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### Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance

Lolita Buckner Inniss

*University of Colorado Law School*

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## RESPONSE

# RACE, SPACE, AND SURVEILLANCE: A RESPONSE TO #LIVINGWHILEBLACK: BLACKNESS AS NUISANCE

LOLITA BUCKNER INNIS\*

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### INTRODUCTION

In *#LivingWhileBlack: Blackness as Nuisance*, Taja-Nia Henderson and Jamila Jefferson-Jones examine incidents wherein white people called 911 to report Black people for occupying spaces that callers believed the Black people in question ought not to occupy.<sup>1</sup> Sadly, these incidents

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\* Senior Associate Dean for Academic Affairs, Professor of Law, University Distinguished Professor and Inaugural Robert G. Storey Distinguished Faculty Fellow, *SMU Dedman School of Law*. Ph.D., LLM with Distinction, *Osgoode Hall Law School, York University*. J.D., *University of California, Los Angeles*. A.B., *Princeton University*.

1. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 *AM. U. L. REV.* 863, 863 (2020). The phenomenon of white people calling the police or personally accosting Black people based on unfounded allegations of wrongdoing has also been described as “white caller crime,” an ironic reference to white collar crime. See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication*

are consistent with the seemingly never-ending instances of vigilante and police detentions, assaults, and killings of Black people who find themselves charged with running afoul of formal legal norms and, just as often, informal, unarticulated norms that seem to apply only to Black people. Such incidents cross class and gender lines, as Black people from all walks of life seem at all times prone to being summarily judged and even executed by agents of the state or by self-deputized private citizens. Few news cycles go by without such an incident coming to light, and those incidents are vested with meanings even beyond their immediate impact, as media representations of the events are systematically “constructed, crafted, curated and circulated.”<sup>2</sup> In one recent case in May 2020, a white woman called the police on a Black man in a semi-wild section of Central Park in New York after he asked her to follow park rules and keep her dog leashed.<sup>3</sup> The woman refused and falsely claimed during the call that the man, an avid bird watcher, had threatened her life.<sup>4</sup> Video of the incident revealed the woman’s falsehood and sparked widespread anger.<sup>5</sup> In February 2020, a young Black man, Ahmaud Arbery, was chased down, shot, and killed by white men who claimed that he resembled a suspect in neighborhood

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*and Existing While Black*, 24 MICH. J. RACE & L. 335, 335 (2019). Though McNamara treats a topic similar to that addressed by Henderson and Jefferson-Jones in their article, McNamara takes a different approach, framing the problem as “a systematic phenomenon” of “racialized police communication.” McNamara borrows the phrase “white caller crime” from author Michael Harriot. See Michael Harriot, *White Caller Crime: The Worst Wypipo Police Calls of All Time*, ROOT (May 15, 2018, 9:30 AM), <https://www.theroot.com/white-caller-crime-the-worst-wypipo-police-calls-of-1826023382>.

2. GAVAN TITELY, *RACISM AND MEDIA* 36 (2019).

3. Sarah Maslin Nir, *The Bird Watcher, that Incident and His Feelings on the Woman’s Fate*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/nyregion/amy-cooper-christian-central-park-video.html>.

4. *Id.*

5. As author Taja-Nia Henderson observed in an interview, many people were angry because the incident raised memories of the Central Park Five, five young Black and Latino men who were wrongfully convicted of raping a white woman jogger in Central Park in 1989. Nikita Stewart, *The White Dog Walker and #LivingWhileBlack in New York City*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/nyregion/central-park-video.html>. The woman, Amy Cooper, was charged with filing a false report, a misdemeanor punishable by up to a year in jail. Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html>.

burglaries.<sup>6</sup> The unfortunate young man was apparently only out for a jog and was scarcely a block from his home.<sup>7</sup> Arbery's killing was a reminder of the distinctly racialized, spatialized, and surveillance legacy of jogging.<sup>8</sup> It has, like so many other such incidents, been captured with a hashtag: #IRunWithMaud.<sup>9</sup>

The COVID-19 crisis,<sup>10</sup> a global pandemic that reached the United States in early 2020 and remains a public health crisis as of the publication of this Article, has also given birth to yet new instances in which Black people are harangued and harassed for being present in public places. During the COVID-19 pandemic, Black people have been targeted for being present in public without masks or for other alleged violations of recently established, frequently changing, sometimes ambiguous, and unevenly enforced public health norms.<sup>11</sup> For instance, the *New York Times* reported recently that of the forty people arrested in Brooklyn for violating social-distancing rules between March 17 and May 4, 2020,<sup>12</sup> thirty-five were Black, four were Hispanic, and one was white.<sup>13</sup>

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6. Russ Bynum & Kate Brumback, *White Father, Son Charged with Murder in Ahmaud Arbery Case*, ASSOCIATED PRESS (May 8, 2020), <http://www.apnews.com/b1abc55058e7e6aa8cf8f8084681097e>.

7. *Id.*

8. See Natalia Mehlman Petrzela, *Jogging Has Always Excluded Black People*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/opinion/running-jogging-race-ahmaud-arbery.html> (“[T]he most enduring legacy of the racialized experience of recreational running is the surveillance and suspicion to which Black people have long been subjected.”).

9. Jacey Fortin, *On Ahmaud Arbery's Birthday, Thousands Say #IRunWithMaud*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/run-with-maud-ahmaud-arbery.html> (last updated May 11, 2020).

10. COVID-19 is a highly infectious viral illness that can cause a respiratory tract infection and broader systemic damage. Its symptoms range from mild sickness to death. See *Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION, [cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html](https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html). (last visited August 4, 2020).

11. Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html> (last updated May 13, 2020). Over one-third of the arrests were made in the predominantly Black Brownsville section of Brooklyn, while no arrests were made in the whiter Park Slope area of Brooklyn. *Id.*

12. Social distancing is a practice that has emerged to help slow the spread of COVID-19, requiring people to stay at least six feet from each other and avoid gathering in large groups or crowded places. *Social Distancing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [<https://perma.cc/NU5C-LSLU>].

