Weaponized Racial Fear

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* © 2019 Shawn E. Fields. Assistant Professor of Law, Campbell University School of Law. This Article would not have been possible without the support and compelling insights of Noël Harlow. I also thank Professor Anthony J. Ghiotto for his assistance and feedback on earlier drafts of this Article.

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Dispatcher: “911, what’s the address of your emergency?”
Caller: “[Provides address.] There’s a woman pushing a shopping cart in front of my house.”
Dispatcher: “I’m sorry, I’m not getting it. What’s the problem?”
Caller: “You need to get out here now.”
Dispatcher: “Um. . . . I’m sorry, I don’t understand what you’re reporting.”
Caller: “She’s black.”
Dispatcher: “Sir, I’m still not seeing the problem. Is she being loud? Is the noise of the cart disturbing your peace?”
Caller: “Where do you live?”
Dispatcher: “Oakland.”
Caller: “You wouldn’t understand, then. This isn’t Oakland. We
don’t have people like her in this neighborhood. Just send someone out
to get rid of her. I’m not talking to you anymore.” [Click.]

“The worst thing about it? I had to send someone out.”

I. INTRODUCTION

Fear and ignorance lie at the heart of prejudice. Irrational fear,
particularly of people of color, has shaped the American criminal
justice system since the nation’s colonial beginnings. For nearly 350
years, from the arrival of the first slave ships to Virginia in 1619 to the
passage of the Fair Housing Act in 1968, de jure segregation in
America created a caste system based on race. Many of the
propagators of this apartheid trafficked in racist fear-mongering to
justify discriminatory treatment of African Americans, warning white
America about the inherent criminality and violent propensities of
black men.

1. Rachael Herron, I Used to Be a 911 Dispatcher. I Had to Respond to Racist Calls
   Every Day, Vox, https://www.vox.com/first-person/2018/5/30/17406092/racial-profiling-
   911-bbq-becky-living-while-black-babysitting-while-black (last updated Oct. 31, 2018)
   (emphasis omitted) (recalling a call from an “affluent and very white” neighborhood in
   northern California).

2. Id. (“Dispatchers usually don’t get to choose which calls lead to the dispatching of
   emergency personnel and which don’t. If a person wants to make a report, they get to make
   a report. You can think of police reports as being like lawsuits. Anyone can make one about
   anything, no matter how stupid.”).

   (“What motive is there ever for prejudice and bigotry? There is no motive for it. It stems from
   hate, from ignorance, maybe from fear.”); Williamson v. Waldman, 696 A.2d 14, 21 (N.J.
   1997) (urging knowledge as an antidote to “the kind of ignorance that nourishes . . . hysteria
   and irrational fear . . . which, in turn, perpetuate . . . prejudice and discrimination”); Sheri Lynn
   (“I am convinced that unconscious racism is ignored . . . for three reasons, all linked to the
   nature of phenomenon itself: ignorance, fear, and denial.”).

4. CHARLES E. SILBERMAN, CRISIS IN BLACK AND WHITE 21-25 (1964); see also
   Stacey Patton & Anthony Paul Farley, There’s No Cost to White People Who Call 911 About
   com/news/posteverything/wp/2018/05/16/theres-no-cost-to-white-people-who-call-911-about-
   black-people-theres-should-be/? (“Blackness was a crime, a conviction and a life sentence for
   most of our history. From 1619 to the late 1960s, blackness was as much an endless subjection
   to humiliating and impoverishing legal controls as it was a color.”).

5. Fran Lisa Buntman, Race, Reputation, and the Supreme Court: Valuing Blackness
   and Whiteness, 56 U. MIAMI L. REV. 1, 1 (2001) (“In the United States, being black . . . has
   long been seen as a sign of criminality, or at least criminal propensity.”). See generally Paul
   “blackness” as synonymous with crime to early court decisions justifying slavery because of
   the inherent criminality of black men).
This myth of the "black bogeyman" has endured for centuries and taken many forms—from the "rebellious Negro," to the "[b]lack brute" rapist, to the "super-predator." These racist tropes of a black criminal subclass are now so ingrained in the fabric of American society that science long ago confirmed the existence of a pervasive, unconscious, and largely automatic bias against dark-skinned individuals as more hostile, criminal, and prone to violence. These biases infect nearly everyone.


8. See Ryan Patrick Alford, Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis, 11 MIC. J. RACE & L. 325, 346 (2006) ("[The stereotype of the Black brute ... has been proven to be one of the most enduring and powerful stereotypes in the nation's history."); Barbara Holden-Smith, Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era, 8 YALE J.L. & FEMINISM 31, 59 (1996) (recalling how the "Southern myth of the 'black-beast' rapist justified lynching" in the post-Reconstruction South); R.A. Lenhardt, Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U. L. REV. 803, 859 (2004) (describing the stereotype of "the black beast, a violent brute with an unusually powerful sexual appetite for white women who was completely devoid of humanity"); see also State v. Washington, 67 So. 930, 931 (La. 1915) (quoting a prosecutor addressing the jury in the trial of a black man accused of raping a white woman in Louisiana as saying, "Gentlemen, do you believe that she would have had intercourse with this black brute? ... [H]e is a beast and a brute of the lower beastly kind.").


10. Rachel D. Godsil & L. Song Richardson, Racial Anxiety, 102 IOWA L. REV. 2235, 2238-45 (2017) (connecting implicit racial bias to systemic "racial anxiety" in interracial interactions); L. Song Richardson & Phillip Atiba Goff, Implicit Racial Bias in Public Defender Triage, 122 YALE L.J. 2626, 2629-31 (2013) (summarizing the science of implicit bias and the widely held implicit stereotype of "blacks as violent, hostile, aggressive, and dangerous").

Scholars have written passionately and convincingly about the ways in which these long-held explicit and implicit racial biases corrupt official actors within the criminal justice system—the legislators, police officers, prosecutors, public defenders, judges, and juries. This Article explores the impact of racial fear on a critical but little-examined “ unofficial” actor in the criminal justice system: the civilian complainant. In particular, it considers how bias-motivated civilians weaponize law enforcement to respond to their irrational racial fears through misuse and abuse of 911 and other emergency response systems.

In doing so, this Article contributes to the existing literature by examining (1) why this particular form of “weaponized racial fear” is occurring with increasing frequency, (2) what impacts police response to frivolous complaints have on the individuals and communities most targeted, (3) how legislatures and courts acquiesce to such behavior, and (4) how modest changes to existing law and police department policies can limit the impact of this weaponization.

This discussion is overdue for several reasons. First, local 911 call centers across the country receive an overwhelming number of frivolous or accidental “nonemergency” 911 calls. Yet, most police departments require officers to respond to all but the most patently unnecessary calls. Second, in a pluralistic, integrated society where


13. Throughout this Article, the term “civilian" refers to anyone who is not a police officer or member of law enforcement generally. It is intended to denote the dividing line between the individuals making police reports and the police officers responding to them. The term does not have any military connotations, nor is it used in the way members of the armed forces typically refer to “civilians.”


African Americans occupy physical, professional, and hierarchical spaces once legally or traditionally reserved for Caucasians, fearful white Americans increasingly interpret innocent conduct by black Americans in “their space” as suspicious behavior requiring a response from an armed officer. Third, acting on these racial fears results in far more than frivolous phone calls and a waste of taxpayer money. As the killings of Michael Brown, Stephon Clark, and dozens of other unarmed black men and boys at the hands of police officers has made clear, what may begin as a vague complaint about a “suspicious black male” too often ends in unnecessary violent confrontation. The consequences of weaponized racial fear are simply too great to ignore.

At its core, this Article challenges the popular notion that improving the quality of police interactions with people of color can sufficiently lessen this epidemic of racial fear. While community policing efforts and implicit bias awareness training are laudable, they represent a drop of water in the ocean of explicit and unconscious racial bias permeating all aspects of society. Instead, recognizing the sheer number of unnecessary police contacts initiated by frivolous 911 calls and the role pervasive racial fear plays in many of these civilian complaints, this Article advocates for a reduction in the quantity of police contacts with people of color by suggesting legislative reforms designed to inject much-needed discretion into the emergency response system and to provide enforceable deterrence mechanisms against racially motivated calls.

This Article proceeds in five parts. Part II traces the history of racial fear in America, highlighting racist fear-mongering efforts to instill a permanent suspicion of the “unidentified black male.” In this Part, I discuss what I call the emerging “fourth wave of American racial fear,” defined by fear of African Americans coexisting in public “white

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16. Elijah Anderson, “The White Space,” 1 SOC. RACE & ETHNICITY 10, 15 (2015) (describing white backlash to America’s “major racial incorporation process, during which large numbers of black people have made their way from urban ghettos into many settings previously occupied only by whites”).

17. Erwin Chemerinsky, Transcript of Keynote Speech, 54 IDAHO L. REV. 287, 287 (2018) (“Stephon Clark, Michael Brown, Eric Garner, Laquan McDonald, Walter Scott—all of these individuals share something in common. They all were African-American men who were unarmed, who were killed by police officers.”).

spaces.” The first three waves of racial fear—tracking roughly the eras of slavery, Jim Crow, and early mass incarceration—were each defined by the formal legal expression of fear through *de jure* or *de facto* discriminatory criminal treatment. In contrast, the fourth wave of racial fear reflects a growing uneasiness by white Americans of black Americans thriving outside of their “iconic ghettos” and in all sectors of society. Fearful of this change and lacking a formal segregationist mechanism to validate their fear, these individuals consciously or unconsciously see criminal suspicion in innocent conduct and call upon the state to restore the status quo.

Part III examines the fact that many of these fears reflect deeply ingrained, implicit racial biases held by both civilians and police. Rather than merely repeat the important scholarship on the science of implicit bias, this Part highlights the growing evidence that implicit bias awareness and retraining programs do little to improve either individual or institutional biases. It also articulates an often-overlooked limitation on bias retraining efforts in the criminal justice system. These efforts only focus on institutional bias from official actors such as police officers, judges, and prosecutors but do not and cannot systematically retrain the biased brains of civilians who irrationally feel threatened in their daily lives. Retraining programs also cannot penetrate the phenomenon of confirmation bias, wherein apprehensive people of color, anticipating discrimination, may respond


20. Elijah Anderson, *Black Americans Are Asserting Their Rights in “White Spaces.” That’s When Whites Call 911.*, Vox (Aug. 10, 2018), https://www.vox.com/the-big-idea/2018/8/10/17672412/911-police-black-white-racism-sociology (“When black people do appear in such places, white people subconsciously or explicitly want to banish them ... to the stereotypical space in which they think all black people belong, a segregated space for second-class citizens.”).

21. See Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism/ (“There are now thousands of workplace talks and police trainings and jury guidelines that focus on implicit bias, but we still have no strong scientific proof that these programs work.”); Katie Herzog, *Is Starbucks Implementing Flawed Science in Their Anti-Bias Training?*, STRANGER (Apr. 17, 2018), https://www.thestranger.com/slog/2018/04/17/26052277/is-starbucks-implementing-flawed-science-in-their-anti-bias-training (quoting a co-developer of the Implicit Association Test as stating that implicit bias training “has not been shown to be effective, and it can even be counterproductive”); Jessica Nordell, *Is This How Discrimination Ends?*, ATLANTIC (May 7, 2017), https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/ (explaining that multiple psychologists responsible for developing implicit bias tests have argued that “workshops geared toward eliminating people’s hidden prejudices ... don’t work”).
unconsciously to interracial or police interactions uncooperatively or with hostility. This Part thus serves to illustrate the permanence and pervasiveness of racial fear across all societal strata.

The history, violence, permanence, and unconscious pervasiveness of racial fear within the criminal justice system confirms that all encounters with law enforcement are fraught with racial iniquity, despite the best intentions of individual officers or precincts. This phenomenon should urge lawmakers and police departments to minimize unnecessary adversarial contact with communities of color, at least the contacts initiated by a threadbare civilian accusation of criminality. But that has not been the case.

Part IV demonstrates that civilians possess broad license to weaponize racial fear by summoning police officers to respond to any and every bias-motivated 911 call, regardless of how frivolous or patently racist. This Part begins by highlighting the crippling epidemic of misuse of emergency response systems in general and the inefficient requirement in most departments that dispatchers send officers to all but the most egregious “nonemergency” calls. It then focuses on racially biased calls, providing a thirty-day snapshot of weaponized racial fear in action. The Part concludes with an exploration of the devastating impacts of police response to bias-motivated calls, including the erosion of trust between police and vulnerable communities, and the psychological, legal, and physical effects of these encounters to the wrongfully accused individuals.

Part V turns to the “weapon” in the weaponization of racial fear: the armed police officer. In particular, this Part examines how the state acquiesces to being weaponized by civilian racial fear. While most police officers are required to respond to every frivolous criminal complaint, they remain largely immune from any sanction if they respond to a clearly frivolous encounter with unnecessary or even lethal force. Requiring armed officers to respond to all racially motivated calls but allowing them to act with impunity in their responses creates a dangerous “weapon” for use by prejudiced civilians.

22. See, e.g., Simon Stern, Constructive Knowledge, Probable Cause, and Administrative Decisionmaking, 82 NOTRE DAME L. REV. 1085, 1121 (2007) (“Identity-based prejudices, particularly racial bias, often trigger confirmation bias . . ..”); cf. L. Song Richardson & Phillip Atiba Goff, Interrogating Racial Violence, 12 OHIO ST. J. CRIM. L. 115, 124 (2014) (“Stereotype threat is not a self-fulfilling prophecy. Rather, it arises in those who care highly about the domain in which they believe they are being evaluated; simply being aware of the stereotype is often sufficient to provoke it.”).

23. See sources cited supra notes 14-15; discussion infra Part IV.A-B.
This Part also explores the role of courts in fostering this epidemic. Lower courts throughout the country, following the intimations of the United States Supreme Court, have lowered the *Graham v. Connor* \(^{24}\) "objective reasonableness" standard for use of force cases to such a degree that all but the most patently egregious violent conduct will be protected. And even if a judge or jury finds the officer acted unreasonably, the doctrine of qualified immunity has "metastasized into an almost absolute defense" for police officers. \(^{25}\) Judges and juries also routinely give officer testimony greater weight than civilian testimony in misconduct cases, despite widespread evidence of "testilying" by officers to manufacture details in hindsight making their conduct appear more reasonable. \(^{26}\)

Part VI offers recommendations, including model legislation to address and deter racially motivated 911 calls. In doing so, this Part borrows from the uneven experience of legislatures attempting to deter frivolous lawsuits known as strategic lawsuits against public participation (SLAPP). \(^{27}\) These suits abuse and weaponize the court system by allowing plaintiffs to bring frivolous claims for the sole purpose of intimidating defendants and silencing their public criticism of plaintiffs. \(^{28}\) A majority of states have passed "anti-SLAPP" legislation, but these laws have drawn sharp criticism for restricting the fundamental right to access to the courts. \(^{29}\)

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25. *See* Diana Hassel, *Excessive Reasonableness*, 43 *Ind. L. Rev.* 117, 118 (2009) (asserting that modification to the application of the qualified immunity doctrine "may give some relief to courts attempting to apply the ... defense, but it does not address fundamental problems at the heart of the qualified immunity doctrine," which "can only be made by examining the defense's basic underlying principles"); *cf.* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 *Baylor L. Rev.* 869, 873-74 (1998) (asserting that the doctrine of qualified immunity was intended to provide broad immunity for government officials, even when they "violate[] a clearly established constitutional right," where the official "mistaken[ly] believe[ves] that his conduct does not violate a clearly established right" (emphasis omitted)).


The "anti-SLAPP" experience provides an instructive parallel to the weaponized racial bias context. Bias-motivated individuals abuse and weaponize law enforcement resources by making frivolous complaints for the purpose of intimidating an innocent person of color or having him arrested.30 But much like current anti-SLAPP legislation, calls by some legislators and activists to criminally punish all nonemergency 911 calls or make all bias-motivated calls a hate crime31 would almost certainly deter people from accessing critical lifesaving services for true emergencies. With these competing considerations in mind, the Part provides a model statute giving greater discretion to dispatchers and police officers to ignore frivolous calls on the front end, providing for stiffer penalties for all such clearly frivolous calls, and providing greater access to civil remedies for wrongfully targeted individuals on the back end. The Part concludes with a discussion of anticipated criticisms of this approach.

