.<sup>105</sup>

99. See DOUGLAS, *supra* note 28, at 43 n.89.

100. *Id.*

101. *Id.* at 43.

102. *Id.*

103. Chris Riotta, *Republicans Withdraws Support for Candidate Who Said, 'God Is Racist White Supremacist' and Jewish People Are 'Satanic'*, INDEPENDENT (June 28, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/racist-republican-russell-walker-god-gop-white-supremacist-antisemitism-jewish-satan-north-carolina-a8421861.html> [<https://perma.cc/HY4X-VJT4>] (noting that in 2018, a website tied to Russell Walker, a candidate for the North Carolina General Assembly, stated that "God is a racist white supremacist").

104. See generally ALEXANDER JUNE ET AL., *WHITE JESUS: THE ARCHITECTURE OF RACISM IN RELIGION AND EDUCATION* (2018) (conceiving of White Jesus as a socially constructed apparatus — a mythology that animates the architecture of salvation). The authors argue that White Jesus was constructed by combining empire, colorism, racism, education, and religion, and distinguish White Jesus from Jesus of the Gospels, whose life, death, and resurrection mandates a love ethic. *Id.*

105. DOUGLAS, *supra* note 28, at 11 (citing Thomas Jefferson, *Letter to the Honorable J. Evelyn Denison, M.P., in AMERICAN HISTORY FROM REVOLUTION TO RECONSTRUCTION AND BEYOND* (Nov. 9, 1825),

Jefferson believed that Americans were “chosen by God to implement Anglo-Saxon system of governing.”<sup>106</sup> Douglas writes that Jefferson, and later Benjamin Franklin, applied religious narratives about Anglo-Saxonism in a sectarian way that was not necessarily Christian.<sup>107</sup> Their new ideology was about “the sacred nature of Anglo-Saxonism” and eventually became American civil religion.<sup>108</sup> Jefferson and Franklin’s secularized philosophy ultimately generated a myth of racial superiority that both determined America’s founding and defined its identity. The myth “constructed cherished property and generated a culture to shelter that property, thus insuring that America remain ‘exceptional.’”<sup>109</sup> Anglo-Saxonism became not only an identity marker, but the very core of what it meant to be an American, which was to be governed by White people, whose governmental institutions were considered superior.

In 1775, the focus on preserving Anglo-Saxon governmental institutions shifted to a focus on the racial purity of the nation’s inhabitants.<sup>110</sup> Franklin, for example, began to emphasize protecting “the language, customs, and complexion of ‘pure [W]hite people.’”<sup>111</sup> Soon after, two pivotal cultural events solidified the relationship between Anglo-Saxonism and White sacred identity: (1) the Romantic Movement, which highlighted the differences between peoples and resulted in the almost complete identification between God and humans;<sup>112</sup> and (2) the quest for human origins in the nineteenth century, which helped construct a myth of “a specific, gifted people — the Indo-Europeans.”<sup>113</sup>

Douglas explains that U.S. courts reinforced the notion that Anglo-Saxon identity was special and distinct. In *United States v. Bhagat Singh Thind*, Bhagat Singh Thind, an Indian immigrant, petitioned for naturalized citizenship, contending that he was the descendant of a

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<http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl283.php> [<https://perma.cc/LL27-LR3M>].

106. *Id.* at 12.

107. *Id.* at 13.

108. *Id.* (citing ROBERT BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1992)).

109. *Id.* at 4.

110. *Id.* at 17.

111. *Id.*

112. *Id.* at 18–20.

113. *Id.* at 20 (citing REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 33 (1981)).

high-caste Hindu, which meant he was Aryan and therefore White.<sup>114</sup> The majority denied Thind's claim, stating, "[t]he children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin."<sup>115</sup> Of Thind, the Court remarked, "[o]n the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry."<sup>116</sup>

In essence, the Court denied Thind's citizenship because Thind did not *appear* to be White and could not assimilate to Whiteness. The case marked a seismic shift in American conceptions of the White body, Douglas explains, because Anglo-Saxon blood proved that it was able to "stand its ground against the threat of contamination . . . [and] had the power to extinguish [other] identities."<sup>117</sup> *Thind* laid the legal groundwork for the White body as exceptional and, therefore, sacred.<sup>118</sup> Douglas explains that White bodies, which she describes as "castles,"<sup>119</sup> carry this sacredness with them wherever they go.<sup>120</sup> She maintains that, in its strongest form, the Anglo-Saxon myth was codified in the form of twenty-first century Stand Your Ground Laws,<sup>121</sup> which are established to protect White sacred

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114. *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923); DOUGLAS, *supra* note 28, at 38 (citing *Thind*, 261 U.S. at 206).

115. DOUGLAS, *supra* note 28, at 38–39 (citing *Thind*, 261 U.S. at 215).

116. *Id.* at 39 (citing *Thind*, 261 U.S. at 215).

117. *Id.* at 39.

118. Yazmine C'Bona Levonna Nichols, *Charged with Impiety, When Black Bodies Defy Tradition*, RELIGION DISPATCHES (Oct. 6, 2016), <http://religiondispatches.org/charged-with-impiety-when-black-bodies-defy-tradition/> [https://perma.cc/3XAA-GDG5].

119. DOUGLAS, *supra* note 28, at 115 (explaining that Stand Your Ground laws "extended the 'castle doctrine' to include defense of one's space as well as one's home. The castle doctrine was now applied to public space. It, in effect, allowed for the protection of white space, which is whatever space white bodies inhabit. The white body becomes essentially a mobile castle.").

120. *Id.* at 42.

121. *Id.* Stand Your Ground laws allow a person to use deadly force in self-defense in public, even if that force can be safely avoided by retreating. *Stand Your Ground Laws*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> [https://perma.cc/PB3U-66KB] (last visited Nov. 1, 2019). These laws "upended centuries of legal tradition, emboldening individuals to use deadly force even when a safe retreat from the situation is possible or when nonlethal force would suffice." *Id.*; see also *Stand Your Ground and Castle Doctrine Laws*, BILL RTS. INST., <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/current-events/stand-your-ground/> [https://perma.cc/4WKE-VB5Q] (last visited Nov. 19, 2019) (explaining that Florida's Stand Your Ground law allows those who feel a reasonable threat of death or bodily injury to "meet force

identity and White property. Taking Douglas's theory to its natural conclusion, all public and private space becomes part of the White sacred identity.<sup>122</sup>

Given the history discussed above, White supremacy and anti-Blackness must be understood as *psycho-spiritual* and *structural* evils that work in tandem. Thus, it is imperative that those who are invested in undoing the harms of Whiteness recognize it not just as a legally constructed category, but also as theologically constructed. The belief that White bodies are sacred implies the inverse: that Black bodies are dirty and need to be quarantined, killed, and/or controlled. Harris writes, “[i]n the commonly held popular view, the presence of Black ‘blood’ . . . evoked the ‘metaphor . . . of purity and contamination’ in which Black blood is a contaminant and White racial identity is pure.”<sup>123</sup> When contextualized against this backdrop, it becomes apparent that White-on-Black FRBPCs occur in part because a “free [B]lack body . . . threatens the very social order,”<sup>124</sup> by disrupting it.

The next Part of the Note examines why current New York State law is an inadequate remedy for this existing *psycho-spiritual* and *structural* crisis.