13. Southall, *supra* note 11.

Some Blacks were beaten and otherwise assaulted in the encounters.<sup>14</sup> In contrast, there were widespread images of New York City police moving among clusters of whites sitting outside closely together in Williamsburg, Long Island City, and Lower Manhattan without charging anyone.<sup>15</sup> Some officers even offered masks to these groups of whites, moving on when they declined.<sup>16</sup> Police behavior in the COVID-19 crisis is a reminder of a famous adage about the metaphoric spatial functioning of law: there must be in-groups whom the law protects but does not bind, alongside out-groups whom the law binds but does not protect.<sup>17</sup>

In most of these #LivingWhileBlack cases (#LWB for short),<sup>18</sup> Henderson and Jefferson-Jones note, the reporting against Black people targeted men, women, and even children who had the right to be present and to engage in the activities for which they were reported or accosted.<sup>19</sup> At other times, the reported activity violated some minor aspect of the civil or criminal law.<sup>20</sup> What unites many of these #LWB incidents is that the public often only became aware of incidents because of the almost ubiquitous presence of cellphone camera videos.<sup>21</sup> The uploading and sharing of videos documenting many of the incidents via social media allowed what would have otherwise been hidden to become “viral.”<sup>22</sup> Digital images, sometimes grainy, often taken from

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14. *Id.*

15. *Id.*

16. *Id.*

17. This assertion is often credited to political scientist Francis M. Wilhoit. It is in keeping with what is broadly understood about the spatial metaphoric functioning of law and legal geography. See Lolita Buckner Inniss, *From Space-Off to Represented Space: A Review of Reimagining Equality: Stories of Gender, Race, and Finding Home by Anita Hill*, 28 BERKELEY J. GENDER L. & JUST. 138, 148–49 (2013). The categories that people use to describe their perceptions of social or other realities are often processed via spatial cognitive models called schemata. *Id.* at 148. Some examples are near versus far, inside versus outside, or center versus periphery. *Id.*

18. Living While Black is a sardonic reference to perhaps the best known while Black incident: driving while Black, or DWB. Driving while Black is a description of racial profiling of Black automobile drivers who are stopped by law enforcement for real or imagined traffic violations largely because of their race. See *infra* note 27.

19. Henderson & Jefferson-Jones, *supra* note 1, at 870 n.29, 913 n.287.

20. *Id.* at 879–80.

21. *Id.* at 867, 869.

22. This use of social media to garner support for causes has sometimes been called “slacktivism,” largely because some people have discounted the commitment required to repost hashtags or posts. See, e.g., Linda S. Greene, Lolita Buckner Inniss & Bridget J. Crawford with Mehrsa Baradaran, Noa Ben-Asher, I. Bennett Capers, Osamudia R. James & Keisha Lindsay, *Talking About Black Lives Matter and #MeToo*, 34

curious perspectives and angles, have acted as “white witnesses,” offering confirmatory testimony to the treatment of Black people.<sup>23</sup>

This type of “sousveillance”—that is, looking back at the lookers—helps to expose the extent to which anti-Black racism, an issue that has too often been assumed to belong to the past, persists as a part of United States law and culture.<sup>24</sup> The widespread nature of these incidents garnered a number of hashtags, among them: #LWB. This particular hashtag is reminiscent of other “while Black,” or “WB,” incidents.<sup>25</sup> While Black incidents are a particular expression of racial profiling, “a process in which police officers [or others] use ‘race as a [key] factor in deciding who to place under suspicion and/or surveillance.’”<sup>26</sup>

Both #LWB and other WB incidents focus on the performance of a particular activity and, in most such incidents, Black people who have been stopped by police or security forces for engaging in all sorts of activities in which they have a right to engage, such as driving or shopping.<sup>27</sup>

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WIS. J. LAW, GENDER & SOC’Y 109, 175 (2019) (suggesting that research needs to focus on the concept of slacktivism to increase participation in social movements beyond just a retweet).

23. See Lolita Buckner Inniss, *Video Surveillance as White Witnesses*, AIN’T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <https://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html> [<https://perma.cc/CQ75-TL97>] (noting that video surveillance sometimes provides much-needed valorization for less-regarded members of society such as Black people, and functions much like the historic “white witness” requirement for people of color to make claims against white people in much of the United States); see also Bennett Capers, *Video as Text/Archive*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 790 (Simon Stern et al. eds., 2019) (arguing that sousveillance often validates the reality of racism).

24. “Sousveillance is the observation or recording of an activity from the perspective of a participant in the activity. The term also refers to the recording or monitoring of real or apparent authority figures by others, particularly those who are generally the subject of surveillance.” Buckner Inniss, *supra* note 23.

25. I describe while Black, or WB incidents, as “any disparate treatment of Black people by persons with authority or under color of authority.” Lolita Buckner Inniss, *Help Me Please Chase Away the WB’s*, AIN’T I A FEMINIST LEGAL SCHOLAR TOO? (June 6, 2013), <https://innissfls.blogspot.com/2013/06/help-me-please-chase-away-wbs.html> [<https://perma.cc/8VNT-KBPG>].

26. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) (quoting Randall Kennedy, *Suspect Policy*, NEW REPUBLIC (Sept. 13, 1999), <https://newrepublic.com/article/63137/suspect-policy> [<https://perma.cc/V2XM-Z53V>]).

27. One of the best known of the WBs is driving while Black, DWB, the phenomenon whereby Black people are stopped more frequently by police than white people or persons of other races for real or imaginary minor infractions. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 268–69 (1999). DWB is itself a mocking reference to DWI, a common abbreviation for

#LWB, as Henderson and Jefferson-Jones frame it, takes an all-too-familiar problem and offers a startling proposition: the ways in which agents of the state and private citizens have responded to the presence of Black people in some instances suggest that Black people, in their very embodiment or presence, act as undesirable “sensational subjects” and thus may constitute a nuisance.<sup>28</sup>

Henderson and Jefferson-Jones approach their claim by first looking at how the language of nuisance and a sometimes-related concept, trespass to land, are deployed or “weaponized” to counter Black presence.<sup>29</sup> Next, they look at the historical roots of Blackness as nuisance.<sup>30</sup> Finally, they consider the racial entitlements, implicit or explicit, in #LWB incidents.<sup>31</sup> I agree with the authors that, given the ways in which the very presence of Black people has been treated in both law and society, it is fruitful to view Blackness as a perverse form of nuisance and, in some instances,

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the actual traffic violation of driving while intoxicated. *See* Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 L. & PSYCHOL. REV. 127, 129–30 (2000) (stating that racial profiling often leads to automobile stops on highways, a concept known widely in Black communities as “driving while Black”); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 3 (2005) (recognizing that “driving while brown” is a phenomenon similar to “driving while Black” that specifically affects Latino communities); Ironically, as one scholar has recently noted, while Black people driving has long raised issues of potential peril, it has also long been a source of freedom and independence. *See* GRETCHEN SORIN, *DRIVING WHILE BLACK: AFRICAN AMERICAN TRAVEL AND THE ROAD TO CIVIL RIGHTS* 35–36 (2020); *see also* Katheryn K. Russell, “*Driving While Black*”: *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 717 (1999) (focusing on the increasing criminal consequences faced by Black people, particularly as a result of the DWB phenomenon). Another while black instance is shopping while Black (SWB), where Black people are followed or harassed in retail stores or accused of shoplifting. SWB often has other features, such as “closely monitoring, questioning, searching, and detaining” Black customers with the suspicion, however thinly supported, of criminal activity such as shoplifting and credit card or check fraud. TRACI PARKER, *DEPARTMENT STORES AND THE BLACK FREEDOM MOVEMENT: WORKERS, CONSUMERS, AND CIVIL RIGHTS FROM THE 1930S TO THE 1980S* 233 (2019). I have described my own WB incident, RWB—being accosted by security forces while attending the reunion of my elite undergraduate school. *See* Buckner Inniss, *supra* note 25.