II. THE FOURTH WAVE OF AMERICAN RACIAL FEAR

To understand the current state of weaponized racial fear in this country, a brief consideration of the historical development of race-based fear is instructive. This Part traces the violent origins and evolution of this nation's irrational fear of a criminal racial subclass through four historical "waves" of racial fear.

A. Slavery and the Violence of Racial Fear

For most of this nation's history, race relations were defined by de jure segregation built on violence against and fear of people of color.32 From 1619 to 1865, southern American society and the American economy depended on chattel slavery, a labor system...
defined by violence and forced subjugation.33 As with any systemic forced oppression, the architects of this brutal system remained fearful of rebellions.34 "Whites—even those who never owned a slave—lived with the fear that [the existing] racial order might be turned upside down" by insurrection.35 This 250-year history of violence and apprehension created a foundation of racial fear from which this country has never escaped.

The irrational racial fear created by America’s “original sin”36 is indelibly woven into the fabric of contemporary American policing. In fact, modern-day municipal policing in the United States evolved initially from “slave patrols” created in South Carolina and other southern states in the eighteenth century to quell rebellions and instill fear in slave populations.37 These slave patrols were “known for their brutality and ruthlessness” and continued to exist in unofficial forms long after abolition.38 These unofficial incarnations—most notably lynch mobs and the Ku Klux Klan—reinforced the fear white Americans were expected to have of “rebellious” black Americans and carried that fear well into the twentieth century.39

B. Jim Crow and the “Black Bogeyman”

After the Civil War, white supremacists sought to enforce racial superiority through de jure segregation, Jim Crow laws, and symbolic

33. See United States v. Nelson, 277 F.3d 164, 189-90 (2d Cir. 2002) (discussing the history of chattel slavery and accompanying violence in the United States); see also Stephen Kantrowitz, America’s Long History of Racial Fear, WE’RE HIST. (June 24, 2015), http://werehistory.org/racial-fear/ (connecting the violence of slavery to contemporary racially fearful violence).

34. Kantrowitz, supra note 33 (“In other words, whites attributed to blacks the same desire for domination that they themselves were exercising.”); see also Nelson, 277 F.3d at 190 (“[T]here exist indubitable connections . . . between slavery and private violence directed against despised and enslaved groups and . . . between post Civil War efforts to return freed slaves to a subjugated status . . . .”).

35. Kantrowitz, supra note 33.


37. Hannah LF Cooper, War on Drugs Policing and Police Brutality, 50 SUBSTANCE USE & MISUSE 1188, 1190 (2015) (“Slave patrols were the first state-sponsored police forces. These patrols consisted of White property-owning men who were charged with preventing slave uprisings and escapes.” (citations omitted)).


39. See Kristian Williams, Our Enemies in Blue: Police and Power in America 77-81 (South End Press rev. ed. 2007); Solomon, supra note 38.
domestic terrorism. As with slavery subordination efforts, the "struggle"\textsuperscript{40} of white supremacists to maintain formal dominance required significant effort. Part of that effort involved sowing intense fear of newly freed African Americans as violent criminals to justify racist official actions and reinforce the nation's caste system.\textsuperscript{41}

One of the great victories of white supremacy in this era was the propagation of the false claim that whites faced an "epidemic of black men raping white women."\textsuperscript{42} Despite overwhelming evidence that no such threat existed,\textsuperscript{43} the fantasy that predatory black men routinely victimized white women became the justification for lynching.\textsuperscript{44} During a 1921 debate over a federal anti-lynching bill on the floor of the United States House of Representatives, Representative James Buchanan of Texas denounced "the damnable doctrine of social equality which excites the criminal sensualities of the criminal element of the Negro race and directly incites the diabolical crime of rape upon white women. Lynching follows as swift as lightning, and all the statutes of State and Nation can not stop it."\textsuperscript{45} Representative Thomas Upton Sisson of Mississippi agreed, asserting that white southern men "are going to protect our girls and womenfolk from these black brutes. When these black fiends keep their hands off the throats of the women of the South then lynching will stop."\textsuperscript{46}

This myth of the "black bogeyman," a violent and crazed sexual criminal, endures. Ten years after the abominable statements of Representatives Buchanan and Sisson, nine African-American teenagers were wrongfully accused and convicted of raping two white women on a train.\textsuperscript{47} The "Scottsboro Boys"\textsuperscript{48} were convicted on three separate occasions in rushed and procedurally improper trials held in Scottsboro, Alabama, with all but one being sentenced to death.\textsuperscript{48}

\textsuperscript{40} Kantrowitz, \textit{supra} note 33 ("The Reconstruction years thus gave way to another history: the continuing struggle by white supremacist activists to create and enforce Jim Crow's exclusion, segregation, and lynching.").
\textsuperscript{41} \textit{Id}; see sources cited \textit{supra} notes 5-7.
\textsuperscript{42} Kantrowitz, \textit{supra} note 33.
\textsuperscript{44} See sources cited \textit{supra} notes 5-8.
\textsuperscript{45} 62 CONG. REC. 451, 468 (1921) (statement of Rep. Buchanan).
\textsuperscript{46} 62 CONG. REC. 1669, 1721 (1922) (statement of Rep. Sisson).
\textsuperscript{48} \textit{Id}. 
During the civil rights movement, white supremacists argued that segregation was necessary to keep black predators from raping white women and leading to the "mongrelization" of the white race.\textsuperscript{49} And on June 17, 2015, Dylann Roof entered an African-American church in Charleston, South Carolina, and reportedly exclaimed to the prayer group inside, "You rape our women and you're taking over our country."\textsuperscript{50} He then opened fire and killed nine people.\textsuperscript{51}

The enduring nature of this false and pernicious racist trope helps explain the phenomenon of "racial hoaxes."\textsuperscript{52} Coined by Kathryn Russell-Brown, the term "racial hoaxes" refers to false accusations of an unknown "black male" engaging in crime to direct attention away from the accuser's own misdeeds.\textsuperscript{53} Russell-Brown identified at least seven such hoaxes between 1987 and 1996.\textsuperscript{54} Similar hoaxes continue to make national news. In recent years, white accusers have invoked the "violent black man" to cover up school truancy,\textsuperscript{55} embezzlement of funds from an employer,\textsuperscript{56} accidentally shooting themselves,\textsuperscript{57} accidentally shooting a girlfriend,\textsuperscript{58} self-mutilation,\textsuperscript{59} politi...
motivated mutilation, murdering their children, and killing their pregnant spouse. These racial hoaxes work in large part because of the enduring belief in the myth of the "black bogeyman," a myth that continues to be reinforced through negative media imagery that demonizes and stereotypes black men.

C. Mass Incarceration and "Super-Predators"

Although the 1968 Fair Housing Act eliminated the last vestige of de jure racial segregation in the United States, that same year presidential candidate Richard Nixon swept into office on a race-baiting platform of "law and order" that characterized African Americans as dangerous drug users requiring stiffer criminal penalties. Although President Nixon would not declare drug abuse to be "public enemy number one" until 1971, ushering in the unofficial "war on drugs," Nixon's campaign advisor John Ehrlichman later acknowledged that:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the

headlines/2013/02/acid-attack-hoaxer-bethany-storro-says-she-was-suffering-from-mental-illness-exclusive/.


62. Danielle Young, White Lies: A Brief History of White People Lying About Crimes, ROOT (Aug. 19, 2016), https://www.theroot.com/white-lies-a-brief-history-of-white-people-lying-about-1790856437 (describing the case of Charles Stuart, who alleged "that his wife, Carol DiMaiti, and unborn child were shot and killed by a black man," which led to an arrest of African-American William Bennett, before Stuart's brother confessed that Stuart had committed the crimes "to collect life insurance").

63. See Russell, supra note 18, at 600 n.43 (discussing the creation of the "black bogeyman" myth and its impacts).

64. Rogers M. Smith, Ackerman's Civil Rights Revolution and Modern American Racial Politics, 123 YALE L.J. 2906, 2920 (2014).

65. TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 97 (2001) ("Law and order for Nixon boiled down to the 'damn Negroes,' but he could not say this in his [campaign] ad. . . . He intended to convey racial meaning implicitly. He wanted to appeal to racial stereotypes, fears, and resentments, yet conform to the norm of racial equality.").

public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.67

Throughout the Nixon presidency, the Administration orchestrated public drug raids almost exclusively targeting communities of color, buttressing both Nixon's self-cultivated "watchdog" reputation and the "black bogeyman" myth, this time in the form of a drug-crazed, violent inner-city criminal.68

But the most severe effects of the war on drugs were not felt until the Reagan Administration pursued draconian legislation targeting communities of color with shockingly disparate sentencing treatment. In 1984, Congress passed the Sentencing Reform Act, which established twenty-nine new mandatory minimum sentences for drug offenses, including minor drug use and possession offenses.69 Around the same time, the Anti-Drug Abuse Act of 1986 also created a 100-to-1 sentencing disparity for the trafficking or possession of crack cocaine compared to penalties for trafficking or possession of powder cocaine.70

This disparity had racist origins, targeting African Americans who were more likely to traffic and use cheaper crack cocaine than white Americans who were more likely to traffic and use more expensive powder cocaine.71 As with Nixon, President Reagan sought approval for his disparate sentencing measures by deliberately misleading the public about the allegedly more potent, harmful, and addictive qualities
of crack cocaine. The "black bogeyman" myth was reborn in the form of "crack whores" and "crack babies" hollowing out American cities and "welfare queens" bilking honest taxpayers to feed their addictions. In 1986, Time magazine declared "crack" the issue of the year. The 100-to-1 mandatory minimum sentencing disparities became law later that year.

The black criminal underclass trope was peddled by both Republican and Democratic administrations. The Clinton Administration doubled down on the war on drugs with its own harsh, disparate sentencing policies. In 1996, then-First Lady Hillary Rodham Clinton defended "zero tolerance" and "three strikes" policies, claiming that an entire generation of "super-predator" children, born without conscience or empathy, needed to be brought "to heel."

Mandatory minimum sentences and disparate sentencing treatment for drug offenses predominantly committed by African Americans sparked an explosion in the U.S. prison population. In 1974, the state and federal prison population stood at 218,466. By 2014, that total had risen to 1,508,636, a nearly 600% increase. The state and federal prison population nearly tripled in the twelve years immediately following passage of the Anti-Drug Abuse Act. Today, imprisonment for drug offenses has grown over 1000% since 1974, with the disproportionate brunt of this mass incarceration epidemic being borne by communities of color.

Baradaran, supra note 68, at 231; see also Baum, supra note 67 (quoting a former Nixon Administration official on the goals of distinguishing crack from powder cocaine—namely to disrupt black communities).


See sources cited supra note 9.


Id.

Id.


See Carroll, supra note 78 ("58 percent of all sentenced inmates in 2013 were black or hispanic, yet the two groups make up just about 30 percent of the [United States] population."). Further confirming the disparate impact on communities of color, a 2014 study concluded that "black people are 3.6 times more likely than white people to be arrested for selling drugs and 2.5 times more for drug possession." Id.
WEAPONIZED RACIAL FEAR

The effects of this “new Jim Crow” regime are far-reaching and catastrophic. “The War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged [black] Americans . . . and undermined decades of effort to improve the life chances of members of the urban black underclass.” It perpetuated institutional poverty by removing significant portions of the population from the workforce by labeling millions of black men and women with the scarlet letter of a felony drug conviction, making them all but unemployable. Psychologically, the fact that black and brown Americans compose nearly three-fifths of the U.S. prison population reinforces the unfounded, irrational fear that people of color are predisposed to crime.

D. “Iconic Ghettos” and “White Spaces”

It is within this context that the “fourth wave” of racial fear takes hold. An entire generation of white Americans have come to expect a certain “ghettoization” of African Americans, portrayed in the news media and entertainment outlets as poor, urban, and prone to drug use or other criminal activity. When people of color fail to fulfill that stereotype, whether by shopping at an upscale clothing store, attending a prestigious university, or walking through a neighborhood that “isn’t Oakland,” deeply ingrained and automatic apprehensions of the “black bogeyman” once again rise to the surface.

83. Michael Tonry, Race and the War on Drugs, 1994 U. CHI. LEGAL F. 25, 27.
84. Criminal Justice Facts, supra note 80.
85. See Tasha Hill, Inmates’ Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights, 62 UCLA L. REV. 176, 218 (2015) (“Overinclusion of minority groups in the prison population may make it even more difficult for (overwhelmingly White) judges to overcome their implicit bias against both inmates and people of color.”).
86. See Anderson, supra note 16.
89. See Herron, supra note 1.
Yale sociology Professor Elijah Anderson attributes these apprehensions to white confusion over blacks occupying “the white space” in public life, areas that were traditionally “off limits” to people of color. By not conforming to the idea of the “iconic ghetto” in which African Americans are supposed to remain, completely innocent people of color having a barbecue, attending a pool party, or checking out of a home rental elicit suspicion from a fearful white majority.

“[F]or many whites, the anonymous black person in public is always implicitly associated with the urban ghetto.” Thus, when a white person sees a black person in the “white space,” there exists an unconscious idea, passed down over generations, from slavery to Jim Crow to mass incarceration to the present day, that the black individual is out of place and must only be there for a reason associated with the “iconic ghetto”—crime, violence, or impoverished opportunistic gain.

This tension is exacerbated in today’s complex sociological landscape. African Americans appear more often in places of privilege, power, and prestige in the diverse twenty-first century meritocracy. But this progress, following nearly four hundred years of explicit racial stereotyping, has proven unnerving to many white Americans. As one researcher observed, the “lag between the rapidity of black progress and white acceptance of that progress” may be responsible for the impulse of many white Americans to view innocent behavior in “white spaces” as suspicious or criminal.

This is the defining feature of the fourth wave of American racial fear. “In times past, before the civil rights revolution, the color line was more clearly marked. Both white and black people knew their so-

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90. Anderson, supra note 16.
91. Anderson, supra note 19 (“In this sociological context, the urban ghetto is presumed to be, descriptively, ‘the place where the black people live.’ But it’s also, stereotypically, a den of iniquity, a fearsome, impoverished place of social backwardness where black people perpetrate all manner of violence and crime against one another.”).
96. Id.
called place, and for the most part, observed it. When people crossed
that line—black people, anyway—they faced legal penalties or extra-
judicial violence. Lacking these formal delineations of what
behavior is permitted where and by whom, racially fearful Americans
are increasingly turning to police to enforce an invisible color line by
complaining about such “suspicious” behavior as working out at a
gym or waiting for a friend in a coffee shop. This “white fragility”
triggers a range of defensive reactions, including making frivolous 911
calls, further reinforcing the idea of the “iconic ghetto” and “shaping
the conception of the anonymous black person” four hundred years in
the making.

III. THE PERMANENCE OF RACIAL FEAR

With nearly four centuries of stoked racial fear woven into the
fabric of American society, one cannot expect attitudes to change
sufficiently to bring anything close to egalitarian racial treatment into
the criminal justice system. Social cognition research confirms that
these racist tropes are so deeply ingrained in our collective unconscious
that no amount of bias awareness will rid us of the epidemic of racial
fear.

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97. Id.
100. ROBIN DIANGELO, WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 9-18 (2018) (asserting that racially segregated white people, lacking consistent connections with people of color, respond defensively when confronted with an uncomfortable situation).
102. See, e.g., Finkelman, supra note 5, at 2070 (“[I]n examining the history of how ‘color’ became associated with crime, it is important to recognize that the court decisions and laws of early America were a convergence of two complementary themes: economics and race.”).
This Part explores the science of implicit bias, including the pseudoscience of implicit bias retraining. By confronting the permanency of racial fear, this Part lays the foundation for a reformed system built on decreasing the quantity of police contact with communities of color rather than solely on increasing the quality of these contacts.

A. Implicit Racial Bias and the Color of Crime

A half-century of social psychological research has repeatedly demonstrated that virtually all individuals in the United States harbor implicit, unconscious racial biases conforming to the myth of the "black bogeyman." These biases—automatic in nature and affecting individuals from all races and classes—link dark-skinned individuals with criminality and light-skinned individuals with innocence. The pernicious pervasiveness of the "black bogeyman" trope is such that "[p]eople possess these unconscious associations even if these associations conflict with their consciously and genuinely held beliefs."