#### IV. THE INEFFECTUOUSNESS OF CURRENT NEW YORK STATE FALSE REPORTING STATUTES AND HATE CRIME STATUTES

Section II.A of this Part identifies the individual and collective legal harm that Black people suffer as a result of FRBPCs. Section II.B discusses the ineffectiveness of New York State false reporting statutes. Lastly, Section II.C discusses the ineffectiveness of New York State Hate Crime statutes.

##### A. The Legal Harm or Injury

The adaptability<sup>125</sup> of anti-Blackness and White supremacy make them difficult to eradicate. These ideologies are even more difficult to tackle when they occur in the form of White-on-Black FRBPCs,

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with force” rather than retreat). Similar “Castle Doctrine” laws assert that a person does not need to retreat if their home is attacked. *Id.* Over half of the states in the United States have forms of “Stand Your Ground” or “Castle Laws” laws on their books. *Id.*

122. Nichols, *supra* note 118.

123. Harris, *supra* note 46, at 1737 (citing Neil Gotanda, *A Critique of “Our Constitution Is Colorblind”*, 44 STAN. L. REV. 1, 26 (1991)).

124. DOUGLAS, *supra* note 28, at 69.

125. *Supra* note 42 and accompanying text.

because the law bifurcates potential redresses. On the one hand, false reporting statutes exist to deter people from making illegitimate claims and wasting valuable state resources. On the other hand, hate crime statutes exist to discourage people from committing prejudice-motivated crimes and to protect potential victims. In the first instance, the broad legal harm is the misuse of public resources and, in the second, the legal harm is discrimination or racial animus directed toward the victim. Black victims of White-on-Black FRBPCs, however, experience a compounded injury, including but not limited to public embarrassment,<sup>126</sup> psychological harm,<sup>127</sup> racial stigma,<sup>128</sup> and in some cases, arrest or imprisonment. This injury is imported not only to the individual Black victim, but also results in a group-based injury to Black people as a whole.<sup>129</sup>

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126. See Samuel Brenner, *'Negro Blood In His Veins': The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 50 SANTA CLARA L. REV. 333, 334–35 (2010) (discussing defamation *per se* by racial misidentification, which was historically recognized as a morally egregious tort).

Between the first years after the ratification of the United States Constitution and the middle of the twentieth century, to the state courts in the American South and West (and in at least one state in the North) repeatedly found defendants in tort actions liable for having uttered *per se* defamatory (either slanderous or libelous) statements by falsely or mistakenly identifying individuals as 'Mulattos,' 'Colored,' 'Negros,' or 'Niggers.'

*Id.*

127. See *Physiological & Psychological Impact of Racism and Discrimination for African-Americans*, AM. PSYCHOL. ASS'N (2019), <https://www.apa.org/pi/oema/resources/ethnicity-health/racism-stress> [<https://perma.cc/6Y3F-ME4O>] ("[U]nique psycho-social and contextual factors, specifically the common and pervasive exposure to racism and discrimination, creates an additional daily stressor for African-Americans.").

128. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (citing *Belton v. Gebhart*, 87 A.2d 862, 865 (Del. Ch. 1952)) (noting that segregation of White and Colored children in public schools has a detrimental effect upon the Colored children).

The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.*

129. Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 698 (1993) (stating that, in regard to hate crimes, "the victim suffers for being singled out on the basis of her race, and the general community of the target racial group is harmed as well").

FRBPCs are particularly dangerous for Black people because they are rooted in private acts of force that are given legitimacy by law when White citizens enlist the police to enforce racial boundaries. This boundary enforcement relegates Black individuals to geographical confinement and, in some cases, literal incarceration.<sup>130</sup> Neither the existing New York State false reporting statute nor the New York State hate crime statute addresses the intersection between false reporting and racially motivated crimes. The following Sections will discuss the inefficacy of current New York State law.

### B. New York State False Reporting Statute

In New York, “false reporting” is a third degree misdemeanor offense.<sup>131</sup> The New York Penal Law states:

A person is guilty of falsely reporting an incident in the third degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she: Gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein.<sup>132</sup>

In *Daas v. Pearson*, a New York State Supreme Court denied a defendant’s motion to dismiss a false reporting claim, reasoning that

130. See Ray Sanchez & Steve Almasy, *Spike Lee Explains Expletive-Filled Gentrification Rant*, CNN (Feb. 27, 2014), <https://www.cnn.com/2014/02/26/us/new-york-spike-lee-gentrification/index.html> [<https://perma.cc/H79G-94J2>]; see also Daniel Kay Hertz, *How Segregated Is New York City?*, DANIELKAYHERTZ.COM (April 14, 2014), <https://danielkayhertz.com/2014/04/14/how-segregated-is-new-york-city/> [<https://perma.cc/GYG9-LATM>]; Yazmine C’Bona Levonna Nichols, *Opinion, The Harmful Effects of Gentrification on NYC’s Low-Income Black and Latino Populations*, BLAVITY (Nov. 14, 2018), <https://blavity.com/the-harmful-effects-of-gentrification-on-nycs-low-income-black-and-latino-populations?category1=opinion> [<https://perma.cc/PV76-Q5BE>].

131. N.Y. PENAL LAW § 240.50(3) (McKinney 2009) (stating that under New York State law, falsely reporting an incident in third degree is a Class A misdemeanor); see also N.Y. PENAL LAW § 70.15 (McKinney 1967) (stating that sentences of imprisonment for a Class A misdemeanor “shall be fixed by the court, and shall not exceed three hundred sixty-four days”); N.Y. PENAL LAW § 240.55 (McKinney 2001) (stating that falsely reporting an incident in the second degree is a Class E felony); N.Y. PENAL LAW § 240.60 (McKinney 2001) (stating that falsely reporting an incident in the first degree is a Class D felony); *Section 70.15, Sentences of Imprisonment for Misdemeanors and Violation*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/laws/PEN/70.15> [<https://perma.cc/Q46S-K7PY>] (last visited Nov. 3, 2019) (describing the sentences of imprisonment associated with each class of criminal misdemeanors).

132. N.Y. PENAL LAW § 240.50(3)(a)-(c) (McKinney 2009).

“[w]hile the violation of this statute may not be negligence per se, the statute does establish a standard of reasonableness of care and conduct.”<sup>133</sup> The court went on to opine that “[w]ords constitute an act and words negligently or falsely and wrongfully uttered may be actionable under certain circumstances.”<sup>134</sup> The *Pearson* case reinforces the notion that false reporting has harms beyond the economic consequences of expending unnecessary police resources. In *People ex rel. Morris v. Skinner*, the New York State Supreme Court clarified that the legislature intended for the word “gratuitously” in the statute to make the giving of false information a crime only where that information was volunteered and unsolicited.<sup>135</sup> The *Morris* case establishes that part of the reason why perpetrators incur liability is because they falsely call the police of their own volition.