28. *See* Henderson & Jefferson-Jones, *supra* note 1, at 897 (explaining how nuisance claims against Black people have stretched as far back as the years following the Reconstruction); *see also* JOHN JERVIS, *SENSATIONAL SUBJECTS: THE DRAMATIZATION OF EXPERIENCE IN THE MODERN WORLD* 48 (2015) (arguing that the power of sensation and spectacle comes both from presentational and rhetorical aspects; thus, bodies that appear to convey race or gender shape both such discourses).

29. Henderson & Jefferson-Jones, *supra* note 1, at 872.

30. *Id.* at 897–98.

31. *Id.* at 905–06.

trespass to land. This framing is especially in keeping with the way that both United States nuisance law and the peripherally-related trespass law have been understood over the last century and a half.<sup>32</sup> Henderson and Jefferson-Jones' article is a part of the larger discussion that explains how legal spatial norms like nuisance and trespass combine with norms of surveillance to create deficiencies in Black access to legal rights and civic membership.<sup>33</sup>

#### I. NUISANCE, TRESPASS, AND THE INTERACTION BETWEEN THE TWO

As Henderson and Jefferson-Jones acknowledge, the #LWB scenarios they describe do not “neatly fit” into the elements of traditional common law nuisance claims.<sup>34</sup> As the authors show, a large number of #LWB claims are at least initially framed as claims that fit the traditional elements of public nuisance.<sup>35</sup> Still others incorporate norms of private nuisance, and yet others seem to allude to private trespass to land norms.<sup>36</sup> At times, claimants in a single #LWB situation move between the norms of public nuisance, private nuisance, and trespass to land, rendering already dubious claims of white grievance premised on Black presence or behavior even more confusing. Part of the crux of Henderson and Jefferson-Jones' article is that this sometimes-risible amalgamation of legal geographic claims by whites against Blacks is worth understanding given how such incidents deploy old, often arcane laws as vehicles for the legal enactment of invidious discrimination.<sup>37</sup>

Before addressing the opacity of the legal doctrine of nuisance, it is worth pointing out that the word “nuisance” has a significant non-legal valence that often colors the way in which it is understood in legal decisions. Nuisance in the lay sense refers to a person, thing, or circumstance that causes harm or injury or is unpleasant, obnoxious, or annoying.<sup>38</sup> This non-legal definition is clearly related to the legal context, and is but one

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32. *Id.* at 872.

33. See SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 9 (2015) (arguing that Blackness is “a key site through which surveillance is practiced, narrated, and enacted”).

34. Henderson & Jefferson-Jones, *supra* note 1, at 873.

35. See *id.* (explaining how 911 callers targeting Black people in public spaces typically frame their complaints in terms of public nuisance by claiming an affront to the “collective peace, safety, comfort, [and] convenience”).

36. See *id.* at 873 n.43, 888.

37. See *id.* at 863.

38. *Nuisance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nuisance> [<https://perma.cc/E3H4-US8Q>].

example of where non-legal, social meanings blend with legal contexts and normative analysis.<sup>39</sup> The idea of Black people being “bothersome,” “vexing,” “annoying,” or “harmful” to white people is one that has circulated since the antebellum period and has persisted well after. Such claims were often closely tied to concerns that Black people were non-compliant with white orders, were too assertive, failed to offer sufficient labor value, or were too loud or visible.<sup>40</sup> These notions are at the heart of segregation and other

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39. For a historic look at the interplay of social and legal norms of nuisance, see, for example, Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986); Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974); John P.S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155 (1983). For a more general discussion of what some scholars have called the “law-and-norms school,” see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 468 (2003). Some of the fundamental tenets of the law-and-norms school are that “social actors are governed less by formal laws than by patterns of behavior which have accrued normative, if not obligatory force” and that “norms often govern in a manner indifferent to legal rules.” *Id.* Henderson and Jefferson-Jones allude to cases where white plaintiffs sued under theories of private nuisance where the claims were often premised on little more than objection to Black presence. Henderson & Jefferson-Jones, *supra* note 1, at 898 (citing Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 507 (2006)) (discussing 19th century cases where efforts were made to limit Black presence).

40. Consider, for example, some contexts in which non-compliant enslaved or liberated Black people were often described as “nuisance” causing, “bothersome” or “troublesome” to white people, and the extent to which physical distancing or removal was used as a remedy. See S. S. NICHOLAS, *CONSERVATIVE ESSAYS: LEGAL AND POLITICAL* ser. 2, at 30 (Philadelphia, J.B. Lippincott & Co. 1865) (describing plans for the potential exile of freed Blacks in order to rid the country of the “negro nuisance”); see also 1 ROBERT EMMETT CURRAN, *THE BICENTENNIAL HISTORY OF GEORGETOWN UNIVERSITY: FROM ACADEMY TO UNIVERSITY: 1789–1889* 119 (1993) (discussing the sale of individual enslaved people in order to punish “troublesome slaves”); JOHN WILLIAM GRAVES, *TOWN AND COUNTRY: RACE RELATIONS IN AN URBAN-RURAL CONTEXT, ARKANSAS, 1865–1905* 151 (1990) (discussing the rationale for a proposed law creating segregated train seating for Arkansas Blacks and decrying the “negro nuisance” on railroads); JOHN C. INSCOE & GORDON B. MCKINNEY, *THE HEART OF CONFEDERATE APPALACHIA: WESTERN NORTH CAROLINA IN THE CIVIL WAR* 225 (2000) (describing disposal of “troublesome slaves” as the Civil War waned and fears grew that enslaved people would be liberated); Edmund Ruffin, *The Free Negro Nuisance and How to Abate It*, *SOUTH*, July 2, 1858, reprinted in 1 EDMUND RUFFIN, *THE DIARY OF EDMUND RUFFIN* app. C at 622–26 (William K. Scarborough ed., 1972) (arguing for removing from Virginia “all free negroes who, as such, are nuisances in their neighborhood and a detriment to the Commonwealth”); JOSEPH STURGE & THOMAS HARVEY, *THE WEST INDIES IN 1837: BEING THE JOURNAL OF A VISIT TO ANTIGUA, MONTSERRAT, DOMINICA, ST. LUCIA, BARBADOS, AND JAMAICA: UNDERTAKEN FOR THE PURPOSE OF ASCERTAINING THE ACTUAL CONDITION OF THE NEGRO POPULATION*