The implicit stereotypes most commonly held by civilians include "the cultural stereotype of blacks, especially young men, as violent, hostile, aggressive, and dangerous." In the policing context, implicit stereotypes can cause an officer who harbors no conscious racial animosity and who rejects using race as a proxy for criminality to unintentionally treat individuals differently based solely upon their physical appearance. Thus, people of color targeted for unwarranted suspicion by fearful civilians face two waves of implicit discrimination: first, at the hands of the bias-motivated civilian who makes the complaint, and second, at the hands of the officer who responds to the complaint.

104. Nosek et al., supra note 103.
106. Id.
108. Richardson, supra note 105, at 75.
1. Civilian Bias

Human beings categorize people and objects "to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope." Racial categorization, like most categorization processes, occurs automatically, unintentionally, and without conscious awareness.

The operation of these implicit stereotypes affects behaviors in three ways. First, implicit biases can result in increased scrutiny of certain citizens based upon their racial appearance. Second, these biases can affect the evaluation of ambiguous behavior, causing identical behavior to be interpreted differently depending upon the racial appearance of the person performing the act. Third, implicit biases can cause individuals to treat members of different racial groups disparately. These biases—known respectively as attentional bias, interpretation bias, and treatment bias—all play a role in civilian weaponization of racial fear.

**Attentional:** Researchers consistently find that dark-skinned individuals, especially young black men, capture the attention of people before light-skinned individuals. Scientists "attribute this difference in attention to the fact that people have automatic and rapid threat reactions toward black men." Scientists attribute this difference in attention to the fact that people have automatic and rapid threat reactions toward black men.

**Interpretation:** Once attention is directed toward dark-skinned individuals, cultural stereotypes of black men as "violent, criminal, and dangerous" affect the bystander's interpretation of the witnessed behavior. One study found that individuals of all races "are more ready to identify an ambiguous object as a dangerous weapon when in
the hands of a black male than a white male.”117 Another study requiring participants to observe and rate ambiguous physical contact between two people found that participants overwhelmingly rated the contact as deliberate, aggressive, and hostile when at least one of the individuals was black.118 Unconscious racial biases “can even influence how people read another’s facial expressions, with identical expressions being evaluated as more hostile on a Black face than on a White face.”119

**Treatment:** Not surprisingly, researchers find that bystanders modify their behavior when in the presence of a person of color, particularly during an interracial encounter.120 One study found that, in such encounters, white individuals become increasingly uncomfortable and are more likely to respond defensively.121 People of color also tend to change their behavior during interracial interactions, with their behaviors becoming “more rigid and less warm and friendly than [they] would be in a nonthreatening context.”122 These responses can make each party appear unfriendly and uncomfortable, which has the effect of “confirming” the implicit bias of African Americans as hostile and aggressive.123

2. **Police Bias**

Police officers are not immune to the influence of implicit racial biases on their perceptions. Researchers have shown that officers

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117. Id.; see also B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 187 (2001) (providing results from an experiment testing the effect of racial information on the speed with which participants identified weapons).


121. Id.


similarly experience attentional bias, interpretation bias, and treatment bias.\footnote{124}{See Richardson, supra note 105, at 74-77.}

**Attentional:** In one study, researchers found that unconscious biases “associating Blacks with dangerousness caused officers’ attention to be drawn to Black faces over White faces.”\footnote{125}{Id. at 76 (citing Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 886-87 (2004)).} This study also showed that once an officer’s attention was focused on a black face, that attention was held longer than attention to a white face.\footnote{126}{Id.}

**Interpretation:** “[T]he unconscious association between Blacks and crime [also] influences how quickly officers identify weapons. In computer simulations, officers are quicker to determine that individuals are armed when they are Black as opposed to White.”\footnote{127}{Id. at 77.} Even when no evidence exists to suggest the presence of a weapon, “automatic stereotype activation can cause officers to interpret behavior as aggressive, violent, or suspicious even if identical behavior performed by a white individual would not be so interpreted.”\footnote{128}{Id.} The confronted individual may respond in kind, thus unconsciously fulfilling officers’ beliefs that the individual is suspicious and aggressive.\footnote{129}{Id.}

Researchers have also observed that officers are more likely to assume a black individual will view them as racist and illegitimate, increasing the likelihood that the officers will feel unsafe, and thus increasing the likelihood of an unnecessarily violent encounter.\footnote{130}{See Phillip Atiba Goff et al., *Illegitimacy Is Dangerous: How Authorities Experience and React to Illegitimacy*, 4 PSYCHOL. 340, 343 (2013).}

**Treatment:** Researchers also find that, when officers automatically focus attention on black individuals as dangerous and unconsciously interpret their behaviors as hostile, they are more likely to conduct unnecessary stops and frisks triggered not by conscious racial animus
but by implicit racial biases.\textsuperscript{131} The objective but easily malleable standards of “reasonable suspicion” and “reasonable force” do little to constrain officers from acting on these implicit biases.\textsuperscript{132} In short, social cognition confirms how implicit biases “perpetuate discrimination through covertly influencing who is deemed suspicious, who is stopped and searched, who is deemed a threat, what determinations of ‘reasonable force’ are made, who is judged to be armed and dangerous, and who gets shot.”\textsuperscript{133}

B. The Limits of Retraining Efforts

Given the overwhelming evidence of implicit racial bias and the devastating effects these biases can have, implicit bias “retraining” programs have proliferated in an attempt to make individuals aware of their biases and encourage them to refrain from acting on them.\textsuperscript{134} Corporations in the United States began offering these “diversity” trainings in earnest in 2013.\textsuperscript{135} Perhaps most famously, Starbucks closed nearly 8000 store locations on May 29, 2018, to conduct mandatory racial bias training in response to a viral video showing the arrest of two black men who had been sitting quietly in a Philadelphia Starbucks after the store’s manager called the police to report the men for trespassing.\textsuperscript{136}

The response by implicit bias experts was as surprising as it was uniform: these types of racial bias trainings simply do not work. Many pointed to the fact that these “one size fits all” solutions are not sufficiently tailored to the unique problems faced in different locations by different people to have any real impact.\textsuperscript{137} More fundamentally, though, implicit bias experts expressed grave skepticism that any such program can have a lasting impact on behavior. As Brian Nosek, a University of Virginia psychology professor and cofounder of a nonprofit organization promoting awareness of implicit bias, observed, “I have been studying this since 1996, and I still have implicit bias. . . .

\begin{itemize}
\item \textsuperscript{131} Richardson, supra note 105, at 83 (“They will be stopped and frisked more often than similarly situated Whites, not because they are acting more suspiciously, but because implicit biases will impact how police interpret their ambiguous behaviors.”).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Holroyd, supra note 116.
\item \textsuperscript{134} Mak, supra note 103.
\item \textsuperscript{135} Id.
\item \textsuperscript{137} Mak, supra note 103.
\end{itemize}
We can be sure that training by itself is not going to get rid of implicit bias.”

Perhaps most damning was the response of Anthony Greenwald, one of the creators of the Implicit Association Test that helps researchers and individuals identify implicit bias. When asked to comment on Starbucks’s training, Greenwald stated:

Starbucks would be wise to check out the scientific evidence on implicit bias training. . . . [T]his training has not been shown to be effective, and it can even be counterproductive. It will appear that Starbucks is doing the right thing, but the training is not likely to change anything. The Implicit Association Test is a valuable educational device to allow people to discover their own implicit biases. However, taking the IAT to discover one’s own implicit biases does nothing to remove or reduce those implicit biases. Desire to act free of implicit bias is not sufficient to enable action free of implicit bias.

A wide-ranging study of 800 U.S. corporations that had implemented mandatory racial bias training “ultimately found that the positive effects of diversity training often don’t last beyond two days, and may actually entrench biases due to backlash.” According to one of the study’s authors, “The studies that look out six months to a year tend to be equally likely to show increased bias after the training as they are to show decreased bias.”

The limits of these retraining efforts are understandable given the inherently automatic nature of implicit bias. “[B]rain scans reveal that the amygdala, a section of the brain associated with fear, responds more when people view Black male faces as opposed to White male faces.” This kind of hard wiring can be almost impossible to undo, particularly when that wiring has been reinforced by centuries of explicit racial bias.

But even if these institutional retraining programs worked, they would solve only one side of the implicit bias equation. The negative treatment people of color receive often causes them to implicitly respond in kind, creating a “self-fulfilling prophecy or behavioral

138. Id.
139. Herzog, supra note 21.
140. Mak, supra note 103; see Frank Dobbin & Alexandra Kalev, Why Diversity Programs Fail, HARV. BUS. REV., July-Aug. 2016, at 52.
142. Richardson, supra note 105, at 76.
confirmation effect." Even when not directly confronted with a bias-motivated police officer, people of color may automatically respond with apprehension, aggression, or hostility—precisely the types of behaviors officers are trained to view with suspicion. No amount of institutionalized police department training can similarly "retrain" the inherent distrust and fear people of color feel and exhibit when confronted by law enforcement.

Institutionalized racial bias trainings also do not alter the unconscious behaviors of the bias-motivated civilians who call police in the first place, at least in most situations. While Starbucks presumably sought to train its employees not to call the police on patrons for "living while black," the typical civilian does not have the benefit of institutionally mandated sensitivity training before calling 911 to report a suspicious person for sleeping while black, selling lemonade or water while black, or eating a sandwich while black.

The pervasiveness and permanence of racial fear, the limited efficacy of retraining programs in reducing racial fear, and the inability of these programs to address the fear of civilian bystanders all suggest that little can be done to reduce or eliminate racial bias from police interactions. Thus, this Article suggests that the focus should shift away from trying to change only the quality of police interactions with persons of color and toward limiting the quantity of such interactions, at least when no clearly articulable reason exists for the interaction. The balance of the Article explores this suggestion.

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143. Id. at 80.
144. See Richardson, supra note 110, at 2052 ("This behavioral confirmation effect 'provide[s] a powerful mechanism by which stereotypes and prejudicial behavior are maintained, propagated and justified' since 'the perceiver interprets the target's behavior in line with the expectancy and encodes yet another instance of stereotype-consistent behavior.'" (alteration in original) (quoting Mark Chen & John A. Bargh, Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 542 (1997))).
145. See Wootson, supra note 88.
IV. CIVILIAN LICENSE TO WEAPONIZE RACIAL FEAR

The previous subparts highlighted the history and permanency of irrational racial fear in modern American society and the consistency with which this fear permeates the criminal justice system to the detriment of people of color. Within that context, one might expect states to make every effort to deter civilians from weaponizing these fears through frivolous, bias-motivated accusations of criminality to law enforcement.

That is not the case. In fact, in many ways the opposite is true. This Part highlights the dual problems of nonemergency calls overwhelming 911 call centers and dispatchers’ lack of discretion in responding to these calls. It then zeroes in on the unique problem of police response to racially fearful, frivolous 911 calls, starting with an illustrative snapshot of racially motivated 911 calls over a thirty-day period in 2018. This Part then discusses the devastating impacts of such calls on communities of color, including reinforcing community distrust, promoting over-enforcement and under-enforcement of communities of color, perpetuating disproportionate mass incarceration of black men through mandatory “warrant checks,” and providing continued opportunities for unnecessary physical degradation of black bodies by police officers.

A. Misuse and Abuse of Emergency Response Systems

Drawing from records maintained by separate regional call centers, the National Emergency Number Association (NENA) estimates that approximately 240 million 911 calls are placed nationally each year.\textsuperscript{148} While no national statistics exist, dispatch centers around the country report that an overwhelming number of these calls are frivolous.\textsuperscript{149} The majority of these calls are either purely unintentional dials or cases of honest but mistaken use of the system for nonemergencies.\textsuperscript{150}

Police agencies and organizations studying 911 usage distinguish between two types of inappropriate calls: unintentional and intentional.\textsuperscript{151} The former is labeled a “misuse” of the system, while

\begin{footnotesize}
\begin{enumerate}
\item[149.] Sampson, supra note 14.
\item[150.] Id.
\item[151.] Id.
\end{enumerate}
\end{footnotesize}
the latter is called an "abuse" of the system.\textsuperscript{152} Unintentional calls occur when a person or phone inadvertently dials 911, either through a phantom 911 call, 911 misdial, or 911 hang-up.\textsuperscript{153}

Intentional calls, or abuses of 911, generally fall into one of four categories: nonemergency calls, exaggerated emergency calls, lonely complaint calls, and prank calls.\textsuperscript{154} Racially fearful complaints about criminal behavior fall in either the nonemergency or exaggerated emergency category, depending on the circumstances. Regionally, several of the nation's largest and most overworked law enforcement jurisdictions report that as many as half, sometimes well over that amount, of all intentional 911 calls are for "nonemergencies."\textsuperscript{155}

For example, one study found that "[m]ore than half of the calls to the San Diego County Sheriff's Department's 911 line are frivolous ones that tie up phone lines and keep the department from handling life-threatening emergencies."\textsuperscript{156} These frivolous calls ranged from questions about the weather at Disneyland to reports of broken toilets.\textsuperscript{157} In Sacramento, officials estimate that, year over year, as many as eighty percent of all 911 calls are frivolous.\textsuperscript{158} Florida dispatchers have expressed similar frustration, with Palm Beach County dispatchers handling as many as 400,000 "nonemergency" calls per year, and the Broward Sheriff's Department estimating that half of its 2.5 million annual calls are frivolous.\textsuperscript{159}

Occasionally, particularly humorous or egregious 911 call transcripts make national news, such as when a Texas man called 911 to order a cab, a Florida man called 911 to complain that a Subway

\textsuperscript{152.} Id.
\textsuperscript{153.} Id. Many 911 misdials take place in locations with area codes starting with "9-1-.", Hang-ups are more difficult to quantify as their own category, as dispatchers assume that many hang-ups begin as misdials once the caller recognizes their mistake. Id.
\textsuperscript{154.} Id.
\textsuperscript{155.} See, e.g., M. Alex Johnson, \textit{911 Systems Choking on Non-Emergency Calls}, NBC News (Aug. 5, 2008), http://www.nbcnews.com/id/26040857/ns/us_news-crime_and_courts/t/systems-choking-non-emergency-calls/ (reporting that forty-five percent of 911 calls across California were frivolous, as high as eighty percent in Sacramento); Kenneth Ma, \textit{Frivolous 911 Calls Drain Sheriff's Resources}, SAN DIEGO UNION TRIB. (Feb. 19, 2001), https://www.sandiegouniontribune.com/sdut-frivolous-911-calls-drain-sheriffs-resources-2001feb19-story.html (reporting that about sixty-five percent of the calls to the San Diego County Sheriff's Department's 911 line were frivolous and that only twenty percent reported real emergencies).
\textsuperscript{156.} Ma, \textit{supra} note 155, at 124.
\textsuperscript{157.} Id.
\textsuperscript{158.} Johnson, \textit{supra} note 155.
sandwich artist failed to put mayonnaise on his sandwich, or a Tennessee man called to complain that his stepfather wanted him to do the laundry. But system administrators warn that "911 systems are being choked with clueless, frivolous, even prank, calls." A Knox County, Tennessee, 911 dispatcher put it plainly: "You've got a true emergency with somebody out there—that there's a shooting or something—then those officers are not able to respond to that emergency call, because they're taking care" of 911 abusers.

B. Police and Dispatcher Response to Frivolous 911 Calls

When police departments first began developing 911 emergency call systems in the 1970s, they were lauded for taking a "professional" approach to "reduce[ing] response time to the absolute minimum" when a civilian needed help. But as early as 1990, officers were complaining about the 'tyranny' of 911," referring to the sheer amount of time police spent responding to an endless stream of calls. One of the great benefits of having a number the public could easily remember in an emergency also became a significant hindrance as frivolous calls flooded the lines. But rather than exercise discretion by ignoring calls, officers are often judged by the speed with which they respond to a call "rather than how much good they do for victims or for crime control." In the three decades since 911 misuse and abuse first became a problem, many departments around the country have adopted innovative approaches to make police responses more efficient. "[S]ome cities have adopted 311, a non-emergency, easy-to-remember number for police assistance and other public services." Miami, Florida, utilizes public service aides—uniformed but unarmed quasi-mediators dispatched to handle certain 911 calls that appear to be

160. Johnson, supra note 155.
161. Id.
162. Id.
164. Id. Officers also lamented the "reactive posture" the system put them in. "Only rarely can the police respond quickly enough to stop a crime in progress. Instead, the 911 system forces police into a reactive posture, rolling in after a crime occurs to take information that might or might not lead to an arrest." Id.
165. Police Take Different Approaches to 'The Tyranny of 911,' supra note 15.
166. Anderson, supra note 163.
167. Police Take Different Approaches to 'The Tyranny of 911,' supra note 15.
nonemergencies. But the vast majority of police departments around the country still broadly require a uniformed, armed police officer to respond to any 911 call describing a purported criminal "event" in progress, no matter how clearly lawful the event sounds.