This Note defines a frivolous race-based call as calling the police on an individual because of that individual’s *real or perceived racial identity*, when said individual is engaged in *quotidian activities* (everyday tasks such as sleeping, walking, and playing in the park) that under most circumstances, would not be considered criminal. Some White-on-Black frivolous race-based police calls do, in fact, satisfy the criminal elements under the traditional New York false reporting statute. In a case like the Starbucks incident — where a White manager called the police because Donte Robinson and Rashon Nelson did not immediately purchase items while inside the store<sup>136</sup> — a private White citizen makes a call, knowing that the information is either false or baseless. The White individual making the call usually gratuitously reports to a law enforcement officer or

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133. *Daas v. Pearson*, 66 Misc.2d 95, 98 (N.Y. Sup. Ct., Kings Cty. 1971) (citing *Beauchamp v. N.Y.C. Hous. Auth.*, 190 N.E.2d 412 (N.Y. 1963); *Schmidt v. Merchants Despatch Tr. Co.*, 200 N.E. 824, 828–29 (N.Y. 1936); *superseded by statute*, N.Y. C.P.L.R. § 214-c (McKinney 2003), *as recognized in Caronia v. Phillip Morris USA*, 5 N.E.3d 11 (N.Y. 2013); *Major v. Waverly & Ogden*, 8 A.D.2d 380 (N.Y. App. Div., 2d Dep’t 1959)).

134. *Id.* (citing Jeremiah Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 189 (1900)).

135. *People ex rel. Morris v. Skinner*, 67 Misc.2d 221, 222–23 (N.Y. Sup. Ct., Monroe Cty. 1971); *see also People v. Oliver*, 193 Misc.2d 250, 251–52 (N.Y. City Ct. 2002) (“The presence of the investigators resulted from contact initiated by the defendant’s mother, an action set in motion by the defendant’s claim. Thus . . . the defendant started a chain of events resulting in police questioning and therefore was responsible for initiating police contact. Under these circumstances the initial statements by the defendant were made gratuitously and were not the product of solicitation by law enforcement.”).

136. *Miller*, *supra* note 1.

agency — meaning they give the information voluntarily and unsolicited. And he or she usually satisfies one or all of the criteria listed in § 240.50(3)(a)–(c). In the Oakland barbecuing incident, for example, Jennifer Schulte alleged the occurrence of an offense or incident which did not, in fact, occur. She claimed that the Black family could not barbecue because using charcoal was illegal in the area.<sup>137</sup> In other cases, White citizens allege the impending occurrence of an offense or incident which in fact is not about to occur.<sup>138</sup> And in still other instances, White citizens may falsify or exaggerate information relating to an actual offense or incident.<sup>139</sup>

But there is a wide array of other incidents that do not fall within the statutory definition of a false report. In one case, two workers called the police on Jermaine Massey, a Black man who was a guest at the DoubleTree Hotel in Portland, Oregon.<sup>140</sup> At the time that the employees made the call, they did not necessarily *know* the information to be false, as required by the false reporting statute. The employees likely assumed that, because Massey was Black, he was not a hotel guest. Therefore, they wrongfully inferred that he was breaking the law by trespassing. Similarly, the White student who called the police on Lolade Siyonbola, a Black Yale student who was sleeping in a university common room,<sup>141</sup> likely subscribed to the same line of thinking and would not meet the requirement for “knowing the information reported, conveyed or circulated to be false

137. Zhao, *supra* note 2.

138. See *supra* notes 1–10 and accompanying text.

139. See, e.g., Tom Steele, *Woman Who Lied about Being Abducted, Raped by Black Men Pleads Guilty to Faking Evidence*, DALL. MORNING NEWS (Feb. 23, 2018), <https://www.dallasnews.com/news/courts/2018/02/24/woman-who-lied-about-being-abducted-raped-by-black-men-pleads-guilty-to-faking-evidence/> [<https://perma.cc/P24J-GGJS>] (stating that Breana Harmon, a White woman, lied to police when she said she had been kidnapped and raped by several Black men. Harmon later confessed that she had been fighting with her fiancé and did not think their relationship would last much longer. She said she started cutting her clothes and herself, then made up the abduction); see also Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENT’G PROJECT (Sept. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/#B.%20The%20Racial%20Gap%20in%20Punitiveness> (“When asked for numerical estimates of crime rates, whites attribute an exaggerated amount to people of color. And when asked to what degree various racial groups are ‘prone to violence,’ whites rank people of color as more violence-prone than their own race.”); Russell-Brown, *As Racial Hoaxes Go*, *supra* note 19 (“White accusers are more likely to say they were victims of a random act of violence by a make-believe black offender.”).

140. Youn, *supra* note 6.

141. Griggs, *supra* note 5.

or baseless.”<sup>142</sup> The White woman who called the police on the Black mother and her eight-year-old daughter who were selling water without a permit<sup>143</sup> could likely circumvent the false reporting statute by arguing that her police call was neither a “false” nor “baseless” claim. Although these incidents do not fall within the statutory definition of a false report, they should be understood within the FRBPC framework because they involve White individuals attempting to criminalize Black people’s presence in effectively White spaces. All the Black victims were engaged in *quodidiana activities* that, under usual circumstances, would, and should not, be considered criminal. In other words, they were policed simply for being Black.

In addition to the various inadequacies that have been identified, there is another defect within the New York State false reporting system: lack of data collection and selective enforcement.<sup>144</sup> Currently, there is no comprehensive database that documents the number and frequency of frivolous race-based police calls or false reports. Although the New York City police department compiles yearly “Crime and Enforcement Activity Reports” that contain information on crime victims’ race and ethnicity,<sup>145</sup> information on White-on-Black FRBPCs is virtually non-existent. This is in part because police officers can use their discretion about whether or not to document each incident,<sup>146</sup> and because they are less likely to believe a Black person who accuses a White person of committing a

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142. N.Y. PENAL LAW § 240.50 (McKinney 2009).

143. St. Felix, *supra* note 3.

144. “White residents were more likely than Black, Hispanic, and residents of other races to initiate contact with police – for example to report a crime, a non-crime emergency, or to seek help for another reason.” Alexi Jones, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows*, PRISON POL’Y INITIATIVE (Oct. 12, 2018), <https://www.prisonpolicy.org/blog/2018/10/12/policing/> [<https://perma.cc/94RB-2W9Y>]; see also RUSSELL-BROWN, THE COLOR OF CRIME, *supra* note 11; Hernandez, *supra* note 33, at 846 (stating that “bias incidents more often than not elude prosecution”) (citing Interview with John Fried, Chief of Trial Division within New York County District Attorney’s Office (July 20, 1989); Telephone Interview with Police Officer Walls, N.Y.C. Bias Unit (July 20, 1989) (most incidents are deemed prosecution-worthy cases by the police because in their experience, disfavored group community members do not make frivolous claims about such attacks)); Russell-Brown, *As Racial Hoaxes Go*, *supra* note 19.

145. See generally *Crime and Enforcement Activity Reports*, N.Y.C. POLICE DEPT., <https://www1.nyc.gov/site/nypd/stats/reports-analysis/crime-enf.page> [<https://perma.cc/TR4E-3KU2>] (last visited Nov. 3, 2019).

146. See Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 585 (2016) (“While past discussions focus on police discretion concerning whether to cite or arrest people, officers have equally broad discretion concerning how they treat the members of the public with whom they deal, i.e. whether they are respectful, whether they explain their decisions.”).

bias crime.<sup>147</sup> This problem of selective enforcement and under-documentation likely arises for two reasons: (1) the officer may have a shared perception with the White caller and therefore elect to remove the Black person from the space; or (2) the officer may diffuse the situation altogether, eliminating the need to log the incident as a false report or frivolous call. As it is currently written, the New York false reporting statute does not effectively curb FRBCs because it contains glaring gaps that do not account for racially-motivated police calls.