apartheid-like mechanisms, both de facto and de jure, that have kept Blacks and whites apart in numerous contexts for centuries.<sup>41</sup> Allegations of “Black nuisance” in the non-legal sense have frequently merged into claims about legal nuisance and have included relatively minor claims about bothersome Black body odor,<sup>42</sup> noisy “negro church” presence,<sup>43</sup> or housing for “aged people in good health . . . [and] children of the negro race.”<sup>44</sup> Such claims have also been premised on more pernicious and

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OF THOSE ISLANDS 216 (London, Hamilton, Adams, & Co. 1838) (describing the management of “troublesome negros”); JOHN J. ZABORNEY, SLAVES FOR HIRE: RENTING ENSLAVED LABORERS IN ANTEBELLUM VIRGINIA 101 (2012) (discussing disposing of “troublesome slaves” by hiring them out to a coal pit); Diary Entry of Tennessee Keys Embree (Sept. 8, 1867, in TANDEM LIVES: THE FRONTIER TEXAS DIARIES OF HENRIETTA BAKER EMBREE AND TENNESSEE KEYS EMBREE, 1856–1884 257 (Amy L. Wink ed., 2008)) (recounting one of the authors, a white woman, being “vexed” by recently freed Blacks who “are so *set up* that they dislike to do any thing for the white race”).

41. See, e.g., GRAVES, *supra* note 40, at 151.

42. See Lolita K. Buckner Inness, *Bicentennial Man—The New Millennium Assimilationism and the Foreigner Among Us*, 54 RUTGERS L. REV. 1101, 1112 n.64 (2002) (“Americans have long asserted that foreigners and other racial and ethnic outsiders smelled.”).

43. *Spencer Chapel Methodist Episcopal Church v. Brogan*, 231 P. 1074, 1075 (Okla. 1924). In *Spencer Chapel*, Black defendants who owned a Black church appealed and overturned a lower court finding that rebuilding their church would constitute a nuisance, even though “[t]he negro is of a social and religious nature” and “[t]heir social gatherings are usually at the church.” *Id.* at 1076. Key factors in the win were that the neighborhood was already largely Black, and the white plaintiff bought his property with his “eyes open.” *Id.* Thus, the court ruled, the white plaintiff would not be permitted “to change what was a negro community at the time the original church was built, and for a long time thereafter, into a white community for the purpose of increasing the salable value of their property.” *Id.* Though the Black defendants prevailed in this case, this outcome reads much like the white plaintiff did not prevail because he effectively “came to the nuisance.” “Coming to the nuisance” is a traditional defense to claims of nuisance where a defendant can show that he or she engaged in the offending activity with similar results before the plaintiff moved to the neighborhood. See, e.g., Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance”*, 9 J. LEGAL STUD. 557, 557 (1980).

44. *City Council v. United Negroes Protective Ass’n*, 230 P. 598, 599 (Colo. 1924) (affirming a lower court judgment that required the City Council to issue a permit to the builders of a home for Black orphans and the healthy elderly). Although the court upheld a finding that the proposed building did not constitute either a threat to public health or a nuisance, it noted that “[t]he locality where it is proposed to erect and maintain this institution is congested. Heavy traffic, over railroads and in trucks, passes through it. Business of various kinds, manufacturing, industrial, and commercial, is carried on there” and “[m]any negroes live in the neighborhood.” *Id.* There was, thus, also a “coming to the nuisance” element to the finding, and an implicit suggestion that the neighborhood was already undesirable for more “decent” (read: white) uses. See *id.* For a further discussion of race, place, and nuisance law, see Vicki Been with Francis

broad assertions about Black criminality and dangerousness.<sup>45</sup> In all such instances, non-legal understandings about Black people as nuisance were often conflated with the legal doctrine of nuisance.

But even discounting the interplay of lay understandings of nuisance with legal norms, defining legal nuisance has never been easy. As one court wrote at the end of the nineteenth century, “[I]t would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which, in our complicated civilization, would constitute a nuisance.”<sup>46</sup> Part of the complexity stems from the fact that

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Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997). See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *YALE L.J.* 1383, 1384, 1406 (1994) (examining the claim of the environmental justice movement that the siting of locally undesirable land uses has been carried out in a racist and classist manner).

45. See Henderson & Jefferson-Jones, *supra* note 1, at 885 (quoting Rose Hackman, *Swimming While Black: The Legacy of Segregated Public Pools Lives on*, *GUARDIAN* (Aug. 4, 2015, 12:41 PM), <https://www.theguardian.com/world/2015/aug/04/black-children-swimming-drownings-segregation> [<https://perma.cc/W7TX-GL8W>]) (discussing “white fear” that was “created around a mythology of dangerous, hypersexual [B]lack men and vulnerable, precious white women in need of protection”); see also *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (quoting Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 47 (2003)) (second alteration in original) (stating that “[u]rban renewal projects have long been associated with the displacement of [B]lacks” and that “[i]n cities across the country, urban renewal came to be known as ‘Negro removal’”). Justice Thomas further remarks that “[o]ver 97 percent of the individuals forcibly removed from their homes by the ‘slum-clearance’ project upheld by this Court in *Berman* were [B]lack.” *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 30 (1954)). See Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 *B.C. THIRD WORLD L.J.* 325, 335, 351 (2007), for a discussion of how Black Hurricane Katrina survivors were dispossessed and displaced in New Orleans due to broad white belief in a Black race-crime nexus and how Black separation that was first implemented via ghettoization was later carried out via “urban renewal” or “negro removal.” The notion of Blacks as nuisance was seen in the postbellum adoption of stringent Black codes that kept Blacks off of streets and out of entire towns and states. See CHERYL JANIFER LAROCHE, *FREE BLACK COMMUNITIES AND THE UNDERGROUND RAILROAD: THE GEOGRAPHY OF RESISTANCE* 117–18 (2013); see also Brandi T. Summers, *What Black America Knows About Quarantine*, *N.Y. TIMES* (May 15, 2020), <https://www.nytimes.com/2020/05/15/opinion/sunday/coronavirus-ahmaud-arbery-race.html> (“The American state has restricted [B]lack people’s mobility at least since the time of slavery. These regulations included convict leasing, Black Codes, loitering laws, redlining, racial zoning, . . . and increased surveillance.”).