Before the 911 call is routed to an officer, there exists a surprising lack of discretion for the dispatcher who first receives the call. The dispatcher quoted in the beginning of this Article who handled the call regarding an African-American woman with a shopping cart explained that, in her seventeen years of experience, all calls had to be routed to officers. Her experience mirrors that of virtually all 911 call centers in the country. 

While no discretion exists in deciding whether to dispatch an officer at all, dispatchers have significant discretion in how they "code" calls. Many dispatch centers utilize a priority system, with "Priority 1" calls reserved for clear, imminent threats to life and property, and "Priority 2" and "Priority 3" designations used for less serious threats. But this priority system still requires dispatchers to route all calls—even "Priority 3" calls—to officers for response. In many cases, such as in a major metropolitan area with an overworked police force, officers may not have an opportunity to respond to "Priority 3" calls simply given the scarcity of law enforcement resources. But nothing prevents an idle—or worse, biased—officer from responding to a lower priority call. And in many cases, they do. In fact, the now-infamous 911 call reporting an African-American family for barbecuing in a park in Oakland was initially coded as a

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168. Id.
169. See, e.g., id. (discussing the effect of an overload of 911 calls on police response).
170. See Herron, supra note 1.
171. See, e.g., Police Take Different Approaches to 'The Tyranny of 911,' supra note 15.
172. See id.
173. See Herron, supra note 1 ("[A] Priority 3 call ... essentially means 'not important' . . . ."). Different dispatch systems utilize different priority levels and codes. Shawn Messinger et al., The Distribution of Emergency Police Dispatch Call Incident Types and Priority Levels Within the Police Priority Dispatch System, 1 ANNALS EMERGENCY DISPATCH & RESPONSE, no. 2, 2013, at 14-17 (analyzing nationwide data regarding how calls are coded and routed).
174. See, e.g., Ed Gilgor, Is Your 911 Call a Priority?, GRANT PARK NEIGHBORHOOD ASS'N, http://grantpark.org/info/16029 (last visited Jan. 30, 2019) (describing four priority levels for which an officer could be dispatched in Atlanta, Georgia, including nonemergency "routine" calls).
175. See id.
"Priority 3" call to which multiple armed officers nevertheless responded.\footnote{176 See sources cited supra notes 1-2.}

C. \textit{911 Calls for "Living While Black"}

The automatic response of dispatchers and police officers to millions of nonemergency calls each year highlights the woefully inefficient allocation of resources plaguing police departments and emergency response organizations across the country. But when civilians make nonemergency frivolous calls for racially motivated reasons, the consequences extend far beyond overtaxing an overworked system.

In recent years, Americans have paid increased attention to "how police too often respond to black people who haven't committed a crime: as if they were a deadly threat."\footnote{177 Patton \& Farley, supra note 4.} But focusing only on the police response to suspected criminal activity and not the civilians who generated the suspicion in the first place, "lets everyone else involved in these incidents off the hook."\footnote{178 Jason Johnson, \textit{From Starbucks to Hashtags: We Need to Talk About Why White Americans Call the Police on Black People}, ROOT (Apr. 16, 2018), https://www.theroot.com/from-starsbucks-to-hashtags-we-need-to-talk-about-why-w-1825284087/amp?_twitter_impression=true; Patton \& Farley, supra note 4 ("[M]ost of the time, there is no consequence for the people who weaponize their fear and use the police as an extension of their whiteness."); see also Johnson, supra note 178 ("[C]alling the police on black people for noncrimes is a step away from asking for a tax-funded beatdown, if not an execution.").} In many ways, "calling the police is the epitome of escalation."\footnote{179 Johnson, supra note 178.} African-American scholars and commentators argue that white callers summoning armed officers against innocent black behavior is more than frivolous: "[T]hese callers aren't expecting cops to treat black folks politely, but instead to remind them that the consequences for making white people angry or uncomfortable could be harassment, unfair prosecution or death."\footnote{180 Patton \& Farley, supra note 4 (stressing that calling 911 on black people for innocent conduct is "the continuation of a racist American tradition with deep historical roots: Private citizens and police using feckless interpretations of the law to convert blackness into criminal trespass"); see also Johnson, supra note 178 ("[C]alling the police on black people for noncrimes is a step away from asking for a tax-funded beatdown, if not an execution.").}

The following subparts provide an illustrative snapshot of this weaponized racial fear and consider the immediate and devastating long-term consequences of frivolous, race-based 911 calls.
1. A Thirty-Day Snapshot of Racial Fear: April-May 2018

In a one-month period from approximately mid-April to mid-May 2018, national media saturated airwaves with news coverage of Caucasians calling 911 to report “suspicious activity” by African Americans that could only be reasonably characterized as innocent behavior. Civilians called police to investigate black Americans for sitting quietly in a Starbucks, barbecuing in a park, playing golf “too slow,” working out at a gym, moving into a new apartment, flying on a plane, shopping for a prom outfit, buying a money order to pay rent, checking out of an AirBnB rental, and taking a nap in the common area of a college dormitory.

The response by dispatchers and police to these frivolous calls varied in each circumstance, but in one very important respect the response was the same—the dispatchers notified police and armed police officers personally investigated—no matter how patently frivolous the call or wasteful the use of scarce law enforcement resources. The following narratives illustrate the consistency with which such frivolous calls are made and the uniformity with which officers respond to these bias-motivated calls.

181. See Siegel, supra note 99.
182. See Mezzofiore, supra note 92.
184. See Siegel, supra note 98.
187. See Siegel, supra note 87.
189. See Victor, supra note 94.
190. See Wootson, supra note 88.
191. Most media coverage of the events described in this section used a similar “‘While Black’ headline to catch readers’ attention and summarize the absurdity of the encounter, such as “Sitting in Starbucks While Black,” “Flying While Black,” or “#AirBnBWhileBlack.” I have chosen instead to use the names of the individuals targeted by
a. Rashon Nelson and Donte Robinson

On April 12, 2018, at approximately 4:35 p.m., Rashon Nelson and Donte Robinson walked into a Philadelphia Starbucks and Nelson asked to use the restroom. When the store manager stated that restrooms were for paying customers only, the two men settled down at a table to wait for a scheduled 4:45 p.m. business meeting. At 4:37 p.m., approximately two minutes after the men entered the store, the white store manager called 911 and reported the men for “refusing to make a purchase or leave.” Four minutes later, multiple police officers arrived on scene, handcuffed Nelson and Robinson, and took them outside to their squad car.

b. Tshyrad Oates

On April 15, 2018, Tshyrad Oates and a friend—both black men—were working out at an L.A. Fitness gym in Seacaucus, New Jersey, when they were mistakenly accused of not paying for access. Although the white employee making the accusation had checked the men in under valid membership and guest passes less than thirty minutes earlier, she loudly confronted the men in front of other patrons and threatened to call the police if they did not leave immediately. Ten minutes later, the store’s manager told Oates that he was banned from the gym and that his friend’s membership had been terminated. By this point, five uniformed police officers arrived, having responded to a 911 call about two men who “were refusing to leave due to them not showing their membership cards.” The two men left voluntarily without being arrested, but not before shooting a video of the busy gym.

the racially motivated calls, in part to illustrate that most people do not know or remember the names of the people involved in these high-profile incidents because, fortunately, the incidents did not end in tragedy. But in a different context, with a different first responder, any one of these individuals could have tragically joined the long list of more well-known targets of racial fear, including Michael Brown, Eric Garner, Tamir Rice, Sandra Bland, Freddie Gray, Philando Castile, Stephon Clark, and Alton Sterling.


193. Id.

194. Id.

195. Id.

196. See Siegel, supra note 98.

197. Id.

198. Id.

199. Id.
showing that they were the only African-American patrons in the facility at the time.  

  c. Sandra Thompson  

On April 21, 2018, Sandra Thompson, president of the York County, Pennsylvania, National Association for the Advancement of Colored People (NAACP) and four of her African-American friends were playing golf at a club in Dover Township, Pennsylvania, a mostly white suburb. After playing only one hole, a white advisor to the club reprimanded the women for playing too slowly and threatened to cancel their memberships if they did not leave “our” premises. When the women ignored the demand and continued playing, a co-owner of the golf course sarcastically congratulated the women as “real winners” and advised them that police were on the way. Multiple officers arrived and quickly determined that there was “no need for [police] to be there.”

  d. Kenzie Smith  

On April 29, 2018, a group of African-American friends set up a charcoal grill for a Sunday barbecue in a common “BBQ zone” in Oakland, California’s Lake Merritt Park. A white woman in the park called 911 to report that someone was illegally using a charcoal grill and requested that the situation be dealt with immediately. One of the women at the gathering recorded the encounter, during which the white woman can be heard accusing the group of trespassing in a public park and threatening that they would all be going to jail. When police

200. Id.  
201. See Siegel, supra note 183.  
202. Id.  
204. See Siegel, supra note 183 (quoting Northern York County Regional Police Chief Mark Bentzel).  
205. See Mezzofiore, supra note 92.  
206. Id.  
arrived, they took down a police report but made no arrests and allowed the barbecue to continue.\textsuperscript{208}

e. Kelly Fyffe-Marshall, Komi-Oluwa Olafimihan, and Donisha Prendergast

On April 30, 2018, at approximately 12:30 p.m., three African-American friends were checking out of an AirBnB rental in Rialto, California, when an elderly white neighbor called police because she didn’t recognize the vehicle or the people and saw them loading a car with suitcases.\textsuperscript{209} The police department responded to a potential in-progress residential burglary by dispatching seven police cars and a helicopter.\textsuperscript{210} Police arrived almost immediately and informed the three friends that a helicopter was tracking them.\textsuperscript{211} According to Kelly Fyffe-Marshall, “They locked down the neighborhood and had us standing in the street.”\textsuperscript{212} Fyffe-Marshall, a filmmaker, began recording the incident, which showed a swarm of police vehicles in a sleepy suburban neighborhood surrounding the three friends.\textsuperscript{213} A sergeant arrived and ordered the individuals’ detention after stating he had never heard of AirBnB but relented when other officers who were aware of the house-sharing company cleared up the confusion.\textsuperscript{214}

f. Mekhi Lee, Eric Rogers, and Dirone Taylor

On May 3, 2018, Mekhi Lee, Eric Rogers, and Dirone Taylor were shopping at a Nordstrom Rack near St. Louis, Missouri, “when they

\begin{footnotesize}
\textsuperscript{208} Id.

\textsuperscript{209} Black Filmmakers Swarmed by Police After Checking Out of Airbnb Say They Were Racially Profiled, CBS LA (May 7, 2018), https://losangeles.cbslocal.com/2018/05/07/black-filmmakers-swarmed-police-airbnb-racially-profiled/. The 911 caller later admitted that she called police when the black Airbnb guests did not smile or wave at her. See Victor, supra note 94.

\textsuperscript{210} Black Filmmakers Swarmed by Police After Checking Out of Airbnb Say They Were Racially Profiled, supra note 209.

\textsuperscript{211} Id.


\textsuperscript{213} Id.

\textsuperscript{214} Sam Levin, Airbnb: Police Helicopter Targets Black Guests After Neighbor Fears Burglars, GUARDIAN (May 7, 2018), https://www.theguardian.com/us-news/2018/may/07/airbnb-black-guests-california-police-helicopter. Fyffe-Marshall later posted about the incident, stating that at first they “joked about the misunderstanding,” but it escalated immediately. “We have been dealing with different emotions and you want to laugh about this but it’s not funny . . . . The trauma is real.” Victor, supra note 94 (quoting an Instagram post authored by Fyffe-Marshall following the event).
\end{footnotesize}
noticed store employees closely eyeing them and following them through the aisles. At one point, an elderly white patron referred to the teens as "a bunch of bums" and asked, "Would your parents and grandparents be proud of what you’re doing?" When the men reached the register to check out, they noticed the white store manager escort the elderly lady out of the store and overheard other white employees calling the police. When the men exited the store, they were greeted by police who said they had been alerted to three black men shoplifting. The officers quickly determined that no crime had been committed and left.

g. Lolade Siyonbola

On May 8, 2018, thirty-four-year-old African-American graduate student Lolade Siyonbola fell asleep in the common room of her Yale University dorm. A white student walked into the room, turned on the lights, and told her, “You’re not supposed to be sleeping here. I’m going to call the police.” Four officers arrived and interrogated Siyonbola, stating that they received a call reporting “somebody who appeared they weren’t... where they were supposed to be.” Siyonbola recorded the entire interrogation, which showed officers declining to question the white complainant standing by but demanding Siyonbola prove her enrollment even though she unlocked her dorm room right in front of them. The officers eventually relented after nearly twenty minutes. Siyonbola later told “Good Morning America” that she recorded and posted the video for her safety. “I have always said to myself since Sandra Bland was killed. I said to myself if I ever have an encounter with police I’ll film myself.”

215. See Siegel, supra note 87.
216. Id. (quoting St. Louis NAACP President Adolphus Pruitt’s account of the event).
217. Id.
218. Id.
219. Id.
220. See Wootson, supra note 88.
222. Id. (omission in original).
223. Id.
225. Id.
2. Lessons from the Thirty-Day Snapshot

In each of the incidents above, the 911 dispatcher either failed to or lacked the discretion to exercise independent judgment and decline to send armed police officers to respond to a clearly nonthreatening event.226 Similarly, in each incident the police let the callers use them to weaponize the callers' own biases without exercising adequate independent judgment and declining to confront innocent people of color without justification.227

This thirty-day snapshot is an illustrative, but by no means exhaustive, account of the nature and types of racial fears weaponized through emergency response systems. These examples help frame the context for discussing possible solutions to the problem, because they highlight several important variables that each merit scrutiny when fashioning a legal or policy remedy: (1) the precise (or vague) articulation of the fear by the caller; (2) the response of the dispatcher to the caller; (3) the communication of concern from the dispatcher to the officer; (4) the response of the officer to both the alleged suspect and, when present, the caller; (5) the response of the police department after the incident; and (6) the response of any relevant corporation or institution after the incident.

One further point merits mention here. This snapshot does not make the case that bias-motivated 911 calls are on the rise, as many have claimed.228 Although some preliminary evidence suggests a "surge" in these types of calls, the evidence to date is inconclusive.229 More likely, the ubiquity of high-definition cell phone video cameras, coupled with the viral nature of the videos when posted to social media, increases awareness of a long-existent trend.230 Indeed, recent research suggests that people are more likely to read, absorb, and deem stories that reinforce their own political beliefs as having "greater intrinsic news importance."231 Thus, those more sympathetic to racial justice causes or sensitive to police violence may be more likely to read and share stories of weaponized racial fear.

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226. See sources cited supra note 15 (discussing the lack of discretion 911 dispatchers have in sending officers to respond to all calls).
227. See Takei, supra note 30.
228. See Anderson, supra note 20.
229. See id.
230. Id.
231. Harold Pashler & Gail Heriot, Perceptions of Newsworthiness Are Contaminated by a Political Usefulness Bias, ROYAL SOC'Y OPEN SCI., Aug. 1, 2018, at 1.
But even if both suppositions are true—that the rate of racially fearful 911 calls has remained static and that preexisting attitudes about race and criminal justice affect how much attention one pays to the issue—neither diminishes the reality of racial fear nor the importance of confronting the problem. The discussion that follows explores the devastating and far-reaching consequences of weaponized racial fear.

D. The Impacts of Civilian Weaponization

1. Community Distrust

A growing number of political science researchers have demonstrated that an individual’s view of and trust in government are most significantly correlated to their direct experience with the government. For many, that experience comes at the hands of a police officer. When police officers enforce the racial biases of private citizens, they convert those biases into governmental discrimination, which undermines the legitimacy of law enforcement.