### C. New York State Hate Crime Statute

New York State law provides that a person commits a hate crime when he or she commits a specified offense and either:

- (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or
- (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding [the stated characteristics].<sup>148</sup>

Although the hate crime statute ostensibly covers a broad range of prejudicially-motivated crimes, it is not particularly helpful for Black victims of frivolous race-based police calls, whose false reporting claims fall outside the statute's scope. In the case of FRBPCs, the White citizen's act is both an individual offense to the Black person whose *quotidian behavior* is rendered criminal and a collective offense to the Black community at large because it engenders fear, and utilizes valuable state resources to regulate Black bodies.

Similar to the false reporting context, the hate crime statute and its accompanying systems of collection are void of meaningful data and subject to the problem of selective enforcement.<sup>149</sup> The New York

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147. Katheryn Russell-Brown, *The Racial Hoax as Crime: The Law as Affirmation*, 71 *IND. L.J.* 593, 616 (1996) [hereinafter Russell-Brown, *The Racial Hoax as Crime*] (citing Laure Weber Brooks, *Police Discretionary Behavior: A Study of Style*, in *CRITICAL ISSUES IN POLICING* 140, 154–55 (Roger G. Dunham & Geoffrey P. Alpert eds., 2d ed. 1993)) (“The police are not likely to treat as seriously the claim of victimization of someone Black as they would a similar claim by someone White.”).

148. N.Y. PENAL LAW § 485.05(1)(a)-(b) (McKinney 2018).

149. Hernandez, *supra* note 33, at 848.

State Division of Criminal Justice Services (DCJS) is an agency that is statutorily required to produce statistical reports,<sup>150</sup> and each year, it produces a report entitled, *Hate Crime Incidents in New York State by Reporting Agency*.<sup>151</sup> The report documents the number of hate crimes reported by each agency by county, but does not specify the type of hate crime committed.<sup>152</sup> The agency also publishes the *Hate Crime in New York State Annual Report*, which details hate crime incidents that law enforcement agencies report to DCJS, including data on the number of incidents and type of bias reported.<sup>153</sup> The latter report breaks down the reported crimes into two categories: (1) Crimes Against Persons (defined as rape, robbery, aggravated assault, simple assault); and (2) Property Crimes (defined as burglary, larceny, arson, criminal mischief).<sup>154</sup> Race-based false reports are not included in either category of hate crimes. This is problematic because it leaves a gap in the law.

The reason that New York State hate crime law fails to address race-based false reports is because FRBPCs involve elements of false reporting crimes and hate crimes, placing the calls outside of traditional legal analysis. The traditional anti-discrimination framework unfortunately focuses “on the most privileged group members [and] marginalizes those who are multiply-burdened.”<sup>155</sup> This anti-discrimination framework marginalizes those Black people whose claims do not fall within strictly defined legal categories. New York State hate crime law thus fails to acknowledge the

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150. See N.Y. EXEC. LAW § 837(4)(c) (McKinney 2017); see also *Criminal Justice Statistics*, N.Y.S. DIVISION CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm> [https://perma.cc/U6BX-MU6K] (last visited Nov. 19, 2019).

151. N.Y.S. DIV. OF CRIMINAL JUSTICE SERVS., HATE CRIME INCIDENTS IN NEW YORK STATE BY REPORTING AGENCY (2017), <https://www.criminaljustice.ny.gov/crimnet/ojsa/hatecrimeincidents2016.pdf> [https://perma.cc/T46L-LHQB].

152. *Id.*

153. BRIAN DENVER, HATE CRIME IN NEW YORK STATE 2016 ANNUAL REPORT 1 (2017), <https://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2016-annual-report.pdf> [https://perma.cc/5RN7-E3W8].

154. *Id.* at 2.

155. See Kimberlé Crenshaw, *De-Marginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 138, 140 (1989) [hereinafter Crenshaw, *De-Marginalizing*] (contrasting Black womens’ experience with dominant conceptions of discrimination, and arguing that “in race discrimination cases, discrimination tends to be viewed in terms of sex-or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women”).

intersectional<sup>156</sup> nature of FRBPCs, which are premised on compound assumptions about race, class, and gender.

Both hate crime and false reporting statutes are ineffective because they fail to address discrimination as an adaptive and malleable problem.<sup>157</sup> Law professor Elise Boddie explains that, in the realm of constitutional law, the federal courts virtually “read racial geography out of Equal Protection framework.”<sup>158</sup> Courts almost never consider the meaning and import of racial geography in a claim of racial discrimination, instead focusing on the race of the parties and the state’s use of explicit racial classifications.<sup>159</sup> Under Boddie’s proposed framework, courts would examine the meaning of a particular space and the marginalization of people of color.<sup>160</sup> Just as in the constitutional law context, the New York State statutory framework, and state court interpretations of that framework, tend to focus “singularly on individuals and neglect spatial context.”<sup>161</sup> Thus, existing New York State law misses an important element of racial harm.<sup>162</sup> The current New York State false reporting and hate crime statutes, in failing to address the connection between false reporting and racially-motivated hate crimes, fuel the creation of vast geographical prisons, which effectively trap Black people in manufactured ghettos and render them immobile. Even political leaders, like Jesse Hamilton, become prisoners in their own campaigning territory.<sup>163</sup> These geographical prisons have psychological implications, too<sup>164</sup> — Black children who merely want to swim at their neighborhood pool must proceed with caution, lest

156. *Id.* at 149 (comparing the compounding forms of discrimination that Black women face to an intersection, where traffic flows in all four directions). “If an accident happens in an intersection, it can be caused by cars traveling from any number of directions, and sometimes by all of them. Similarly, if a Black woman is harmed at the intersection, her injury could result from sex discrimination or race discrimination.” *Id.*

157. *See generally* Boddie, *supra* note 42.

158. Elise C. Boddie, *Racial Territoriality*, 58 *UCLA L. REV.* 401, 421 (2010) [hereinafter Boddie, *Racial Territoriality*].

159. *Id.* at 408.

160. *Id.*

161. *Id.* at 410.

162. *Id.*

163. *See* Mosbergen, *supra* note 8.

164. *See* JAMES H. CONE, *SPEAKING THE TRUTH: ECUMENISM, LIBERATION AND BLACK THEOLOGY* 67 (1986) (“When I say that injustice is violence. I mean that the slum environment, the structure of the slum itself, works violence against those who live within it, even if they never experience the physical harm so often attendant on slum dwelling.” (quoting ROBERT M. BROWN, *RELIGION AND VIOLENCE* 35–36 (1973))).

they be arrested and placed in actual confinement.<sup>165</sup> Cumulatively, these incidents subject Black people to violent exclusion and relegate Blacks to the slums and the shadows.

### V. A NEW, INTERDISCIPLINARY APPROACH

Section V.A of this Part briefly discusses Senator Jesse Hamilton's proposal for a New York State hate crime bill and why its focus on intentional discrimination is misplaced. Section V.B discusses why a meaningful remedy must address the *psycho-spiritual* and *structural* aspects of the FRBPC problem by incorporating theological discourse, tort law and criminal law principles, and critical legal theory. In addition, Section V.C discusses a proposed alternative remedy, and Section V.D discusses the role of enforcing agencies.