46. *People v. Lee*, 40 P. 754, 755 (Cal. 1895).

modern nuisance law may be separated into three distinct categories, all of which share some common doctrinal history and are frequently confused.<sup>47</sup> Though similar in some respects, there are vital differences among the three.

A private nuisance claim is an action brought by a private plaintiff that asserts that a defendant's nontrespassory use of his personal property interferes with the plaintiff's enjoyment of his own property.<sup>48</sup> In opposition to private nuisance is public nuisance. A public nuisance is an unreasonable interference with the public's right to property.<sup>49</sup> Unlike its private counterpart, public nuisance claims often include conduct that interferes with public health, safety, peace, or convenience.<sup>50</sup> Such claims are typically brought by a public (governmental) plaintiff.<sup>51</sup> Existing between private and public nuisance is a hybrid form of nuisance that involves a private plaintiff who brings a claim for interference with public rights. These private plaintiffs, according to the traditional doctrine, must demonstrate some recognized type of "special," "particular," or "peculiar" harm.<sup>52</sup> Central to such inquiries is the reasonableness of the alleged nuisance-doer's behavior, "which varies from case to case and is highly fact-specific."<sup>53</sup> Regardless of modern classification, all nuisance claims relate to, but still remain distinct from, trespass to land suits.

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47. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 765 (2001).

48. RESTATEMENT (SECOND) OF TORTS § 821D (Am. Law Inst. 1979) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.")

49. RESTATEMENT (SECOND) OF TORTS § 821B(1) (Am. Law Inst. 1979) ("A public nuisance is an unreasonable interference with a right common to the general public.")

50. *Id.* § 821B(2)(a).

51. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*167 ("*Common nuisances* are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."); see also William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 *U. FLA. L. REV.* 27, 36 (1948) (discussing the evolution of private nuisance from the English Crown's right of public nuisance claims).

52. Antolini, *supra* note 47, at 766 (citing RESTATEMENT (SECOND) OF TORTS § 821C(1)) ("In order to recover damages in an individual action for a public nuisance, one must have suffered *harm of a kind different* from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.")

53. Lolita Buckner Inniss, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?*, 11 *U. PA. J.L. & SOC. CHANGE* 75, 82 (2007).

When lay people, and even many law-trained people, hear the word trespass, they immediately envision a harm having to do with real property. It bears noting, however, that at common law there were several forms of trespass, chief among them trespass to chattels and trespass to land. Trespass to chattels is defined as “dispossessing another of the chattel” or “using or intermeddling with a chattel in the possession of another.”<sup>54</sup> Traditionally, courts applied trespass to chattels in cases of intentional intermeddling with another’s personal property or in cases of dispossession short of conversion.<sup>55</sup> Trespass to chattels requires actual harm and does not give nominal damages.<sup>56</sup> In contrast, trespass to land at common law occurs when a person physically enters the lands of another without an invitation, license, or lawful authority to do so and once there causes damage to the lands or to the title in the lands.<sup>57</sup> A trespass to land claim requires a defendant’s entry to be both “wrongful,” and “intentional”; as a result, mere unauthorized and intentional interference or presence alone, without fault, has traditionally been sufficient to support such a claim.<sup>58</sup> Unlike nuisance, trespass to land does not require harm caused.<sup>59</sup>

Though trespass to land and nuisance have increasingly been viewed as similar, such as where courts reject any distinction between trespass to land and nuisance based on whether an invasion to land is tangible and direct versus intangible and indirect, many courts have retained distinctions between the two.<sup>60</sup> At the center of these distinctions is one

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54. RESTATEMENT (SECOND) OF TORTS § 217.

55. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 87 (5th ed. 1984).

56. *Id.*

57. *Id.* § 13.

58. See Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, UNIV. OF TORONTO L.J., Winter 2015, at 48, 51–52 (2015) (asserting that the property tort of trespass to land “formally belongs in the class of *intentional* wrongs” and has traditionally been viewed as a strict liability wrong).

59. See *id.* at 53–54 (noting that there is an “otherwise unusual commitment on the part of courts to find trespass and to grant appropriate relief even in cases where boundary crossings are no more than trifling inconveniences or, indeed, harmless”).

60. See, e.g., *Bradley v. Am. Smelting & Ref. Co.*, 635 F. Supp. 1154, 1156 (W.D. Wash. 1986) (maintaining that although the Washington Supreme Court has rejected distinctions between trespass and nuisance based on an invasion’s directness or tangibility, the court continues to recognize a distinction based on the nature of the interest being interfered with); see also *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. Ct. App. 2003) (quoting *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 644 n.2 (Minn. Ct. App. 1989)) (“[A]lthough some of the traditional distinctions between nuisance and trespass have become blurred and uncertain, the distinction now

concerning the nature of the interest with which a particular invasion interferes. As one court described it, “If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies.”<sup>61</sup> The non-physical/physical dichotomy between nuisance and trespass continues to give shape and coherence to the two doctrines.

## II. #LWB INCIDENTS AS LEGAL GEOGRAPHY: RACE AND SPACE

The interaction between various forms of nuisance and trespass to land norms are part of the discussion of legal geography.<sup>62</sup> Legal geography is an aspect of law that concerns itself with spatial issues in law.<sup>63</sup> This includes contemporary real property norms such as zoning and planning.<sup>64</sup> Legal geography also encompasses common law norms such as servitudes, nuisance, and trespass, especially in the context of contemporary reconsiderations of historic real property issues.<sup>65</sup> There is a large amount of

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accepted is that trespass is an invasion of the plaintiff’s right to exercise exclusive possession of the land and nuisance is an interference with the plaintiff’s use and enjoyment of the land.”); *Burke v. Briggs*, 571 A.2d 296, 298 (N.J. Super. Ct. App. Div. 1990) (contending that the blurring of the distinction between nuisance and trespass has led to difficult to explain outcomes).

61. *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979).

62. See generally *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* (Nicholas Blomley et al. eds., 2001) (exploring the relationship between law and geography and illustrating the value of geographical perspective to the theory and practice of law).