Research consistently shows that minorities are more likely than whites to view law enforcement with suspicion and distrust. This suspicion and distrust can heighten anxieties and increase the risk of an unnecessarily violent confrontation. More broadly, this distrust, which can erode the lawfulness and legitimacy of police officers, is exacerbated when officers respond in force to racially motivated 911 calls.


233. See Vesla Mae Weaver, Why White People Keep Calling the Cops on Black Americans, Vox (May 29, 2018), https://www.vox.com/first-person/2018/5/17/17362100/starbucks-racial-profiling-yale-airbnb-911 ("The gulf between how black America and white America experience the police is vast.").

234. See Richardson, supra note 105, at 80.

235. Id. ("For Black individuals, racial anxiety is experienced as the fear of being victimized by police racism. . . . These worries may result in Black individuals approaching police interactions with heightened suspicion and anxiety. During their interaction, these mutual anxieties increase the risk that officers will conduct a frisk and that force will be used unnecessarily.").

In fact, individuals in society obey the law only partially to avoid punishment. The largest factor affecting obedience is legitimacy:

(B)y increasing respect for the law as both fair and fairly applied, lawmakers can in fact increase voluntary compliance with the law.

... The more an individual regard[s] legal authorities as exercising legitimate authority, the more that individual [is] likely to obey the law. ... [T]he relationship between legitimacy and compliance is linear: as legitimacy increases, so does compliance.

Researchers have shown that the single largest determinant in how one views the legitimacy and authority of police is the qualitative and quantitative personal interactions one has with the police. “People tend to focus on how police treat them—the process and interactions—rather than the final outcome of those interactions. ... People who perceive that they receive 'procedural justice' are also likely to perceive the police as legitimate and trustworthy and [thus] are likely to comply in the future.”

These findings help explain why people of color tend to have greater distrust of police—they are far more likely to have involuntary interactions with police, and those interactions are more likely to be adversarial, disrespectful, and violent. Thus, when civilians call 911 and summon police for illegitimate reasons, alleged suspects are less likely to view the encounter as a legitimate exercise of police authority and less likely to engage in perfect compliance, which itself may unnecessarily escalate a police contact that should never have taken place. For people of color, who may already have distrustful perceptions of police legitimacy owing to past personal experiences or exposure to others’ stories of illegitimate policing, this reluctance to comply may be magnified.

With each unwarranted encounter between police and a person of color, the distrust of the affected individual grows. As recent events have shown, these negative encounters are more likely to be broadcast

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238. Capers, supra note 26, at 838-39 (footnotes omitted).
240. Id.
241. See discussion supra Part III.A.2.
to the world, indirectly shaping views on legitimacy and authority for the rest of the community.\textsuperscript{242}

2. Over-Enforcement and Under-Enforcement

Problems of over- and under-enforcement can help explain why white individuals may utilize 911 more frequently than black individuals to report nonemergencies. Police response to these calls also exacerbates these problems.

White people tend to experience law enforcement as helpful, cooperative, and responsive as compared to African Americans.\textsuperscript{243} A large study of white and black drivers pulled over by police showed that "even when whites have involuntary contact with police, they overwhelmingly experience the police as helpful, benevolent, fair, and efficient problem solvers."\textsuperscript{244} In contrast, "[n]onwhite people who try to enlist law enforcement for help are more likely than whites to themselves come under suspicion."\textsuperscript{245} Moreover, officers are more likely to view African Americans as defiant and uncooperative, and thus suspicious, for exercising constitutional rights such as asking questions, refusing consent to enter or search premises, or asking officers to leave.\textsuperscript{246} This "mismatch in experience [creates] powerful incentives for people of one racial group to call the police" and a "powerful disincentive for black people to call the police in almost any situation except when their lives depend on it."\textsuperscript{247}

\textsuperscript{242} See Perceptions of Treatment by Police, supra note 239 ("Frequent exposure to media reports of police abuse or corruption is a strong predictor of perceptions of misconduct and supports the belief that it is common. African-Americans who live in high-crime areas and who regularly hear others talk about police misconduct are especially likely to believe misconduct is common."); see also Tyler & Fagan, supra note 237, at 245-46 (2008) (showing the effects of personal experiences with the police on survey respondents' views of police legitimacy and performance, as well as how likely respondents would be to cooperate with the police in the future).


\textsuperscript{244} Weaver, supra note 233; see also Epp et al., supra note 243 (examining racial disparities in investigatory police stops).

\textsuperscript{245} Weaver, supra note 233.

\textsuperscript{246} See id.

\textsuperscript{247} Id. Moreover, recent studies have concluded that police take less seriously—and therefore under-police—calls from predominantly black and Hispanic communities. For example, a review of Chicago Police Department practices found that "the average time to arrival for calls to police in nonwhite neighborhoods was twice as long as in predominantly white neighborhoods." Id; Press Release, ACLU Ill., Newly-Released Data Shows City Continues to Deny Equitable Police Services to South and West Side Neighborhoods (Mar.
This critical imbalance leads to "over-enforcement," or excessive action against people of color under suspicion for no legitimate reason, and simultaneously to "under-enforcement," or inadequate action in communities of color that need police protection. Data on over-enforcement against communities of color is overwhelming. For example, a report by retired federal and state judges studying policing in San Francisco found significant "racial disparities regarding [San Francisco Police Department] stops, searches, and arrests, particularly for Black people."248 In Chicago, a 2016 Police Accountability Task Force report found that "black and Hispanic drivers were searched approximately four times as often as white drivers."249 Similarly, a 2015 analysis by the New York Times found that in Greensboro, North Carolina, police officers "used their discretion to search black drivers... more than twice as often as white motorists."250

But in each of these studies, the data showed that black individuals who were searched were far less likely to have contraband than white individuals who were searched.251 Thus, this data also suggests the "under-enforcement" of the law against white individuals engaged in criminal activity, who appear to escape detection and arrest more frequently than black individuals. In this sense and from an economic efficiency standpoint, over-enforcement against one community necessarily leads to under-enforcement against another, so long as the over-scrutinized community does not actually engage in criminal activity at greater rates. Studies routinely demonstrate that this is not


250. Sharon LaFraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html ("Officers were more likely to stop black drivers for no discernible reason. And they were more likely to use force if the driver was black, even when they did not encounter physical resistance.").

251. See S.F. DIST. ATTORNEY, supra note 248, at 30-31; POLICE ACCOUNTABILITY TASK FORCE, supra note 249, at 9 (showing that contraband was found on white drivers twice as often as black and Hispanic drivers); LaFraniere & Lehren, supra note 250 (remarking that drugs and weapons were found "significantly more often when the driver was white").
the case.\textsuperscript{252} Rather than communities of color committing crimes at
greater rates, the crime in those areas are simply detected at greater
rates because of over-enforcement.\textsuperscript{253} By extension, the crimes
committed in white areas or by white motorists are detected at lower
rates because of an inefficient allocation of resources to communities
and motorists of color.\textsuperscript{254}

3. Incarceration

Disproportionate incarceration rates for communities of color are
an obvious and well-documented consequence of over-policing.\textsuperscript{255} But
responding to frivolous 911 calls also contributes to disproportionate
incarceration rates in two specific ways: disproportionate arrest rates
resulting from civilian “noncompliance” and from mandatory “warrant
checks.”

Intuitively, one might conclude that a truly frivolous civilian
complaint would not lead to an arrest or conviction because no crime
actually occurred. But as discussed in the previous subpart, police
officers are more likely to interpret a black individual’s lawful
behavior—even constitutionally protected behavior—as hostile,
adversarial, or violent.\textsuperscript{256} Thus, not only are African Americans less
likely to comply when confronted by a police officer responding to a
frivolous 911 call, but that officer is more likely to interpret the lawful
behavior as illegal and make an unnecessary arrest.

Second, many police departments require that any officer
responding to a 911 call conduct a “warrant check” of all individuals at
the scene. These “warrant checks” are designed to find individuals
with outstanding arrest warrants for, among other things, failure to pay

\textsuperscript{252} Kim Farbota, \textit{Black Crime Rates: What Happens When Numbers Aren’t Neutral},
8078586.html (Sept. 2, 2016) (summarizing research confirming that no statistical difference
exists in actually committed crime rates between whites and blacks but that blacks are
significantly more likely to be monitored by police, arrested, convicted, and sentenced to
lengthy prison terms).

\textsuperscript{253} See id.

\textsuperscript{254} See id.

\textsuperscript{255} Id.

\textsuperscript{256} The study reviewing Ferguson Police Department practices, for example, found
that “[o]fficers expect and demand compliance even when they lack legal authority,” and “are
inclined to interpret the exercise of free-speech rights as unlawful disobedience, innocent
movements as physical threats, [and] indications of mental or physical illness as belligerence.”
CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE
traffic tickets or court fees and fines associated with prior cases.\textsuperscript{257} The existing disproportionate arrest and conviction rate of black men results in a disproportionate number of arrest warrants issued against these communities. Moreover, many of these communities have greater poverty rates and thus are disproportionately affected by warrants issued for failure to pay steep fees and fines.\textsuperscript{258} As one former police captain observed in discussing mandatory warrant checks, "Warrants are what happen when one community is policed at a rate that is greater than others, making it unusual in some parts of a city to find young black males who don't have warrants."\textsuperscript{259}

4. Physical Violence

Each racially motivated 911 call creates an additional opportunity for unwarranted police violence against a person of color. While the same can be said for every frivolous 911 call—and indeed, any police interaction—empirical evidence confirms that the risks to communities of color are substantially greater. In this sense, bias-motivated callers truly are weaponizing their fear by sending an armed officer to confront an innocent person of color, with a greater chance that the confrontation will end in violence.

Although no adequate federal database of fatal police shootings exists,\textsuperscript{260} a study from the University of California at Davis found that "the probability of being [black, unarmed, and shot by police] is about 3.49 times the probability of being [white, unarmed, and shot by police] on average."\textsuperscript{261}

\begin{itemize}
\item \textsuperscript{258} Id.
\item \textsuperscript{259} David C. Couper, \textit{Best Way to Respond to Foolish 911 Calls—Stop Sending Armed Cops}, USA TODAY (June 27, 2018), https://www.usatoday.com/story/opinion/policing/2018/06/27/911-calls-cops-policing-usa/732692002/; see also Atkinson, supra note 257, at 225-26 (noting that, in many jurisdictions where a majority of African Americans have outstanding warrants, "police ignore[ ] the reasonable suspicion requirement to run as many identifications as possible through the warrant system to identify 'offenders,' arrest them, and levy additional fines").
\end{itemize}
This disparity has no rational justification. An independent analysis of Washington Post data on police killings found that, "when factoring in threat level, black Americans who are fatally shot by police are no more likely to be posing an imminent lethal threat to the officers at the moment they are killed than white Americans fatally shot by police."262

Disproportionate violence is not limited to fatal shootings. A working paper by Harvard Professor Roland Fryer, Jr. found that police officers are more likely to use their hands, push a suspect into a wall or onto the ground, use handcuffs, draw weapons, point their weapon, and use pepper spray or a baton when interacting with black individuals.263 This study confirms findings by the Center for Policing Equity, which found that "African-Americans are far more likely than whites and other groups to be the victims of use of force by the police, even when racial disparities in crime are taken into account."264

This disproportionate use of force is particularly apparent with the use of restraints. A Stanford University study of police practices in Oakland, California, found that in a thirteen-month period, "2,890 African Americans [were] handcuffed but not arrested . . . while only 193 whites were cuffed. When Oakland officers pulled over a vehicle but didn't arrest anyone, 72 white people were handcuffed, while 1,466 African Americans were restrained."265


But perhaps no study illustrates the danger of allowing civilians to weaponize armed government agents for racially biased reasons than a 2007 University of Chicago study comparing the abilities of police officers and the general population to determine whether to shoot a target that flashed before them. The targets featured a mix of armed and unarmed black and white people. The researchers found that although the officers generally set higher criterion for the decision to shoot black targets than community members, the officers nevertheless manifested “robust racial bias in the speed with which they made shoot/don’t shoot decisions.”

Media reports of high-profile shootings of unarmed black boys and men preceded the increased attention to racially motivated 911 calls. The link between the two is unmistakable. Over half of all police contacts with “suspicious” individuals occur as a result of a civilian complaint, and many of the now-infamous police shootings of unarmed civilians were initiated by a nonemergency 911 call.

Consider the case of Stephon Clark. On the night of March 18, 2018, police in Sacramento were responding to a vague 911 call about someone breaking car windows when they spotted twenty-two-year-old Stephon Clark standing in his grandmother’s backyard holding a cell phone. Police approached Clark in the dark but did not announce that they were law enforcement. Instead, body camera footage showed officers shouting “show me your hands!” before firing dozens of bullets in rapid-fire succession at Clark less than twenty seconds after arriving. Clark, an African-American father of two with no criminal record, was unarmed. He had been shot twenty times.
The tragic case of Tamir Rice provides another poignant example. On November 22, 2014, officers responded to a 911 call reporting a person pointing a gun in a Cleveland, Ohio, park. While the call itself clearly was not frivolous, the caller expressly stated that the gun was "probably fake" and that the individual was likely a juvenile. However, the dispatcher did not relay either of these pieces of information to the responding officers. Police officers shot twelve-year-old Tamir Rice within two seconds of arriving on the scene. The officers neither approached Tamir nor provided him an opportunity to put his hands up. Officers waited four minutes before approaching Tamir to provide medical aid, at which point they confirmed the gun was a toy. Tamir died the next day.

V. STATE ACQUIESCENCE AND THE "WEAPON" OF RACIAL FEAR

This Part focuses on the "weapon" in the equation: the armed police officer. In particular, it challenges legislative and judicial efforts to immunize police officers from all but the most outrageous misconduct by finding virtually all uses of force by officers "objectively reasonable" and providing "qualified immunity" in the rare instance when the use of force is deemed excessive. This failure to provide any sort of check or deterrent mechanism against the use of force by armed, implicitly biased officers improperly strengthens the "weapon" in weaponized racial fear and further empowers bias-

276. Id.
277. Id.
278. Id.
motivated individuals to act on their biases. This Part concludes with a comparison of this near-absolute immunity for police officers and the immunity for civilian vigilantes provided by so-called “Stand Your Ground” laws in certain jurisdictions.

A. Protecting a “Shoot First, Think Later” Culture: Objective Reasonableness and Qualified Immunity

Police officers have long enjoyed “an immunity from scrutiny” for using unnecessary force in encounters with civilians. The law, as developed in state legislatures and federal courts, has affirmatively “encouraged such favoritism.” The doctrines of “objective reasonableness” and “qualified immunity” account for much of this protection from prosecution and liability. The law regarding use of force and qualified immunity has evolved over the last two decades to provide a near-blanket protection for even the most egregious, unwarranted, and racially charged police misconduct.

1. Use of Force and “Objective Reasonableness”

The Supreme Court first attempted to define a precise legal standard for excessive force in Tennessee v. Garner. In Garner, a police officer responding to a report of a prowler observed an African-American teenager named Edward Garner running across the backyard of a home that had just been burglarized. When Garner began climbing over the fence, the officer shot him in the back of the head, fearing that if Garner made it over the fence, he would elude capture. Garner was taken to a hospital where he died on the operating table.

The Supreme Court criticized the common law rule permitting an officer to use whatever force was necessary, including deadly force, to effectuate the arrest of a fleeing felon. Rejecting the common law

282. Id.
283. See Hassel, supra note 25, at 130 (highlighting the diminishing importance of questions of fact in excessive force cases given the power of the qualified immunity defense); see also Saucier v. Katz, 533 U.S. 194, 206 (2001) (finding that qualified immunity protects defendants when their actions fall on the “hazy border between excessive and acceptable force” (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000))).
285. Id. at 3.
286. Id. at 4.
287. Id.
288. Id. at 11.
rule, the Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."\textsuperscript{289} The Court explained that only where an officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others, is it constitutionally reasonable to prevent escape by using deadly force.\textsuperscript{290}

But only four years after deciding \textit{Garner}, the Court retreated from its embrace of clearly defined guidelines for police use of deadly force. In \textit{Graham},\textsuperscript{291} the Court instead held that whether an officer has unconstitutionally used excessive force would be judged by an "objective reasonableness" standard.\textsuperscript{292} This vague and imprecise standard is easily malleable and bends inexorably in favor of police officers over injured or killed civilians.