#### A. Senator Hamilton's Hate Crime Bill

After a White woman called the police on New York State Senator Jesse Hamilton,<sup>166</sup> the lawmaker proposed a bill that would make calling the police on a Black person a hate crime. Hamilton remarked:

These 911 calls are more than frivolous. These 911 calls amount to more than just a waste of police time and resources. These 911 calls are acts of intimidation . . . Living while [B]lack is not a crime. But making a false report, especially motivated by hate, should be. Our laws should recognize that false reports with hateful intent can have deadly consequences.<sup>167</sup>

While Hamilton's proposed legislation is a step toward much-needed reform, its focus on intentional acts of discrimination will make it, and other similar solutions,<sup>168</sup> subject to the same pitfalls of traditional anti-discrimination law. Rather than relying strictly on

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165. See McBride, *supra* note 4.

166. Mosbergen, *supra* note 8.

167. *Id.*; see also Press Release, Jesse Hamilton, Senator, New York State Senate, Senator Jesse Hamilton Announces 911 Anti-Discrimination, Anti-Harassment Legislation in Wake of Living While Black Incidents in Brooklyn and across the Country (Aug. 15, 2018), [www.nysenate.gov/newsroom/press-releases/jesse-hamilton/senator-jesse-hamilton-announces-911-anti-discrimination-anti](http://www.nysenate.gov/newsroom/press-releases/jesse-hamilton/senator-jesse-hamilton-announces-911-anti-discrimination-anti) [<https://perma.cc/2QTP-9NNH>].

168. See Jaweed Kaleem, *#LivingWhileBlack: New Laws Could Outlaw Racially Motivated 911 Calls*, L.A. TIMES (May 27, 2019), <https://www.latimes.com/nation/la-na-living-while-black-police-20190527-story.html> [<https://perma.cc/Z43Q-BWXV>] (noting that, in some states like Michigan, proposed laws would make it a "criminal misdemeanor to racially profile people of color for participating in their lives" and subject people behind those 911 calls to a \$500 fine).

preexisting legal structures, this Note proposes that the law has signaling power apart from its actual enforcement<sup>169</sup> and that remedies should be aimed at fixing the core problem — White supremacy and anti-Blackness, which are both *psycho-spiritual* and *structural* evils.

### B. Insights: Theology, Tort Law, Criminal Law, and Critical Legal Theory

Frivolous race-based police calls are quasi-criminal torts that arise out of the unspoken social contract between individuals. This Note proposes a meaningful legal remedy that addresses the *psycho-spiritual* component of the FRBPC problem by incorporating theological discourse. The legal remedy also addresses the *structural* component of the problem, drawing on tort law and criminal law principles, and incorporating aspects of critical legal theory. The proposed legal remedy emphasizes tort law principles that aim to correct social wrongs, restore the moral balance between persons, “make the victim whole,” and impose civil liability on wrongdoers. The proposed remedy also emphasizes criminal law’s commitment to holding wrongdoers accountable for their actions using alternative community-centered sanctions.

Although this Note relies on some core principles of civil law and criminal law, it recognizes that there are barriers to entry for potential Black plaintiffs, which suggest that a meaningful remedy should not be limited to the court system. If the goal is not simply to punish White defendants, but to eradicate or reduce White supremacy and anti-Blackness, then an effective legal remedy must take into account the various benefits and costs of litigation, which differ depending on the Black victim’s class and gender. It is here that critical legal theory becomes indispensable.

Kimberlé Crenshaw’s concept of intersectionality<sup>170</sup> cautions that the single-axis framework bifurcates victims’ experiences and renders

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169. See Garcia-Villegas, *supra* note 29, at 133 (“A good aspirational constitutionalism is one that narrows the gap between desires and realities and, in this way, ends up being a strong constitutionalism of protection, or in other words, a constitutionalism which aims to guarantee rights in the present.”).

170. See Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012) (“[T]here are many ways that surveillance and punishment are intersectionally scripted, including the ways in which race, gender, or class hierarchies structure the backdrop against which punitive policies interact.”).

Black women and poor Black people invisible.<sup>171</sup> Crenshaw's contribution compels us to consider multiple factors. Civil law, for example, does not guarantee a right to counsel for either defendants or plaintiffs;<sup>172</sup> the financial and time cost of going through a civil trial might deter Black victims from bringing valid claims. In addition to the aforementioned considerations, a meaningful legal remedy must seek to avoid the pitfalls of the "intent" doctrine,<sup>173</sup> which misses important elements of racial harm,<sup>174</sup> and must address implicit and explicit forms of racial bias that result in selective enforcement.<sup>175</sup> Finally, the legal remedy must be aspirational.<sup>176</sup> This means acknowledging that the law can serve public education purposes beyond enforcement.

### C. The Remedy

This Note's remedy includes some of the elements required by New York State false reporting statutes and hate crime statutes, focusing on gratuitous calls that are made voluntarily and/or are

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171. Crenshaw, *De-Marginalizing*, *supra* note 155, at 140 (arguing that, "in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race and class-privileged women"); *see also generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

172. *See Status Map*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/D6XY-S2NS>] (last visited Nov. 19, 2019) (indicating that a civil right to a lawyer does exist for certain matters in particular municipalities; New York City, San Francisco, and Newark, New Jersey have a right to counsel for tenants facing eviction).

173. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional — in the sense that certain outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes." (citations omitted)).

174. Boddie, *Racial Territoriality*, *supra* note 158, at 410.

175. Hernandez, *supra* note 33, at 850.

There are three possible explanations for this lack of enforcement: the exclusion of disfavored groups other than Black Americans from statutory protection; unmonitored prosecutorial discretion; and the related problem of unconscious prosecutorial racism. Unmonitored discretion, coupled with unconscious racism and lack of explicit inclusion of other disfavored groups in the statute, allows prosecutors to: ignore bias crimes; not consider them serious enough for full enforcement; or refuse to realize that many discrete groups are subject to the same bias attacks as are Blacks.

*Id.*; *see also* Brooks, *supra* note 147.

176. *See generally* Garcia-Villegas, *supra* note 29.

unsolicited. Although the remedy mirrors some criminal law principles, it primarily relies on civil law concepts of restitution and wholeness, rather than the criminal law concepts of punishment and retribution.<sup>177</sup> In circumstances where a White-on-Black FRBPC occurs (when a private White individual calls the police on a Black person because of that person's *real or perceived racial identity*, when said Black person is engaged in *quotidian activities* that, under most circumstances, would not be considered criminal), the law should impose:

1. A mandatory compensatory penalty or fine that is paid by the White perpetrator to the Black victim.
2. A mandatory apology requirement.<sup>178</sup>
3. A mandatory implicit bias and anti-racism training for the White perpetrator.
4. A mandatory mediation between the White perpetrator and the Black victim, only upon the Black victim's request and/or with the Black victim's consent.
5. A reporting and data collection requirement that includes: the location of the frivolous call; the total economic cost of responding to the call; and the race, sex, and age of the offender and of the victim.

The first part of the five-pronged solution recommends an automatic compensatory penalty or fine, which has a long-standing history within the law. Compensatory damages are often imposed by courts and government agencies as restitution for wrongdoing within civil law.<sup>179</sup> And New York State criminal law already permits the

177. *Contra* Russell-Brown, *The Racial Hoax as Crime*, *supra* note 147, at 595 (arguing that the criminal law should recognize and punish ongoing racial discrimination with the goal of bringing balance to the use of the term "race" as it relates to crime).

178. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 88–89 (2004).

Remorse and apology could do much more than serve as gauges of an individual defendant's need for punishment. Remorse and apology are fundamentally about social interactions and relationships. Serious wrongdoers sometimes apologize not only to the direct victim, but also to everyone who suffered indirect harm, such as members of the victim's family and community. Victims, in return, can air their sorrows while expressing forgiveness to the wrongdoer. Ideally, this interactive process teaches moral lessons, brings catharsis, and reconciles and heals offenders, victims, and society.

*Id.*

179. See *generally* *Vosburg v. Putney*, 78 Wis. 84 (1890) (imposing single intent and strict liability on the defendant – single intent being a minority rule because there

imposition of fines in false reporting cases that are classified as Class A misdemeanors.<sup>180</sup> In FRBPC cases, a compensatory fine should be imposed on transgressing White defendants, and the amount of the fine should be determined by the appropriate adjudicator according to severity of the incident and as specified by the legislature.<sup>181</sup> The law should consider, for instance, that a Black victim who is detained or arrested as the result of a FRBPC might be entitled to a larger sum due to her heightened injury. The purpose of the compensatory penalty or fine is to “make the [Black] victim whole” and to compensate her for the injury that she suffers. The penalty or fine would also serve as a deterrent to future White callers who might consider making FRBPCs, by signaling to them that the state takes the offense seriously because of its individual and collective implications for Black people.<sup>182</sup>

The second prong of the solution recommends a mandatory apology and draws on theological principles of repentance.<sup>183</sup> It also rests on existing, though seldom used, norms within the criminal law system that recognize the power and effectiveness of acts of contrition.<sup>184</sup> Black communities themselves have noted the remedial

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is no *mens rea* requirement). If a defendant intended the harmful act, then the defendant is liable even if he or she did not intend the harm. *Id.* If a defendant intends the harmful act, then he or she is categorically liable, regardless of the mental element, subjective or objective. *Id.* Even though the extent of the damage was unforeseeable, all damages were awarded to the plaintiff. *Id.*

180. See N.Y. PENAL LAW § 80.05(1) (McKinney 1999) (discussing fines for class A misdemeanors and violation).

181. *Id.* § 80.05(4) (“In the case of a violation defined outside this chapter, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.”).

182. Although the proposed remedy raises Equal Protection concerns because it centers on Black victims, such particularity is justified because the harms differ between and among racial groups. While Black-on-White FRBPCs do occur, they occur so infrequently that their inclusion in the proposed law is unnecessary. Likewise, White-on-White FRBPCs, while they do occur, do not pose the same societal problems as those where the victim is Black. Both Black-on-White and White-on-White FRBPCs can be remedied using existing false reporting statutes. See Russell-Brown, *The Racial Hoax as Crime*, *supra* note 147, at 618.

183. *2 Corinthians*, *supra* note 27 (“Godly sorrow brings repentance that leads to salvation and leaves no regret, but worldly sorrow brings death . . .”).

184. See Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1534–40 (1997) (examining how on-the-ground rules and practices in criminal law treat expressions of remorse and contrition in administering criminal punishment). O’Hear describes how judges in most federal district courts tend to award acceptance-of-responsibility discounts to defendants who plead guilty and deny them to defendants who stand trial. *Id.*

power of public apology outside the parameters of the formal legal system. In one example, after encountering Reverend Dr. James Hal Cone's *The Cross and the Lynching Tree* and uncovering the 1940 lynching of Austin Callaway, a Black community in LaGrange, Georgia founded "Troup Together," an organization committed to investigating the county's racial history.<sup>185</sup> The organization, led by Bobbie Hart and Wes Edwards, wrote a letter to Police Chief Lou Dekmar, "describing LaGrange public officials' complicity in Callaway's murder."<sup>186</sup> Dekmar responded by issuing an impassioned public apology.<sup>187</sup> When asked about the impact of the Chief's apology, Edwards remarked:

It was a real positive for the community to have the public apology, to have the [memorial] marker, to have the leadership of the police department and the city and our religious leaders all acknowledge, apologize, and confess that this occurred and place the marker at Warren Temple . . . . It's now harder to silence that part of our history.<sup>188</sup>

Although this Note recognizes that a statutorily-mandated apology may raise First Amendment concerns,<sup>189</sup> it maintains that the mandatory apology component of the remedy closely aligns with historical and contemporaneous examples in criminal law cases, where judges have compelled defendants to issue public apologies and detail their crimes in court.<sup>190</sup> Moreover, the mandatory apology

185. Benjamin Perry, *LaGrange and the Lynching Tree*, UNION COLLECTIVE: A MORE PLURAL UNION (May 10, 2019), <https://utsnyc.edu/lagrange-and-the-lynching-tree/> [<https://perma.cc/MAH8-UVZD>].

186. *Id.*

187. Brad Schrade, *In a First, Police Chief to Apologize for 1940 Lynching*, ATLANTA J. CONST. (Jan. 25, 2017), <https://www.ajc.com/news/first-georgia-police-chief-apologize-for-1940-lynching/feVIgQ6uJ0CMRnqwbdtKvJ/> [<https://perma.cc/S6KK-4923>].

188. Perry, *supra* note 185.

189. *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the action of the local authorities in compelling the flag salute and pledge transcended constitutional limitations on their power).

190. *See* Travis Andersen, *Hearing to Resume on BU Rape Case Plea Deal That Left Judge 'Baffled'*, BOS. GLOBE (Apr. 9, 2018), <https://www3.bostonglobe.com/metro/2018/04/09/judge-stunned-proposed-plea-deal-rape-case/uu0Rn7r3kPYu2tSX7REpXN/storv.html?arc404=true> [<https://perma.cc/3JFY-2NYL>] ("[A] young woman who was allegedly raped in her Boston University dorm room demanded a public apology from her alleged attacker [Samson Donick]. . . . 'There's an interest in holding people accountable for the crime, both out of justice for the victim and to prevent future violence, but that responsibility cannot lie just with the victim.'"); *see also* Fred Thys, *Former MIT Student Apologizes to Assault Victim for 'Inexcusable Behavior'*, WBUR (Apr. 10, 2018), <https://www.wbur.org/edify/2018/04/10/samson-donick-plead-guilty-rape-case>

component of the remedy addresses what some scholars have argued is criminal law's minimization of the role of remorse and apology. "To remedy this neglect, we must focus not just on the individual defendant's supposed badness, but also on the social practices and norms of remorse and apology."<sup>191</sup> An emphasis on repentance, contrition, and remorse is costly, but lessens the amount of money spent on other forms of retributive punishment.<sup>192</sup> This Note's proposed civil remedy can be adapted to fill the gaps left by the current legal system, and, in this case, is a well-suited remedial mechanism by which to compel contrition.

The third prong of the solution recommends a mandatory implicit bias and anti-racism training for the White caller. The legal system already imposes similar requirements on criminal offenders, ordering them to participate in community service programs,<sup>193</sup> rehabilitative workshops, dispute resolution,<sup>194</sup> and education reform programs.<sup>195</sup> The mandatory implicit bias and anti-racism training requirement is perhaps the most important component of the remedy because it actually holds the White caller accountable by making her reckon with her own implicit bias or racism. It has the potential not only to change her individual behavior, but also to equip her with the tools necessary to have meaningful conversations with other White people and to engage in long-term anti-racism work. This Note argues that, even in the event that the implicit bias and anti-racism trainings were to have no effect on the White caller, the trainings should be part of the proposed law because they have an important signaling function

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[<https://perma.cc/P7BC-USBZ>] (granting Donick's plea bargain, the judge compelled the defendant to participate in a specific form of public speech: "As a condition of the plea bargain, [Judge] Sanders made Donick describe in open court what he did to his victim").