63. See Lolita Buckner Inniss, “Other Spaces” in *Legal Pedagogy*, 28 *HARV. J. ON RACIAL & ETHNIC JUST.* 67, 75 (2012) (“Often the fundamental questions of legal geography concern themselves with the fact that in law, as in geography, ‘space’ is sometimes contested, contingent, or otherwise at issue.”). A more nuanced exploration of legal geography is seen with critical legal geography (CLG). CLG methodology involves “exploring the ways in which geographic assumptions and unequal spatialization of power constitute and are constituted by law.” Hari M. Osofsky, *The Geography of “Moo Ha Ha”: A Tribute to Keith Aoki’s Role in Developing Critical Legal Geography*, 90 *OR. L. REV.* 1233, 1239 (2012). Moreover, CLG scholarship “rejects the belief that law reflects any preexisting or natural division of people or place and argues that law and space are mutually and inexorably generative of each other.” Jacquelyn Amour Jampolsky, *Property, Sovereignty, and Governable Spaces*, 34 *LAW & INEQ.* 87, 91–92 (2016). See generally DAVID DELANEY, *THE SPATIAL, THE LEGAL AND THE PRAGMATICS OF WORLD-MAKING: NOMOSPHERIC INVESTIGATIONS* (2010) (describing the intersection of socio-legal and critical geographic scholarship as a theoretical framework for critical legal geography).

64. See Buckner Inniss, *supra* note 63, at 75 (indicating other spatial legal rules that mediate attachments to physical territory such as the creation of urban and suburban areas and migration across national and sub-national borders).

65. Jeremy Forman & Alexandre Kedar, *Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical*

literature on these more material aspects of legal geography.<sup>66</sup> Much of this work addresses the role that race plays in legal formulations and determinations.<sup>67</sup> What are less common, however, are discussions of common law or modern administrative law legal geographic norms that are contorted or corrupted in the service of implementing racism. This is where Henderson and Jefferson-Jones' article achieves its greatest purchase.

One notion the article makes clear in situations involving #LWB claims is that actual formal claims of nuisance are not typically brought nor are they typically supportable.<sup>68</sup> Rather, the white claimants' attempt to engage the law's force to terminate activities that Blacks undertake would scarcely withstand legal or social scrutiny.<sup>69</sup> Consider the case of "BBQ Becky" that Henderson and Jefferson-Jones describe.<sup>70</sup> BBQ

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*Perspective*, 4 THEORETICAL INQUIRIES L. 491, 493-94 (2003) (discussing the ways in which legal geography offers elucidation for both contemporary and historic geographic norms).

66. Buckner Inniss, *supra* note 63, at 75-76.

67. See, e.g., A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 120-22 (1996) (highlighting how when cities used zoning ordinances to segregate street blocks only to have these ordinances subsequently challenged and struck down, courts overturned these ordinances solely out of concern for white property owners); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1874-75 (1994) (addressing the role of municipalities and other local government actors in creating racially identifiable spaces); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081-89 (1996) (describing the use of zoning and redevelopment power by municipalities to isolate communities along lines of race or socioeconomic status); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1542-43 (2012) (arguing that concerted efforts of welfare and criminal policing institutions, together with private actors, restrict the housing choices of poor Black women and function in ways that are analogous to the formally repudiated racially restrictive covenant).

68. Henderson & Jefferson-Jones, *supra* note 1, at 902, 905.

69. See *id.* at 882-84.

70. Henderson & Jefferson-Jones, *supra* note 1, at 873-75. The nickname "Becky" is increasingly appended to white women whose officious, overzealous, often racist, and classist behavior harms Black people or other people of color. The rise in characterizations of white women as Becky(s) is a modern phenomenon, related to but different from past characterizations, such as Miss Ann. Both Miss Ann, a nickname for violent, harmful white woman enslavers in the antebellum period, and Becky characters foment violence against Black people. See Cheryl E. Matias, *Becky(s) as Violent*, in SURVIVING BECKY(S): PEDAGOGIES FOR DECONSTRUCTING WHITENESS AND GENDER 191, 193 (Cheryl E. Matias ed. 2019). Compare Karen, a pejorative nickname for entitled, self-focused white women who demand accountability from supervisors

Becky is the pejorative nickname given to Jennifer Schulte, a white woman who called police in Oakland, California to report a group of Black people who were allegedly using a charcoal grill where such use was not permitted.<sup>71</sup> Schulte informed the 911 dispatcher that the usage had to be addressed immediately “so that coals don’t burn more children and we have to pay more taxes.”<sup>72</sup> As Henderson and Jefferson-Jones note, Schulte frames herself as hero and victim, despite the fact that some eyewitnesses described Schulte as the harasser.<sup>73</sup> This framing, interestingly, fails the basic framework for a privately-brought public nuisance claim in that Schulte alleged no “special” or “particular” harm to herself from the allegedly public act of nuisance. Instead, she claimed to be vindicating the public’s right to be safe from burning coals and increased taxes.<sup>74</sup> When police failed to respond after Schulte’s first call, she turned to framing the use of the charcoal grill as a matter of private nuisance and alleged that the park was her private property and that she could thus exclude the users of the grill.<sup>75</sup> At this point, Henderson and Jefferson-Jones note Schulte was alleging that the grillers were committing trespass to land.<sup>76</sup>

Schulte’s pivot from a nuisance-like claim to a trespass-like claim is perhaps not surprising. Despite historical distinctions, modern usage has increasingly confused trespass to land and nuisance.<sup>77</sup> However, the confusion or overlap between these two property torts generally

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(“I want to speak to your manager”) and who sometimes, intentionally or not, harm others, especially people of color or less privileged people. See Kaitlyn Tiffany, *How ‘Karen’ Became a Coronavirus Villain*, ATLANTIC (May 6, 2020) (quoting Sarah Miller, *My so-Karen Life*, N.Y. TIMES (Dec. 7, 2019), <https://www.nytimes.com/2019/12/07/style/its-karentown.html>), <https://www.theatlantic.com/technology/archive/2020/05/coronavirus-karen-memes-reddit-twitter-carolyn-goodman/611104> (describing Karens as “the policewomen of all human behavior,’ using the example of a suburban white woman who calls the cops on kids’ pool parties”).

71. Henderson & Jefferson-Jones, *supra* note 1, at 873–74; *BBQ Becky: Woman Photoshopped into Black History After Barbecue Complaint*, BBC NEWS (May 18, 2018), <https://www.bbc.com/news/newsbeat-44167760> [<https://perma.cc/QZ5M-5FE7>].

72. Henderson & Jefferson-Jones, *supra* note 1, at 874.

73. *Id.*

74. *Id.*

75. *Id.* at 875.