In \textit{Graham}, the Court held that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment" involves balancing an individual's Fourth Amendment rights with the government's interest.\textsuperscript{293} Acknowledging that this balancing test "is not capable of precise definition or mechanical application,"\textsuperscript{294} the Court explained that:

\begin{quote}
[It]s proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.\textsuperscript{295}
\end{quote}

The Court explained that in conducting reasonableness balancing, courts should apply an objective standard of reasonableness.\textsuperscript{296} The officer's actual intent or motive is irrelevant in this objective inquiry.\textsuperscript{297} This portion of the holding—that an objective standard would now govern police use of force cases—was a "breakthrough."\textsuperscript{298} Civil rights advocates believed that imposing an objective standard and absolving

\textsuperscript{289} Id.
\textsuperscript{290} Id. at 11-12.
\textsuperscript{291} 490 U.S. 386 (1989).
\textsuperscript{292} Id. at 388, 397 (emphasis added).
\textsuperscript{293} Id. at 396.
\textsuperscript{294} Id. (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 388.
\textsuperscript{297} Id. at 395.
the injured victim from having to prove malicious intent on the part of the officer would give greater protections to civilians against police abuses.299

But elsewhere in the opinion, the Court defined “reasonableness” in unmistakably deferential, officer-friendly terms:

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.300

Several aspects of the “objective reasonableness” test, as articulated in Graham and expanded by lower courts, pose problems for plaintiffs pursuing excessive force claims. First, if there is evidence that an officer was “forced to make [a] split-second judgement[,]” juries are allowed to only consider what a reasonable officer would have done in that “split-second,” even if there is earlier information that would make the use of force appear unreasonable.301 Rather than considering what a reasonable officer would do in general, taking into account all of the information the officer on the scene had prior to the use of force and the calculations a reasonable officer would have made with that information, courts and juries may focus on what a reasonable officer would have done in that “split-second.”302 This very narrow temporal scope defeats the majority of use of force claims.303

299. Id.

300. Graham, 490 U.S. at 396-97 (emphasis added). The Court also noted that an officer does not have to be correct in his assessment of the need to use force. “The Fourth Amendment is not violated merely because an officer was mistaken, as long as his mistake was reasonable.” Lee, supra note 281, at 645.

301. Graham, 490 U.S. at 396-97; see More Perfect: Mr. Graham and the Reasonable Man, supra note 298 (describing how this “split-second” view has led many juries to find that officers’ conduct was reasonable).

302. Graham, 490 U.S. at 396-97. Further, events taking place prior to the use of force may break the chain of causation and render prior unreasonable actions irrelevant. For example, in City of Los Angeles v. Mendez, the Court rejected the Ninth Circuit’s “provocation rule,” which permitted excessive force claims when an officer unreasonably provoked a violent confrontation, even though the use of force during the confrontation was reasonable. 137 S. Ct. 1539, 1546-47 (2017). The Court explained that whether the officers acted unreasonably by entering the premises without a warrant was irrelevant as long as the subsequent use of force was reasonable. Id. at 1545.

303. See More Perfect: Mr. Graham and the Reasonable Man, supra note 298 (explaining how police officers view the objective reasonableness standard, which was originally believed to be a “breakthrough” in the law, as their First Amendment right).
A second problem, related to this deference, is that officer testimony is routinely given greater inherent credibility by courts and juries than conflicting testimony from the plaintiff-victim.\textsuperscript{304} This deference is particularly problematic given recent studies confirming the widespread practice of police officers committing perjury by manufacturing circumstances to justify their behavior, or worse, hiding their own explicit racial motivations in using force. A commission studying the New York Police Department found that perjury was “so common in certain precincts that it has spawned its own word: ‘testilying.’”\textsuperscript{305} But “[d]espite the common knowledge that law enforcement perjury occurs, prosecutions are extremely rare.”\textsuperscript{306} Indeed, except in cases of lethal force or egregious displays of abuse, “law enforcement officers [continue to] engage in otherwise sanctionable and criminal behavior usually without fear of consequences.”\textsuperscript{307}

Third, implicit racial stereotypes can affect perceptions of whether an officer’s use of force was reasonable. As discussed above, African Americans are often associated with aggression, violence, and criminality.\textsuperscript{308} This reality offers two opportunities for racist stereotypes to adversely affect the “reasonableness” inquiry: first, when determining whether the officer was “reasonable” in acting on his perceptions, including the race of the individual; and second, when factfinders act on their own implicit racial biases in determining whether it would be “reasonable” to use force in a circumstance involving a particular racial minority.\textsuperscript{309}

While race cannot explicitly be considered a legitimate factor in the reasonableness analysis, implicit bias inevitably affects factfinding analyses. Researchers studying community members’ perceptions about the reasonableness of police use of force found that “cultural

\textsuperscript{304} See Capers, supra note 26, at 867-68; Hassel, supra note 25, at 125.

\textsuperscript{305} Capers, supra note 26, at 836 (quoting Milton Mollen et al., Comm’n to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep’t, City of N.Y., Commission Report 36 (1994)).

\textsuperscript{306} Id. at 837.

\textsuperscript{307} Kate Levine, How We Prosecute the Police, 104 Geo. L.J. 745, 763 n.103 (2016) (quoting Capers, supra note 26, at 837).

\textsuperscript{308} See discussion supra Part III.A.2.

values influenced the way individuals perceived the reasonableness of the officer’s actions."310 This fact alone suggested to the researchers that “it was inappropriate for a case involving questions regarding the reasonableness of an officer’s use of deadly force to be adjudicated on a motion for summary judgment as opposed to a jury trial.”311 But the vast majority of civil use of force trials end at summary judgment in favor of the officer and the majority of criminal excessive force cases end with a grand jury failing to indict.

2. Qualified Immunity

Even if a judge finds sufficient evidence that an officer used excessive force, a second layer of protection—qualified immunity—almost always shields officers from prosecution and liability. What first developed as a doctrine designed to balance the rights of individuals to be free from government abuse with the need to protect government actors from frivolous lawsuits “has metastasized into an almost absolute defense to all but the most outrageous conduct. The values of deterrence of unlawful behavior and compensation for civil rights victims have been overshadowed by the desire to protect government agents, particularly police officers, from almost all claims against them.”312

Qualified immunity initially was similar to the good faith defense available under common law, which included a subjective component.313 The Supreme Court eliminated the subjective element in *Harlow v. Fitzgerald,*314 holding that “government officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”315 The Court later clarified in *Ashcroft v. Al-Kidd*316 that qualified immunity shields federal and state officials from money damages unless the plaintiff can prove “(1) that the official violated a statutory or constitutional right,

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311. *Id* at 649-50 (citing Kahan et al., *supra* note 310, at 881).
313. See Pierson v. Ray, 386 U.S. 547, 555-56 (1967) (validating officers’ claims “that they should not be liable if they acted in good faith . . . in making an arrest” because the doctrine of qualified immunity includes “the defense of good faith”).
315. *Id.* at 818.
and (2) that the right was 'clearly established' at the time of the challenged conduct. 317

By design, qualified immunity provides a broad and generally successful defense to most civil rights claims. As the Court has explained, qualified immunity ensures that only "the plainly incompetent or those who knowingly violate the law" will be found liable for misconduct.318 Indeed, even when courts find that officers violated the "objective reasonableness" test under Graham by using excessive force, they still shield officers from liability if the officer reasonably believed that no "clearly established" right existed at the time.319 As one scholar observed in describing this two-layered level of officer protection:

When these two standards [objective reasonableness and qualified immunity] are both operating, a court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable.320

As a result of this multilayered system of protection for police abuse, "[q]ualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power."321

The Supreme Court reaffirmed this reality in the 2015 Mullenix v. Luna decision.322 In that case, Israel Leija, Jr., a twenty-four-year-old Latino male, led police on a high-speed chase after an officer approached his car and informed him that he was under arrest.323 Officer Mullenix joined the effort to catch Leija and suggested shooting at Leija's car to disable it, even though spike strips had already been

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317. Id. at 735 (quoting Harlow, 457 U.S. at 818); see also Hassel, supra note 25, at 123-24 ("The objective qualified immunity standard was seen to represent the proper balance between conflicting interests: the interest in providing compensation for, and deterring unconstitutional conduct against the need to protect against frivolous lawsuits and to encourage vigorous enforcement of the law.").


319. Hassel, supra note 25, at 119.

320. Id. at 125.

321. Id. at 124; see also Nicholas T. Davis & Philip B. Davis, Qualified Immunity and Excessive Force: A Greater or Lesser Role for Juries?, 47 N.M.L. Rev. 291, 291 (2017) ("In the past thirty-five years the largest roadblock in any viable civil rights case involving excessive force under the Fourth Amendment of the Constitution has been the doctrine of qualified immunity.").


323. Id. at 306.
placed on the road to disable the vehicle.\textsuperscript{324} Approximately three minutes after Officer Mullenix exited his vehicle, he spotted Leija’s vehicle and fired six shots at it.\textsuperscript{325} Four of the six shots hit Leija, killing him.\textsuperscript{326}

Leija’s estate sued Officer Mullenix and successfully defeated a motion for summary judgment, with the district court finding genuine issues of fact regarding whether the officer acted recklessly or objectively.\textsuperscript{327} The United States Court of Appeals for the Fifth Circuit went further, concluding that Mullenix acted objectively unreasonably because “there was no threat to innocent bystanders . . . and the officer did not make a split-second decision to shoot.”\textsuperscript{328} The court continued that, on these facts, qualified immunity could not protect the officer.\textsuperscript{329}

The Supreme Court reversed.\textsuperscript{330} Without deciding whether Officer Mullenix acted unreasonably in violation of the Fourth Amendment, the Court found that it could not conclude that Mullenix violated clearly established law.\textsuperscript{331}

Justice Sotomayor, the sole Justice to dissent from the Court’s ruling, blamed the Court for supporting a “shoot first, think later” culture of policing.\textsuperscript{332} She noted that when Officer Mullenix confronted his supervisor after the shooting, his first words were “How’s that for proactive?”—referencing an earlier counseling session in which his supervisor had suggested Mullenix was not enterprising enough.\textsuperscript{333} Justice Sotomayor continued:

[The comment seems to me revealing of the culture this Court’s decision supports when it calls it reasonable . . . to use deadly force for no discernible gain and over a supervisor’s express order to “stand by.” By

\textsuperscript{324} Id. Officer Mullenix asked the dispatcher to inform his supervisor of his plan and to ask the supervisor if he thought Mullenix should shoot at Leija’s car. Leija’s estate claimed that Officer Mullenix heard his supervisor telling him to stand by and wait to see if the spike strips set in place by the other officers would disable Leija’s vehicle when it reached a particular overpass. \textit{Id.} at 306-07.
\textsuperscript{325} Id. at 307.
\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} \textit{Lee, supra} note 281, at 651.
\textsuperscript{329} \textit{Mullinex}, 136 S. Ct. at 308.
\textsuperscript{330} Id.
\textsuperscript{331} Id. at 309-11 (discussing the “hazy legal backdrop” behind the excessive force claim but declining to resolve the Fourth Amendment issue because of the existence of a viable qualified immunity claim).
\textsuperscript{332} Id. at 316 (Sotomayor, J., dissenting).
\textsuperscript{333} Id.
sanctioning a “shoot first, think later” approach to policing, the Court renders the protections of the Fourth Amendment hollow.\textsuperscript{334}

In 2017, dissenting from a denial of certiorari in another officer shooting case dismissed at summary judgment on the basis of qualified immunity,\textsuperscript{335} Justice Sotomayor highlighted the factual inconsistencies in the record and described the Court’s continued willingness to prioritize an officer’s right to use force over the right to be free from unnecessary police violence:

[This decision] continues a disturbing trend regarding the use of this Court’s resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on “society as a whole,” than does the erroneous denial of summary judgment in such cases.\textsuperscript{336}

Justice Sotomayor’s dissent puts a fine point on the Court’s role in protecting and sanctioning police violence. Given the current state of the law, the “weapon” in weaponized racial fear—the armed police officer—operates with virtual impunity.

\textbf{B. Protecting Civilian Vigilantism: Stand Your Ground Laws}

No trend better encapsulates the state’s increasing acquiescence to civilian weaponization of racial fear than so-called “Stand Your Ground” laws. These laws remove any duty to retreat when a person feels threatened and permit the use of deadly force in public if the person reasonably believes it is necessary to prevent imminent death or great bodily harm.\textsuperscript{337} Numerous studies show that the enforcement of Stand Your Ground laws has a markedly disproportionate impact on communities of color,\textsuperscript{338} and many legal scholars have criticized them and called for their repeal.\textsuperscript{339} While Stand Your Ground laws are not

\textsuperscript{334} Id.
\textsuperscript{335} Salazar-Limon v. City of Hous., 137 S. Ct. 1277 (2017).
\textsuperscript{336} Id. at 1282-83 (Sotomayor, J., dissenting) (citations omitted) (quoting City of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).
\textsuperscript{337} See Aya Gruber, Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground, 68 U. MIAMI L. REV. 961, 962 (2014).
\textsuperscript{339} See, e.g., Gruber, supra note 337; see also Elizabeth Megale, A Call for Change: A Contextual-Configurative Analysis of Florida’s “Stand Your Ground” Laws, 68 U. MIAMI
the focus of this Article, no discussion of weaponized racial fear would be complete without a brief consideration of the state’s protection for bias-motivated civilian vigilantes who commit homicides deemed “justified” by the statutes.

1. The Disproportionate Racial Impact of Stand Your Ground

Stand Your Ground laws fly in the face of the traditional self-defense doctrine, posing a serious threat to public safety “by encouraging armed vigilantism.” Under traditional self-defense law, a person can use force to defend themselves anywhere, but when they are outside their home they cannot use force likely to kill or seriously injure someone if there is a safe way to avoid doing so. This traditional law respects both a person’s right to self-defense and the sanctity of human life by requiring someone to avoid taking a life if a clear and safe alternative exists.

The centuries-old exception to this rule—the castle doctrine—allows a person inside their home to defend themselves with force even if they could have safely walked away. Stand Your Ground laws radically upend both the duty to retreat and the castle doctrine by allowing people to shoot to kill in public even if a clear and safe alternative exists. At least thirty-three jurisdictions have some version of Stand Your Ground, either through legislative enactment or judicial order.


343. Catherine L. Carpenter, Of the Enemy Within, the Castle Doctrine, and Self-Defense, 86 Marq. L. Rev. 653, 667 (2003) (“In the case of defense of habitation, the Castle Doctrine allows the resident to stand ground and use deadly force against the intruder to protect the sanctity of the home from the attempted atrocious felony because the duty to retreat would be incompatible with the goal of preventing the commission of the felony.”).

344. “Stand Your Ground” Laws, supra note 342.
It is indisputable that these laws “are associated with higher rates of homicides.” A 2012 study by researchers at Texas A&M University found that Stand Your Ground jurisdictions saw a significant increase in homicide rates, with an average of more than 600 additional homicides per year. In Florida, homicides determined to be “justified” tripled in the years following passage of its Stand Your Ground statute.

Moreover, Stand Your Ground laws have a clear disproportionate impact on communities of color. In advocating for the repeal of Stand Your Ground laws, the advocacy group Everytown for Gun Safety noted that “[w]hen white shooters kill black victims, the resulting homicides are deemed justifiable 11 times more frequently than when the shooter is Black and the victim is white.” Therefore, the death of a minority individual in a Stand Your Ground case is less than “half as likely to result in a conviction, compared to cases with white victims.” Similarly the American Bar Association has highlighted that Stand Your Ground laws exacerbate existing racial tensions and “perpetuate a foolish bravado of those who feel a bold security when they have a gun in their hand, and it exonerates an arrogance and/or ignorance.”

Researchers have also shown that implicit bias and cultural misperceptions of racial minorities as “more violent” or “more aggressive” exacerbate the disproportionate impact of Stand Your Ground laws. Many scholars have noted the importance of race and racial stereotypes as public policy considerations when considering whether to repeal Stand Your Ground laws, explaining that cross-racial and cross-cultural fears and perceptions can unfairly impact the reasonableness prong in a justifiable homicide analysis.