191. Bibas & Bierschbach, *supra* note 178, at 89.

192. *Id.* at 146-47.

193. N.Y. CRIM. PROC. LAW § 170.55(6) (McKinney 2019) (authorizing the use of community service as a sanction for certain offenders in conjunction with specific dispositions imposed by a criminal court); *see also* N.Y. FAM. CT. ACT § 353.2(2)(a)-(h) (McKinney 2019) (noting that community service sanctions and restitution can also be imposed by the family court).

194. N.Y. CRIM. PROC. LAW § 170.55(5) ("The court may grant an adjournment in contemplation of dismissal on condition that the defendant participate in dispute resolution and comply with any award or settlement resulting therefrom.").

195. *Id.* § 170.55(6-a) ("The court may, as a condition of an authorized adjournment in contemplation of dismissal, where the defendant has been charged with an offense and the elements of such offense meet the criteria of an 'eligible offense' and such person qualified as an 'eligible person' as such terms are defined in section 458-1 of the social services law, require the defendant to participate in an education reform program in accordance with section 458-1 of the social services.").

apart from their actual effectiveness. Furthermore, the trainings are consistent with tort law principles of wholeness. That is, they exemplify a more expansive vision of what it means to make people whole. In this instance, the trainings not only serve to restore the individual Black victim by imposing service on the White caller; they also have the capacity to help restore the Black community's faith in the civil system as more than just an economic exchange.

The fourth prong of the solution recommends a mandatory mediation between the White perpetrator and the Black victim, only upon the Black victim's request or with the Black victim's consent. Similar to the apology requirement, this component seeks to reduce or eradicate implicit and explicit acts of White supremacy and anti-Blackness by compelling White callers to reckon with the gravity of their actions. Like apologies, face-to-face mediations can be "a powerful ritual for offenders, victims, and communities,"<sup>196</sup> rituals that the state could "facilitate by encouraging offenders to interact face to face with their victims . . . [t]each[ing] offenders lessons, vindicat[ing] victims, and encourag[ing] communities to welcome wrongdoers back into the fold."<sup>197</sup> Beyond the societal benefits of such mediations, Black victims would have a chance to confront the White caller who harmed them and would have the benefit of being able to share their story.<sup>198</sup> Adjudicators and officials would likely also benefit from the wealth of information that would be produced during such a meeting.<sup>199</sup>

Prong five recommends a reporting and data collection requirement that includes: the location of the frivolous call; the total economic cost of responding to the call; and the race, sex, and age of the offender and of the victim. This component is necessary because, as discussed in the previous section on the current New York State false reporting statute, there is no comprehensive database that documents the number or frequency of frivolous race-based police calls. Similarly, the New York State hate crime statute and its accompanying systems of collection are void of meaningful data. The reporting and data collection component of the remedy will help to ensure that state and local governments not only track when and

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196. Bibas & Bierschbach, *supra* note 178, at 90.

197. *Id.*

198. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2009) (arguing that victim impact statements are important because they provide information to the sentencing judge and help crime victims recover).

199. *Id.*

where the calls are happening but will also lay the groundwork for the development of analytical tools to protect against such race-based crimes in the future.

#### D. The Role of Enforcing Agencies

In absence of an enforcement mechanism, the proposed remedy would merely be a hollow shell. Indeed, complaining parties and defendants need a forum whereby their grievances, challenges, and expectations can be managed. The idea of having an adjudicator manage disputes between conflicting parties is consonant with theological principles of justice,<sup>200</sup> and is also consonant with the U.S. legal tradition. To this end, existing state and city agencies can play a valuable role. In particular, the New York State Division of Human Rights (DHR) would be a fitting state agency to adjudicate FRBPC claims. New York State is a pioneer in human rights, and was the first state in the nation to enact a human rights law, which affords every citizen “an equal opportunity to enjoy a full and productive life.”<sup>201</sup> The state created DHR to enforce its human rights law, and the agency’s mission is to ensure that “every individual . . . has an equal opportunity to participate fully in the economic, cultural and intellectual life of the State.”<sup>202</sup> The DHR has the authority to vigorously prosecute unlawful discriminatory practices; receive, investigate, and resolve complaints of discrimination; create studies, programs, and campaigns designed to, among other things, inform and educate the public on the effects of discrimination and the rights and obligations under the law; and develop human rights policies and proposed legislation for the State.<sup>203</sup>

In addition to the broad authority given to the DHR by statute, there are specific groups within the agency that are especially equipped to handle FRBPCs. For example, the Hate Crimes Task

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200. See Yairah Amit, *Location in Canon and Name*, in THE NEW OXFORD ANNOTATED BIBLE, NEW REVISED STANDARD VERSION WITH THE APOCRYPHA: AN ECUMENICAL STUDY BIBLE 355 (Michael D. Coogan et al. eds., Oxford U. Press 4th ed. 2010) (noting that the book of judges features a diverse array of leaders, and that Deborah and Samuel sat in judgment in the juridical sense). “The Hebrew word *shaphat* (‘to judge’) and its derivative *shophet* (‘a judge’) can mean to ‘adjudicate’ but also to ‘rule’ (2 Chronicles 1:10; Isaiah 51:5) . . . and ‘vindicate, provide justice for.’ (Psalm 10:18; 82:1-3).” *Id.*

201. N.Y. HUM. RTS. LAW § 290(3) (2014); *Mission Statement*, N.Y. ST. DIV. HUM. RTS., <https://dhr.ny.gov/mission-statement> [<https://perma.cc/C6PS-P6NJ>] (last visited Nov. 3, 2019).

202. N.Y. HUM. RTS. LAW § 290(3).

203. See *id.* § 295(1)–(11).

Force created by Governor Cuomo fights the increase in reports of bias-motivated threats, harassment, and violence.<sup>204</sup> The Task Force is run by the State Division of Human Rights, the State Police, and the Division of Criminal Justice Services who work together to prevent, investigate, and monitor hate crimes and violations of human rights law.<sup>205</sup> The Hate Crimes Task Force would be an ideal adjudicator of FRBPC claims because it has the power to review complaints and investigate cases with probable cause.<sup>206</sup> Given that complainants can file reports online, Black victims would be empowered to seek enforcement against frivolous White callers while avoiding the costs of litigation and traditional barriers to the court system. The agency would provide an effective factual inquiry and serve a quasi-prosecutorial function, through a formal hearing or some other adjudicative proceeding, and could impose a suggested financial penalty if it determines that a frivolous race-based call has actually occurred. The agency also produces annual reports, which would fulfill the reporting and data collection requirement.<sup>207</sup>

The New York City Commission on Human Rights (CCHR) is a city agency that can serve as an alternative<sup>208</sup> adjudicative body for FRBPC claims. The CCHR is charged with the enforcement of New York City Human Rights Law,<sup>209</sup> Title 8 of the Administrative Code of the City of New York,<sup>210</sup> and with “educating the public and encouraging positive community relations.”<sup>211</sup> The Commission is

204. *About the Task Force*, N.Y. STATE HATE CRIMES TASK FORCE, <https://www.ny.gov/programs/hate-crimes-task-force> [https://perma.cc/H9PX-YD9J] (last visited Nov. 3, 2019); see also ANDREW CUOMO, HATE CRIMES TASK FORCE REPORT 3 (Oct. 24, 2017) [hereinafter HATE CRIMES TASK FORCE REPORT], [https://www.ny.gov/sites/ny.gov/files/atoms/files/Hate\\_Crime\\_Task\\_Force\\_Report.pdf](https://www.ny.gov/sites/ny.gov/files/atoms/files/Hate_Crime_Task_Force_Report.pdf) [https://perma.cc/3KWJ-ZGMX].