76. *See id.*

77. See, e.g., *Adams v. Cleveland Cliffs Iron Co.*, 602 N.W.2d 215, 219–20 (Mich. Ct. App. 1999) (explaining how some courts have granted plaintiffs a recovery in trespass to land for intangible invasions of their property, which would typically fall under the tort of private nuisance).

occurs in the context of *private* nuisance and trespass.<sup>78</sup> Private nuisance, in contrast to trespass to land, is an interference with the use and enjoyment of land and does not require interference with the possession of land.<sup>79</sup> What is unusual in Schulte's case is that she pivots between private assertion of a public nuisance and private assertion of a trespass, which is a tort involving private interests. To summarize, it is as if she is saying in her nuisance claim, "I (as a private person) need to vindicate the rights of the polity (to which I, but not you, belong) in this park." Her trespass claim can be summarized as, "I (as a private person) have property rights in this park; you have none, so I may exclude you." Neither facts nor law could support either claim. Instead, Schulte seems to rely upon a heady mix of anti-Black racism and false indignation to fuel her claims.

Henderson and Jefferson-Jones relate Schulte to "Permit Patty,"<sup>80</sup> a pejorative nickname given to Alison Ettel. Ettel, a white woman, called

78. *Id.*

79. See Edwin A. Skoch, *Personal Injury Liability Coverage for Environmental Contamination Under the Comprehensive General Liability Policy: Is Migrating Pollution a "Wrongful Entry or Eviction or Other Invasion of the Right of Private Occupancy"?*, 9 TUL. ENVTL. L.J. 37, 48 (1995).

80. Here, the nickname given to Ettel likely stems from the humorous effects of alliteration and the desire to call Ettel "out of her name" using a stereotypically "white" name. This is seen elsewhere, such as *infra* note 85, which discusses "Coupon Carl." Patty is also, however, an old pejorative name for white people, one possibly growing out of the word "pattyroller" or "patterroller"—a corruption of "patrollers," who were publicly- or privately-engaged whites who pursued escaped slaves in the antebellum period. See KENNETH C. DAVIS, *IN THE SHADOW OF LIBERTY: THE HIDDEN HISTORY OF SLAVERY, FOUR PRESIDENTS, AND FIVE BLACK LIVES* 56–57 (2016) (exploring the history of "pattyrollers"). The term was captured in a little-referenced, offensively-worded, and darkly-themed Black folk song called "Run, Nigger Run." Some of the lines are:

Run, nigger, run; de patter-roller catch you;  
 Run, nigger, run, it's almost day.  
 Run, nigger, run, de patter-roller catch you;  
 Run, nigger, run, and try to get away.  
 Dis nigger run, he run his best,  
 Stuck his head in a hornet's nest,  
 Jumped de fence, and run fru de paster;  
 White man run, but nigger run faster.

DOROTHY SCARBOROUGH & OLA LEE GULLEDGE, *ON THE TRAIL OF NEGRO FOLK-SONGS* 24 (1925). Filmmaker Jordan Peele makes a not-so-veiled allusion to this song in his film "Get Out," where he plays the 1939 British song "Run, Rabbit, Run" during a scene where a white assailant pursues and captures a Black victim. *GET OUT* (Universal

the police on an eight-year-old Black child selling bottled water on the public sidewalk in front of the San Francisco building where both lived.<sup>81</sup> Ettel took issue with the alleged illegality of the child's actions, the child's lack of a sales permit, and the child's supposed trespassing onto Ettel's property.<sup>82</sup> The sidewalk area did not in fact belong to either the complainant or to the alleged violator.<sup>83</sup> As Henderson and Jefferson-Jones note, Ettel seemed to make first a private law claim (trespass), which she later tried to frame as a public nuisance action to vindicate public rights (she asserted that the child's voice was loud and disruptive).<sup>84</sup> Once again, like Schulte, Ettel lurches between making a public nuisance and a private trespass claim in a situation where race was likely the substantial motivation for her behavior. Throughout their article, Henderson and Jefferson-Jones recount numerous cases of Black people who were victimized by #LWB incidents while sleeping in one's own dormitory, visiting communal pools as residents or guests, and conducting business in retail stores.<sup>85</sup> The authors also discuss some of the historic aspects of #LWB.<sup>86</sup> Surveillance is a past and ongoing aspect of #LWB incidents.

### III. #LIVINGWHILEBLACK AND SURVEILLANCE

Though Henderson and Jefferson-Jones only hint at it in their article, #LWB incidents (and other while Black incidents) feature both literal and figurative surveillance.<sup>87</sup> Much contemporary analysis of

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Pictures 2017). "Run, Rabbit, Run" is believed to be a sanitized and deracinated version of "Run, Nigger Run." See Jennifer Ryan-Bryant, *The Cinematic Rhetorics of Lynching in Jordan Peele's Get Out*, 53 J. POPULAR CULTURE 92, 97 (2020).

81. Henderson & Jefferson-Jones, *supra* note 1, at 875-76; Jessica Campisi et al., *After Internet Mockery, 'Permit Patty' Resigns as CEO of Cannabis-Products Company*, CNN (June 26, 2018), <https://www.cnn.com/2018/06/25/us/permit-patty-san-francisco-trnd/index.html> [<https://perma.cc/W5HM-DH4J>].

82. Henderson & Jefferson-Jones, *supra* note 1, at 875-76.

83. *Id.* at 876.

84. *Id.*

85. See *id.* at 882-83, 886-91. Here the authors discuss the case of Morry Matson (dubbed "Coupon Carl"), a white retail manager in Chicago who called the police on Camilla Hudson, a Black woman who attempted to use a manufacturer's coupon for her purchases. Matson first claimed to be "intimidated" by Hudson, then, after asking her to leave the store, framed his claim largely in trespass to land norms. *Id.* at 890.

86. *Id.* at 898-904.

87. See BRANDI THOMPSON SUMMERS, *BLACK IN PLACE: THE SPATIAL AESTHETICS OF RACE IN A POST-CHOCOLATE CITY* 153-56 (2019) ("Surveillance is practiced, narrated,

surveillance often centers on “high tech” surveillance methods such as security video and police body cameras.<sup>88</sup> However, the question of “low tech,” more conventional surveillance also figures significantly in such incidents.<sup>89</sup> It has long been understood in scholarly domains that there is power inherent in watching people as a form of control.<sup>90</sup>

Outsiders, like Blacks and women, are often at the center of state-based and private low-tech watching, listening, following, and monitoring programs. Frequently, these surveillance schemes are meant to control Black people’s presence, their work, and the extent to which they engage in the “appropriate” racial behaviors as “Good Negroes.”<sup>91</sup> Those Black people who participate in cross-racial interactions or avail themselves of other “white” aspects of daily life, some quite mundane, ranging from attending college to using discount coupons, violate these norms. In the context of civic membership, complex mythologies about behavior and presence form the terrain of Black people’s oppression and frame #LWB incidents. In the “panoptic” or “watcher” regime, there is no clear dichotomy between the public and the private sphere, for the two are fused, confused, and otherwise conflated to serve white desire to retain power over space. This merger, of the public and the private, of the inside and the outside, expressed via the operation of panoptic norms, has particular applicability to the situation involving #LWB incidents.