345. AM. BAR ASS’N, supra note 338, at 11-12. Many of the Stand Your Ground laws are form legislation drafted by the American Exchange Council (ALEC) and the National Rifle Association. Megale, supra note 339, at 1079-84.
347. See id. at 13.
348. Id. at 24-26.
349. The Inherent Danger of Stand Your Ground Laws, supra note 340.
350. Id.
351. AM. BAR ASS’N, supra note 338, at 24 (quoting Rev. Leonard Leach, Mt Hebron Missionary Baptist Church).
352. Id.
353. See id. (“[M]inority communities are deathly afraid that Stand Your Ground law sits side-by-side with racial profiling; the ticket to vigilante justice.” (quoting Ed Shohat, a criminal defense attorney and member of the Miami-Dade County Community Relations Board)); sources cited supra notes 341-344.
2. Misplaced Burdens of Proof

A disturbing expansion of protection for vigilantes under Stand Your Ground laws highlights the willful blindness of state legislatures to weaponized racial fear. This most recent expansion comes in the form of shifting burdens of proof. While self-defense traditionally has been viewed as an affirmative defense to be raised by a criminal defendant in a homicide case, Florida and other states have recently amended their Stand Your Ground laws to shift the burden of proof onto prosecutors to demonstrate in pretrial hearings that a killing was not justified under a Stand Your Ground law. Even more troubling, some jurisdictions have affirmatively removed discretion from police officers responding to a Stand Your Ground homicide, preventing by statute the ability of law enforcement to even arrest killers if it appears possible that the killing was justified under Stand Your Ground laws.

A recent case from Florida illustrates the perverse effect of these shifting burdens. On July 19, 2018, Britany Jacobs pulled into the handicapped parking spot at a convenience store in Clearwater, Florida, while her boyfriend, Markeis McGlockton, and their five-year-old son went inside to buy some snacks. Jacobs stayed in the car. Jacobs, McGlockton, and their child were all African Americans. After McGlockton went inside, Michael Drejka approached the car and began lecturing Jacobs about parking in a handicapped space without the required decal. When McGlockton came out of the store and saw Drejka harassing his girlfriend, he shoved Drejka to the ground. Surveillance footage captured what happened next. Drejka, a

355. Jim Saunders, Florida Appeals Court Upholds 'Stand Your Ground' Changes, TALLAHASSEE DEMOCRAT (May 14, 2018), https://www.tallahassee.com/story/news/2018/05/14/stand-your-ground-law-florida-court-upholds-change-burden-proof/608046002/ ("Before the change was passed last year, the Florida Supreme Court had said defendants had the burden of proof in pre-trial hearings to show they should be shielded from prosecution.").
358. Id.
359. Id.
360. Id.
361. See id.
Caucasian male with a concealed carry permit, pulled out a handgun and shot and killed McGlockton as McGlockton was backing away.362

Sheriff Bob Gualtieri responded to the scene but made no arrest, claiming that Florida's Stand Your Ground amendments prevented him from doing so.363 After several weeks of investigation, prosecutors eventually arrested Drejka and charged him with manslaughter.364 At the time of writing, Drejka was awaiting a pretrial hearing before a judge, at which point another recent amendment to Florida's Stand Your Ground law will become critical: the affirmative requirement that prosecutors prove Drejka is not immune from prosecution under Stand Your Ground.365 Unlike the case of George Zimmerman in 2012, who had to raise self-defense as an affirmative defense at trial under Florida's then-existing Stand Your Ground statute,366 Florida's legislature in 2017 further insulated killers from prosecution by allowing a judge to dismiss the case before trial unless the prosecution proves by clear and convincing evidence that the immunity does not qualify: "In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution ...."367 This amendment contradicts well-settled criminal law doctrine that affirmative defenses are raised at trial before a jury. By placing the burden of proof by clear and convincing evidence on the prosecution prior to trial to rebut an affirmative defense, Florida has made an explicit decision to protect and shield civilian vigilantes despite the clear and unequivocal evidence that these laws provide protections for racially motivated killings and disproportionately impact communities of color. Similar legislation has been passed in other states.368

362. Id.

363. See id.


365. Id.


368. See, e.g., McNeely v. State, 422 P.3d 1272, 1281 (Okla. Crim. App. 2018) (“The Oklahoma Legislature amended the Stand Your Ground statute to make clear that it includes a right to immunity, distinguishing it from a traditional self-defense claim. On its face, ‘immunity’ means that there will be no further prosecution.”).
C. State-Sponsored Weaponization

The result of these changes to Stand Your Ground laws, when combined with the requirements and immunities described in Part V.B, is a perverse system of state-sponsored incentives that all but encourages weaponizing racial fear by biased civilians. In particular,

(1) Civilians are allowed to call 911 for frivolous, racially motivated reasons with virtual impunity.

(2) Police officers are required to respond to all 911 calls, even frivolous calls clearly motivated by race.

(3) When responding to these calls, police officers are authorized to use any amount of force and are immunized from discipline or prosecution if they use excessive force.

(4) Civilians are permitted to stand their ground and not walk away from confrontation, even if a clear and safe path of retreat exists and may kill other unarmed civilians if they feel threatened.

(5) When responding to these homicides, police officers are prevented from making arrests if the homicides even plausibly fit within this expanded definition of self-defense, regardless of whether facts indicate a clear racial motive.

(6) If an arrest is made, prosecutors must affirmatively prove in pretrial hearings that the killing was not justified by a Stand Your Ground law, rather than putting the onus on the defendant to raise the affirmative defense at trial.

When placed side by side, this complex web of requirements, immunizing doctrines, and burdens of proof facilitates the civilian weaponization of racial fear, all with the support of state legislatures and armed police officers. While each of the incentives, individually, may serve a different underlying policy purpose, they collectively point towards the protection of racially motivated civilians who summon the official criminal justice apparatus to reinforce their racial fear.

VI. A Balanced Approach to the Racial Fear Détente

Implicit racial bias is pervasive, permanent, and deadly. Attempts to remedy these biases are fundamentally flawed. The risk that these pernicious biases will lead to unnecessary use of force by officers responding to racially motivated 911 calls is significant. Thus, rather than attempting to improve the quality of police contacts with civilians, this Part offers a balanced approach to reducing the quantity of
unnecessary police interactions, primarily those initiated by frivolous 911 calls.

A. Existing Laws Regarding 911 Misuse and Abuse

Most jurisdictions impose some form of liability for frivolous misuse of the 911 system. Typically these statutes criminalize behavior such as dialing 911 to make a false report or nonemergency request, preventing another person from making a 911 call, or dialing 911 to relay a prerecorded message. But many of these jurisdictions only impose modest fines after multiple documented instances of abuse. Moreover, many states are unable to meaningfully implement the laws in place given the decentralized regional nature of 911 call centers, lack of information shared between dispatchers, and lack of knowledge regarding the identities of the callers themselves. These laws do little to deter frivolous conduct, as demonstrated by the high volume of abusive 911 calls and comparatively few enforcement measures taken in response.

The most common legislation addressing 911 abuse are so-called “false alarm” laws, which only punish those who use 911 to report a false alarm. These laws only punish one narrow, very specific type of 911 abuse and do nothing to deter the vast majority of nonemergency calls, including racially motivated calls.

Other state laws cover a broader range of 911 abuse but impose heightened, subjective requirements, rendering enforcement virtually impossible. Massachusetts, for instance, makes it a misdemeanor to “maliciously” call 911 but requires a finding that the caller acted with a specific intent to harm another person. Other states, including California and Tennessee, use unhelpful, broad language to make it a

369. See, e.g., Eastman, supra note 14, at 490.
371. See, e.g., id.
372. See Weaver, supra note 233.
373. Eastman, supra note 14, at 492.
misdemeanor to call 911 for "any reason other than because of an emergency." These statutes help by clearly covering the “broken toilet” 911 call but are too vague to meaningfully address racially biased claims of criminal activity.

Furthermore, some states only impose liability for the second instance of documented abuse, with fines and jail time increasing with each subsequent violation. But these laws also prove unenforceable, as 911 call centers are managed regionally, not by state, and the various call centers within each state do not typically have the infrastructure, resources, or time to regularly communicate and cross-reference records of frivolous calls. For example, a California caller could make frivolous calls in rapid succession to San Diego, Los Angeles, Sacramento, and Oakland with little chance of facing liability for their “second-time” offense.

Oregon has perhaps the most robust, carefully tailored 911 abuse legislation, making it a misdemeanor to call 911 “for a purpose other than to report a situation that the person reasonably believes requires prompt service in order to preserve human life or property.” This connection to immediacy and preservation of life and property helpfully eliminates calls for golfing too slowly or failing to make a purchase in a coffee shop. This statute provides a useful starting point but may not do enough to address and deter racially motivated 911 calls.

It is clear that reducing the epidemic of 911 misuse and abuse choking the emergency response system requires a more robust, coherent, and enforceable deterrent mechanism. That deterrent and punishment mechanism becomes all the more necessary in the context of racially motivated 911 calls, where the deleterious impacts to human
dignity, the corrosive impact on community trust, and the potentially lethal consequences require a more serious deterrent response.\textsuperscript{382}

B. Frivolous Calls and Frivolous Lawsuits: Borrowing from the Anti-SLAPP Experience

As a result of the need to do something to deter 911 abuse, an increasing chorus of commentators and legislators have argued for zero tolerance policies with harsh criminal penalties or costly civil liability for a single nonemergency call.\textsuperscript{383} Some point to the fact that “[i]t is a crime to file a false police report. When places of public accommodation enlist the police to remove people based on race, the owners and managers should be investigated and prosecuted for filing false police reports.”\textsuperscript{384} New Jersey once “proposed legislation to apply a criminal penalty to someone who ‘knowingly provides false information to a law enforcement officer with purpose to implicate another because of race.’”\textsuperscript{385} More recently, in August 2018, New York State Senator Jesse Hamilton proposed legislation making racially motivated 911 calls a hate crime after a white woman called police on him for “campaigning while black” in her neighborhood.\textsuperscript{386} Others have suggested that targeted individuals could use tort law, in particular defamation, malicious prosecution, or intentional infliction of emotional distress, to hold 911 abusers accountable.\textsuperscript{387}

Calls for civil or criminal liability for abusing emergency responses systems are understandable, but one must carefully balance the desire to reduce frivolous and race-based 911 calls against the potentially chilling effect harsh penalties may have on people using 911 for legitimate purposes. While many of the intentional 911 calls described in this Article qualify on their face as true “nonemergency”

\textsuperscript{382} See Patton & Farley, supra note 4 ("Right now, calling 911 on innocent black people is a costless form of indulgence in racialized fear—or worse, racist amusement. But lawsuits and publicity might make callers think twice and decrease the danger of false arrest and death.").

\textsuperscript{383} See id.

\textsuperscript{384} Id.

\textsuperscript{385} Weaver, supra note 233.


\textsuperscript{387} Patton & Farley, supra note 4 ("In some cases, lawsuits could be filed for intentional infliction of emotional distress. Many state and municipal laws protect civil rights better than their federal equivalents; suits could be brought under these laws in some cases, too.").
calls, others present closer questions, at least for the untrained civilian eye. The legal system cannot, and should not, expect civilians to become trained experts in criminal behavior, discerning and distinguishing suspicious and innocent conduct from suspicious and possibly criminal conduct. Indeed, police officers—the trained experts who are expected to make such distinctions—are only legally required to determine that conduct is reasonably suspicious of criminal activity before initiating an investigative stop. This low standard falls far below probable cause or preponderance of the evidence and does not eliminate the possibility of stopping individuals engaged solely in innocent conduct.

A middle ground exists between imposing no liability for the most egregious, race-based 911 abuses and harsh criminal sanction for a single, “innocent” nonemergency call. A careful balance must be struck between the compelling need to reduce 911 misuse and the weaponization of racial fear on the one hand, and the equally compelling need to provide free and open access to emergency response systems for the safety of the community on the other.

This Article suggests an innovative solution to frivolous 911 calls that borrows from a legal solution to frivolous lawsuits: the anti-SLAPP motion. A SLAPP suit is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. Much like the bias-motivated 911 caller who abuses scarce law enforcement resources for improper intimidation purposes, a SLAPP plaintiff abuses scarce judicial resources for improper intimidation purposes.

What follows is a brief introduction to the evolution of SLAPP suits and anti-SLAPP legislation and a discussion highlighting the close analogical fit between SLAPP suits and frivolous 911 calls. This discussion previews the introduction of model legislation to deter and reduce the impact of race-based 911 calls.

1. SLAPP Suits and Anti-SLAPP Legislation

While not a new phenomenon, the use of SLAPP suits are on the rise. The broadly accepted definition of a “SLAPP suit” includes the
following four elements: “(1) a civil complaint or counterclaim . . . ; (2) filed against nongovernmental individuals and/or groups; (3) because of their communication to a government body, official, or the electorate; (4) on an issue of some public interest or concern.”

The purpose of a SLAPP suit is to intimidate or retaliate against those who use traditional interactions with the government to oppose the SLAPP plaintiff’s plans or purposes. The objective of a SLAPP suit is to quell opposition by fear of large recoveries and legal costs, by diverting energy and resources into defending the lawsuit, and by transforming the debate from a political one into a judicial one. Usually, the SLAPP plaintiff has greater financial resources than their target, making their pursuit of frivolous litigation all the more effective. In practice, SLAPP suits range from multinational corporations suing environmental advocacy groups for intentional interference with contractual relations to small businesses suing online reviewers for defamation.

SLAPP suits ultimately work by chilling the right of free expression and free access to government. This intimidation, and the personal cost and psychological trauma to victims of the SLAPP technique, is itself a matter of concern, as is anything that deters citizens from participating in or accessing the resources of government.

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exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”).

391. Braun, supra note 28, at 969 (citing George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 PACE ENVTL. L. REV. 3, 8 (1989)).

392. Id.

393. Id.; see also PRING & CANAN, supra note 28, at 212 (“The suits are an attempt to ‘privatize’ public debate: a unilateral initiative by one side to transform a public, political dispute into a private, legalistic adjudication, shifting both forum and issues to disadvantage the opposition.”).


396. Alexandra Dylan Lowe, The Price of Speaking Out, A.B.A. J., Sept. 1996, at 48-49 (“These things work . . . . Citizens see a million-dollar lawsuit and they just want to go run and hide.” (quoting attorney Mark A. Chertok, who successfully defeated a high-profile SLAPP action against environmental groups)).
"[M]ore fundamentally, the use of wealth to dominate access to government is deeply subversive. All of these factors together make the SLAPP suit a dangerously corrupting influence in our society."®

But targeting the problems posed by SLAPP suits is a complicated endeavor that requires careful balancing of interests. "In the absence of a statutory method of weeding out SLAPP suits before the damage is done, courts are obliged to take the allegations of SLAPP filers as seriously as they would those of any other plaintiff."®® And states cannot simply ban SLAPP suits through legislation because on the surface these suits are legitimate actions and anything other than a "subtle inquiry . . . to identify them" risks barring a litigant’s legitimate right to access the courts.®®®

Despite the difficulty of finding the right balance between deterring frivolous suits and protecting access to the courts, a majority of states have attempted to strike that balance by passing anti-SLAPP legislation.®®®® The exact contours of each state’s laws differ, but the broad mechanisms remain the same. Anti-SLAPP laws “focus on the swift and efficient dismissal of frivolous lawsuits against protected activity and emphasize subjecting the SLAPPed party to as little time in court as possible. These statutes thus force plaintiffs to take a harder look at litigation by both deterring meritless claims and hastening their resolution.”®®®®® A special motion to strike is a central feature of anti-SLAPP legislation, allowing a defendant to defeat a lawsuit if he can “show that the claim is based on an action involving public participation, petitioning, or free speech covered by the statute.”®®®®®

2. SLAPP Suits and 911 Calls

While it may seem strange to compare SLAPP suits and frivolous 911 calls, the analogy fits remarkably well, considering (1) the motives of SLAPP plaintiffs and biased 911 callers, (2) the object and effect of SLAPP suits and frivolous 911 calls, (3) the problems in detection and
response, (4) the need to balance competing interests, and (5) the need for early identification and response mechanisms.