205. *About the Task Force*, *supra* note 204.

206. See HATE CRIMES TASK FORCE REPORT, *supra* note 204, at 5.

207. *Id.* at 9.

208. N.Y.C. ADMIN. CODE § 8-109(f)(ii)–(iii) (McKinney 2018) (noting that a complainant is not permitted to file the same grievance with the Commission on Human Rights and the Division of Human Rights).

209. See generally *id.* § 8-101.

210. *Id.* (“A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry, discrimination, sexual harassment and bias-related violence or harassment as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.”).

211. *Inside the NYC Commission on Human Rights*, NYC HUM. RTS. (2019), <https://www1.nyc.gov/site/cchr/about/inside-cchr.page> [https://perma.cc/7NJ5-XMN2].

divided into two major bureaus: Law Enforcement and Community Relations.

The Law Enforcement Bureau is “responsible for the intake, investigation, and prosecution of complaints alleging violations of the Law.”<sup>212</sup> The Community Relations Bureau “provides public education about the Human Rights Law and helps cultivate understanding and respect among the City’s many diverse communities through its borough-based Community Service Centers and numerous educational and outreach programs.”<sup>213</sup> The Commission on Human Rights, much like the Division of Human Rights, has the power to: hear complaints;<sup>214</sup> conduct investigations and keep records;<sup>215</sup> hold hearings;<sup>216</sup> issue decisions and orders;<sup>217</sup> and impose civil penalties.<sup>218</sup> Although the current administrative

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212. *Id.*; see also *Enforcement*, NYC HUM. RTS. (2019), <https://www1.nyc.gov/site/cchr/enforcement/enforcement.page> [<https://perma.cc/YLZ8-2H62>] (describing the role and authority of the Law Enforcement Bureau).

213. *Inside the NYC Commission on Human Rights*, *supra* note 211; see also *Community*, NYC HUM. RTS. (2019), <https://www1.nyc.gov/site/cchr/community/community.page> [<https://perma.cc/GNN7-MAZE>] (describing the role and work of the Community Relations Bureau).

214. See N.Y.C. ADMIN. CODE § 8-109(a) (“Any person aggrieved by an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter 6 of this title, or such person’s attorney, may make, sign and file with the commission a verified complaint in writing which shall: (i) state the name of the person alleged to have committed the unlawful discriminatory practice or act of discriminatory harassment or violence complained of, and the address of such person if known; (ii) set forth the particulars of the alleged unlawful discriminatory practice or act of discriminatory harassment or violence; and (iii) contain such other information as may be required by the commission. The commission shall acknowledge the filing of the complaint and advise the complainant of the time limits set forth in this chapter.”).

215. See N.Y.C. ADMIN. CODE § 8-114.

216. See N.Y.C. ADMIN. CODE § 8-119(a) (“A hearing on the complaint shall be held before an administrative law judge designated by the commission. The place of any such hearing shall be the office of the commission or such other place as may be designated by the commission. Notice of the date, time and place of such hearing shall be served upon the complainant, respondent and any necessary party.”).

217. See N.Y.C. ADMIN. CODE § 8-120.

218. See N.Y.C. ADMIN. CODE § 8-126(a) (“Except as otherwise provided in subdivision 13 of § 8-107, in addition to any of the remedies and penalties set forth in subdivision a of § 8-120, where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than \$125,000. Where the commission finds that an unlawful discriminatory practice was the result of the respondent’s willful, wanton or malicious act or where the commission finds that an act of discriminatory harassment or violence as set forth in chapter 6 of this title has occurred, the commission may, to vindicate the public interest, impose a civil penalty of not more than \$250,000.”).

code states that “[a]ny civil penalties recovered . . . shall be paid into the general fund of the city,”<sup>219</sup> the proposed law should permit FRBPC victims themselves to receive appropriate compensatory damages.

Both the Division of Human Rights and the City Commission on Human Rights are ideal adjudicative bodies because they have the power to ensure just outcomes through state and local government. The agencies could and should look to examples from private actors like Starbucks, which addressed the 2018 FRBPC incident that occurred at one of its Philadelphia shops by implementing a multi-faceted approach. The franchise’s response included: reaching an undisclosed settlement with the Black victims Rashon Nelson and Dante Robinson; offering to pay the two men’s college tuition; sending its CEO to issue an in-person apology; and mandating the closing of 8000 Starbucks stores in the U.S. on May 29, 2018 so that some 175,000 employees could get training in unconscious bias.<sup>220</sup> The agencies could and should also look to the City of Philadelphia’s response to the Starbucks incident. To make amends for the unwarranted arrests, the City reached a symbolic \$1 settlement with Nelson and Robinson, agreed to expunge their arrest records, and pledged to contribute \$200,000 to create a counseling and mentoring program for Philadelphia high school students.<sup>221</sup> The Starbucks example provides a model for what an enforceable legal remedy could look like, if such a remedy were adopted and applied to hold White individuals accountable for the harms of frivolous race-based police calls.

### CONCLUSION

The interdisciplinary legal remedy outlined above problematizes frivolous race-based police calls as privatized, extralegal acts of discrimination and addresses the individual and group-based injury that Black people experience. The five-pronged solution has the potential to eradicate or reduce the imprisoning remnants of White supremacy and anti-Blackness by recognizing the need for *psycho-*

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219. N.Y.C. ADMIN CODE § 8-127(a).

220. Errin Haines Whack, *Black Men Arrested at Starbucks Settle with the Company*, ASSOCIATED PRESS (May 2, 2018), <https://www.apnews.com/774de094bff34421af4cb250a20475dc> [https://perma.cc/V6B6-ZNQV].

221. *Id.*

*spiritual* “repentance”<sup>222</sup> and *structural* change within the law. It embodies the heart of tort law principles by requiring White perpetrators to make Black victims whole and embodies the heart of criminal law principles by authorizing the use of community-centered sanctions for FRBPC offenses. Lastly, the proposed solution incorporates intersectional analysis and valid concerns raised by critical legal theorists. The proposed remedy affirms Black people’s humanity and their divinity by divesting White people of “their subjugating control over non[W]hite bodies.”<sup>223</sup> In the event that such a law is not frequently enforced, its aspirational nature still suffices as a source of empowerment for Black people, and affirms their inherent value.

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222. *2 Corinthians*, *supra* note 27 (“Godly sorrow brings repentance that leads to salvation and leaves no regret, but worldly sorrow brings death . . .”).

223. *See* DOUGLAS, *supra* note 28, at 69 and accompanying text.