Motives of the Actors: Much like the SLAPP plaintiff who frivolously weaponizes the legal system to directly intimidate a perceived political threat, the racially fearful 911 caller frivolously weaponizes law enforcement to intimidate a perceived safety threat. The SLAPP plaintiff ultimately seeks to force the opponent to back down from engaging in constitutionally protected activity—freedom of speech—to enlarge the scope of the plaintiff's power and authority. Likewise, the racially fearful 911 caller seeks to restrict the alleged suspect's constitutionally protected freedom of movement to ensure and reinforce the white dominant role in public places.  

The Object and Effect of the Actions: Both SLAPP plaintiffs and racially biased 911 callers seek to intimidate undesired classes of people away from public participation and into the shadows. The first scholars to study SLAPP suits “conservatively estimate that thousands have been sued into silence, and that more thousands who heard of the SLAPPs will never again participate freely and confidently in the public issues and governance of their town, state, or country.” Likewise, thousands of people of color have been unfairly targeted into compliance and thousands more who hear about the devastating effects of unwarranted police confrontation withdraw from official government actors, distrusting any interaction with law enforcement or other government agents, even when their help is needed. Moreover, the consequences of each frivolous activity can be devastating, even lethal. The most successful SLAPP plaintiffs can so financially cripple their institutional enemies that the corporations cease to exist. A racially motivated 911 caller can have a similarly lethal effect on a person's life.

Detection and Response: Similar problems of detection and response exist in each context as well. One of the primary difficulties in addressing SLAPP litigation is that plaintiffs do not overtly present themselves to the court admitting the frivolousness of their case or the

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404. PRONG & CANAN, supra note 28, at xi, 3.
405. See Matthew Desmond & Andrew V. Papachristos, Why Don't You Just Call the Cops?, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/01/opinion/why-dont-you-just-call-the-cops.html (describing the chilling effect media attention on police violence has on communities of color, including refusal to engage law enforcement when needed).
sinister motivations behind the suit.\textsuperscript{406} One of the primary difficulties in addressing SLAPP litigation is that plaintiffs typically do not admit the frivolousness of their case or any sinister motivations behind their suit. Creating anti-SLAPP legislation is therefore incredibly difficult, as legislators must derive a way to allow the early termination of SLAPP suits without improperly denying legitimate litigants their day in court. Likewise, the typical 911 abuser does not usually express their racial antipathy to the dispatcher or otherwise articulate their underlying racist motivations in complaining about the lawful conduct of people of color. Indeed, the nature of pervasive implicit bias is such that callers themselves may not be consciously aware of the race-based motives behind the fearful call. Thus, it becomes nearly impossible to craft a remedy that deters and punishes racist behavior without unfairly denying or deterring genuine emergency calls.

\textbf{Competing Interests:} The balance between opposing fundamental interests in the SLAPP and 911 contexts is also instructive. The most common criticism of anti-SLAPP laws comes from those who believe there should be no barriers to the right to petition the court for redress. This right of access to the courts is absolutely fundamental to the concept of justice in a free and democratic society.\textsuperscript{407} The SLAPP penalty circumscribes this fundamental liberty by providing an early penalty to claimants who seek judicial redress.

On the other hand, the problem anti-SLAPP legislation seeks to address also implicates fundamental constitutional freedoms: free speech and access to courts. Courts and legislatures have recognized the need to address intimidation-oriented litigation designed for the sole purpose of curtailing one's fundamental right to speak freely about matters of public importance.\textsuperscript{408} Moreover, the SLAPP suit itself represents a threat to access to justice, as these frivolous suits clog court dockets and delay or deny access to legitimate litigants with genuine needs.

The comparison to frivolous 911 calls is unmistakable. Any proposed liability for misusing the emergency response system threatens to deny access to the critical, often life-saving police and medical apparatuses charged with keeping the citizenry safe. Unlike

\textsuperscript{406} See Braun, supra note 28, at 973 ("Because SLAPP suits masquerade as legitimate tort actions, there is no obvious way to identify them from court dockets.").


\textsuperscript{408} Smith, supra note 27, at 307 (citing cases and anti-SLAPP legislation).
anti-SLAPP concerns, however, there exists no general constitutional right to police protection.\textsuperscript{409} While state police forces are charged with protecting the public and most departments across the country are required as a matter of policy to respond to all 911 calls, a “fundamental principle [of American law is] that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.”\textsuperscript{410}

But like frivolous SLAPP suits, frivolous 911 calls both affect fundamental constitutional guarantees and delay relief to legitimate 911 callers. Marshaling armed law enforcement officers to restrain individuals engaged in innocent conduct restricts the fundamental freedom of movement for victims of these calls. In the racially fearful context, constitutional equal protection becomes a concern when state actors are involved. Moreover, frivolous 911 calls threaten the safety of civilians in genuine need of protection because they delay response to legitimate, time-sensitive calls and thus unfairly and unnecessarily puts citizens at risk.\textsuperscript{411}

\textit{Early Detection and Deterrence}: The importance of effective deterrent mechanisms is evident in both contexts as well. “The importance of effective anti-SLAPP laws is highlighted by the lack of protections available through other common law and statutory solutions to the problem of SLAPPs.”\textsuperscript{412} While defendants may pursue sanctions under Rule 11 of the Federal Rules of Civil Procedure or a state analog, such sanctions are rarely granted and “do not save a SLAPP defendant from the burden of extensive court proceedings.”\textsuperscript{413} Likewise, targets of racially biased 911 calls theoretically can access after-the-fact civil remedies, but these avenues for relief do little to protect them from the risk of degradation, arrest, or violent and potentially lethal confrontations in the first place.

Thus, as states have enacted legislation to give courts tools to easily eliminate the threat to SLAPP defendants at the outset of

\begin{footnotesize}
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\item \textsuperscript{409} Warren v. District of Columbia, 444 A.2d 1, 10 (D.C. 1981) (en banc).
\item \textsuperscript{410} \textit{Id} at 3; \textit{see also} DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 196-97 (1989) (holding that no duty arises from the “special relationship” between police and civilians, concluding that constitutional duties of care and protection only exist as to certain individuals, such as incarcerated persons, involuntarily committed mental patients, and others restrained against their will and unable to protect themselves).
\item \textsuperscript{411} \textit{See sources cited supra notes 160-162 and accompanying text.}
\item \textsuperscript{412} \textit{Ernst, supra note 401, at 1186.}
\item \textsuperscript{413} \textit{Id} at 1186-87. The same is true for civil countersuits bringing malicious prosecution or abuse of process claims. These tort remedies may ultimately provide relief, but only when a defendant has already been forced to litigate a timely and expensive lawsuit. \textit{Id.}
\end{itemize}
\end{footnotesize}
litigation and not merely through after-the-fact remedies, states should also enact legislation to reduce or eliminate the threat to targets of race-based 911 calls on the front end. Here, a major difference exists between a frivolous lawsuit and a frivolous 911 call. Courts lack the discretion to turn away a frivolous lawsuit at the door. Dispatchers and officers do—or at least should—have that discretion. Thus, rather than merely focusing on post-incident punishment for wasting law enforcement resources, “[p]erhaps the best way to deal with erroneous calls is for regular officers not to respond.” 414 This focus on pre-incident deterrence guides the model legislation discussion that follows.

C. Annotated Model Legislation

Title: This Act shall be called the “911 Abuse Act” (Act).

Definitions: The following terms shall have the following definitions for purposes of this Act:

- “Dispatcher” shall mean any individual answering a phone call placed through the 911 or other emergency response system.
- “Officer” shall mean any police officer or other law enforcement personnel.
- “Caller” shall mean any individual placing a phone call through the 911 or other emergency response system.
- “Target” shall mean any individual against whom a complaint is made through a 911 or other emergency response system call.
- “Abuse” or “Abusive” 415 shall mean the misuse of the 911 or other emergency response system through either (1) making a false alarm report, (2) reporting false information, (3) reporting exaggerated information, (4) making a report other than to report a situation that the person reasonably believes requires prompt service to preserve human life or property, (5) intentionally calling and hanging up, (6) intentionally remaining on the line to unnecessarily prevent Dispatchers from handling other calls, or (7) intentionally or knowingly making a report for the sole

414. Couper, supra note 259.
415. This statute is narrowly tailored to address intentional 911 abuse calls, not unintentional 911 misuse calls. See discussion supra Part IV.A.
purpose of implicating a person or persons in criminal activity on the basis of their race or ethnicity.\footnote{416}

**Purpose:** The purpose of this Act shall be to deter and minimize the abusive misuse of 911 and other emergency response call systems, including but not limited to, abusive misuse of 911 for racially biased purposes. This Act is not designed to address, deter, minimize, or punish "unintentional" misuses of 911 and other emergency response systems, including phantom wireless calls, misdials, and accidental hang-ups.

**Penalty:** Any person who abuses the number 911 as defined herein or otherwise makes a call to 911 for a purpose other than to report a situation that the person reasonably believes requires prompt service to preserve human life or property\footnote{417} commits a misdemeanor of the first degree, punishable by a fine of no more than $10,000 and a term of imprisonment not to exceed six months. Any person who is convicted of a second offense under this Act shall be guilty of a class three felony, punishable by a fine of no more than $25,000 and a term of imprisonment not to exceed one year. Any person who is convicted of a third or subsequent offense under this Act shall be guilty of a class one felony, punishable by a fine of no more than $50,000 and a term of imprisonment not to exceed two years.\footnote{418}

**Enhanced Penalty for Racially Motivated Abuse:** Any person who abuses the 911 or other emergency response system with the intention to and for the purpose of harassing, intimidating, causing unwarranted police contact with, or otherwise targeting an individual on the basis of that Target’s race or ethnicity shall face enhanced penalties as follows:\footnote{419}:

\footnote{416} This definition deters most abusive conduct by not imposing a specific intent requirement. It also makes a normative statement about the seriousness and difference of racially motivated abuse by singling it out, while also requiring specific intent for this kind of conduct. Enhanced penalties for this intentional conduct follow. See infra note 419 and accompanying text.

\footnote{417} By borrowing from the precise language in Oregon’s 911 abuse statute, the statute makes clear what constitutes a “nonemergency” and narrowly circumscribes the legitimate purposes of the 911 system.

\footnote{418} Imposing penalties for first-time offenders solves the enforcement problems faced by California and other states that only impose fines for multiple offenses but cannot meaningfully track multiple instances of misconduct. See Takei, supra note 30.

\footnote{419} The statute makes a normative statement that racially biased 911 abuse is a more serious and morally blameworthy act that engenders greater harm to the Target and to society and deserves greater punishment.
WEAPONIZED RACIAL FEAR

(1) First Offense: Class Three Felony, punishable by a fine of no more than $25,000 and a term of imprisonment not to exceed one year.

(2) Second and All Subsequent Offenses: Class One Felony, punishable by a fine of no more than $50,000 and a term of imprisonment not to exceed two years.

Dispatcher Discretion: Notwithstanding any conflicting departmental or administrative policy, Dispatchers shall have discretion to decline to assign an Officer to respond to a 911 call if the Dispatcher reasonably believes that the Caller is committing an Abuse of the 911 system as defined under this Act. The Dispatcher shall, if required, articulate facts with reasonable specificity indicating why the Dispatcher believed the Caller was committing an abuse of the 911 system.\footnote{This discretion is critical to front-end prevention of unwarranted police contact, something not available to judges in the SLAPP context. The statute also protects against negligent or bias-motivated Dispatchers by imposing a requirement that Dispatchers articulate facts to justify why they declined to respond to a particular complaint.}

If, in the exercise of this discretion, the Dispatcher reasonably believes the Caller is abusing the 911 system but decides to assign an Officer to respond to the call, the Dispatcher shall describe to the Officer, with reasonable specificity, the facts and circumstances giving rise to the Dispatcher’s belief that the call amounts to an abuse of the 911 system.\footnote{This provision specifically addresses the situation in Tamir Rice’s case, where the Caller stated the gun was “probably fake” and that Tamir was “probably a juvenile,” but the Dispatcher failed to communicate those statements to the Officers. See Takei, \textit{supra} note 30.}

911 Call Abuse Recordkeeping: Any Dispatcher who reasonably believes a Caller is abusing the 911 system shall log the call in the Statewide 911 Abuse Database (defined herein) and shall record all reasonably pertinent information, including the identity and phone number of the Caller, the substance and nature of the call, and the facts indicating an abuse of the 911 system.

Statewide 911 Abuse Database: The State shall create, fund, and maintain a statewide, centralized 911 database for the purpose of collecting and cross-referencing 911 abuse call logs at emergency response regional centers throughout the State. This database shall be used for the purpose of enforcing the provisions of this Act and maintaining statistical data regarding 911 abuse in the State.\footnote{These two provisions address enforcement and recordkeeping problems for multiple offenses, as demonstrated by California’s enforcement problems. See Eastman, \textit{supra} note 14.}
**Officer Discretion:** Officers and their departments are encouraged to use or authorize the use of discretion when responding to 911 calls the Officer reasonably believes to constitute an Abuse under this Act, including without limitation, declining to respond to the call, sending unarmed law enforcement personnel to respond to the call, or responding to the call for purposes of investigating the 911 abuse.\(^{423}\) When an Officer becomes aware of facts giving rise to probable cause of 911 abuse, the Officer shall respond to and investigate the 911 abuse.\(^{424}\)

**Civil Remedies:** This Act is not intended to create any new cause of action under civil law, or to increase or decrease the availability of any civil remedy otherwise available to a Target concerning any harm resulting from an abusive 911 call, except as follows:

1. A conviction for 911 Abuse under this Act shall conclusively satisfy any causation element under any civil tort.
2. A conviction for 911 Abuse under this Act shall presumptively satisfy any harm element under any civil tort, provided that Officers are dispatched to the call, respond to the call, and make contact with the Target.\(^{425}\)
3. For purposes of any conviction for 911 Abuse under this Act qualifying for an “Enhanced Penalty for Racially Motivated Abuse,” a defense of qualified immunity from civil or criminal liability shall only be available to any Dispatcher who assigns an Officer to respond to the call, or to an Officer who responds to the call, if the Dispatcher and/or Officer identifies specific and articulable facts demonstrating that the Dispatcher and/or Officer objectively reasonably believed that the call did not constitute an Abuse under this Act.\(^{426}\)

\(^{423}\) This provision recognizes the need to afford officers and departments flexibility to develop their own policies regarding how to de-escalate responses to frivolous 911 calls. One may criticize the use of “encourage” in this context, but a state-mandated policy of preventing any officer discretion in responding to a possibly frivolous 911 call unnecessarily removes discretion from expert law enforcement agencies. Other provisions herein address the need for officers to exercise discretion.

\(^{424}\) This provision addresses the under-enforcement of frivolous 911 abuse, requiring Officers to treat them as seriously as other crimes.

\(^{425}\) This provision recognizes the inherent psychological harm to the Target when unnecessarily being confronted by a police officer in response to a frivolous criminal complaint.

\(^{426}\) This provision narrows unduly broad qualified immunity protections by requiring a clear and articulable statement of why, in the face of a clearly frivolous, racially motivated 911 call, Dispatchers and Officers allowed the weaponization of racial fear anyway.
WEAPONIZED RACIAL FEAR

VII. CONCLUSION

When white civilians weaponize their racial fears,

[W]hat’s really happening is that these [individuals] are looking into a mirror and seeing a ghost.

That ghost is our terrible history of slavery and segregation. It tells them that something is not right. At the deepest level, the callers and their enablers seem to feel black people do not belong, that [they] should not be allowed to be as free as whites.\(^{427}\)

The ubiquity and permanence of racial fear is necessarily joined by the ubiquitous and permanent knowledge that people of color are viewed by police and society in general as more suspicious and threatening than white individuals. Nearly a century ago, W.E.B. DuBois stated what was common knowledge then, that “[n]othing in the world is easier in the United States than to accuse a black man of crime.”\(^{428}\)

If we are to acknowledge—as we should—the reality and permanency of racial fear, we should also impose on all civilians the assumption of knowledge of this basic fact. In doing so, we necessarily and quite fairly should require white Americans to consider the consequences of summoning armed agents of the state to investigate black Americans, to think twice before making the phone call, and to assume the consequences of liability for weaponizing racial fear for frivolous reasons.

\(^{427}\) Patton & Farley, supra note 4 (“This is their vision of America: calling 911, again and again and again, perpetually policing and controlling black bodies, forever haunted by a horrific black presence that is in fact nothing more than their own history, their own horror and their own desire, projected onto black lives.”).