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and enacted through Blackness, and surveillance is similarly structured by racism and antiblackness.”).

88. Greene et al., *supra* note 22, at 175.

89. *Id.*

90. JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 34 (Miran Božovič ed., 1995) (“It is obvious that, in all these instances, the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained.”).

91. The “Good Negro,” sometimes known as a sambo figure, is a historic trope about the “ideal” Black person who interacts with whites. It is not merely an individual characterization or description, but rather part of a broader societal ideal that valorized the subservient, obedient Black who embraced white supremacy and thereby enabled the white capitalist, imperialist project. “As a socially constructed category sambo was part of the racialised taxonomy of transcultural colonial subjection that enabled the machinery of imperialism, racial capitalism and white European settler colonialism to function.” SHIRLEY ANNE TATE, *DECOLONISING SAMBO: TRANSCULTURATION, FUNGIBILITY AND BLACK AND PEOPLE OF COLOUR FUTURITY* 4 (2020). In the context of the United States, the sambo figure was seen as “docile but irresponsible, loyal but lazy, humble but chronically given to lying and stealing; his behavior was full of infantile silliness and his talk inflated with childish exaggeration.” STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 82 (3d ed. 1976).

## CONCLUSION

In making their case about Blackness as nuisance, Henderson and Jefferson-Jones offer a meaningful addition to existing literature. While following on some scholarship in the area of property, their article is clearly distinct in that it adopts existing normative ideas about the nature of both nuisance and trespass and deploys them in shaping the parameters of an important new analytical and descriptive idea: Blackness is more than just a racial description; it is sometimes perversely deployed as a property tort. The article also raises an implicit point that is little discussed in other literature: the presumed innocence and normalcy of white guilt and the presumed guilt and deviance of Black innocence.<sup>92</sup> This discourse posits the harmlessness of whiteness in parallel with the dangerousness of Blackness.<sup>93</sup> In almost all of the incidents described, there is an assumption that the only Black people worthy of vindication in such matters are those who can show, categorically, that they are not only not guilty of the claims made against them but are additionally not guilty of anything at all. This is part of the reason that media accounts often excavate any criminal or civil violations of Black victims in such matters, notwithstanding the complete irrelevance of such information.<sup>94</sup>

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92. See DARIUS PRIER, *THE MEDIA WAR ON BLACK MALE YOUTH IN URBAN EDUCATION* 67–68 (2017) (comparing the media’s disparate and imbalanced treatment in representation of Black male youth as compared to their white counterparts).

93. *Id.* For a discussion of the possibilities for Black innocence, see ROBERT REID-PHARR, *ONCE YOU GO BLACK: CHOICE, DESIRE, AND THE BLACK AMERICAN INTELLECTUAL* 131 (2007).

94. Consider, for example, how footage showing slain jogger Ahmaud Arbery looking around the inside of a construction site before his killing was widely shown in media accounts and implicitly used to suggest that he was somehow engaged in trespass or even theft. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>. The owner of the home under construction later weighed in, stating that he himself never reported Arbery’s presence and that nothing had been stolen from the site. Tony Thomas, *Homeowner Doesn’t Believe Ahmaud Arbery Stole Anything Before Shooting*, WSB-TV ATLANTA, <https://www.wsbtv.com/news/local/homeowner-doesnt-believe-ahmaud-arbery-stole-anything-before-his-death/ZRBC7TH4OZ-BGBH6UVIVHE3D7BE> [<https://perma.cc/5EJV-3LJB>] (last updated May 13, 2020, 6:44 AM). Consider also the recent killing of George Floyd, a Black man detained by Minneapolis police on allegations of using a counterfeit bill and then killed when a detaining officer knelt on Floyd’s neck until he died. Floyd’s death was recorded by a bystander. Christine Hauser et al., *‘I Can’t Breathe’: 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/minneapolis-police-man-died.html>. Several subsequent articles

Henderson and Jefferson-Jones observe that there are some moves afoot to obtain relief from #LWB incidents, including federal, state, and local calls for redress.<sup>95</sup> Such initiatives are likely to raise awareness of the problem. But how, they indicate, can Black victims of white callers ever prove that they were the victims of bias, given the absence of proof that plagues many such matters? One way, the authors note, is to intervene with 911 dispatchers and first responders to educate them on the nature of #LWB incidents.<sup>96</sup> This might include training dispatchers and first responders so they have an appreciation for the problem and are able to provide productive advice or guidance. It could also include outsourcing police work.<sup>97</sup> As Henderson and Jefferson-Jones cogently note, “racialized territoriality and entitlements to space and place” are at the heart of the problem.<sup>98</sup> What remains, then, is to redefine the performances that shape the production of norms pertaining to race and space and to thereby broaden the class of people with power to define what, or who, is in or out of place.<sup>99</sup>

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focused on Floyd’s “troubled” past. *E.g.*, Kate Sheehy, *George Floyd Had ‘Violent Criminal History’: Minneapolis Police Union Chief*, N.Y. POST (June 2, 2020), <https://nypost.com/2020/06/02/george-floyd-had-violent-criminal-history-minneapolis-union-chief> [<https://perma.cc/B49K-CZ9P>].

95. See Henderson & Jefferson-Jones, *supra* note 1, at 911–12 (discussing public hearings in Grand Rapids, Michigan concerning amending the city’s municipal human rights code to prohibit “biased crime reporting” and legislation enacted by Oregon to create a cause of action for targets of #LWB calls). Another movement has developed calling for the defunding or even disbanding of police forces. Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html>. Defunding police departments would involve reducing police budgets and reallocating those funds to social services, health, or education. *Id.* Disbanding or abolishing police would mean reimagining the role of police by eliminating some of the more militarized aspects of their practices such as no-knock warrants and military-style raids. *Id.*

96. Henderson & Jefferson-Jones, *supra* note 1, at 912–14.

97. One concern with outsourcing police work is the extent to which or whether the Fourth Amendment applies to law enforcement activity carried out by private actors. See Kiel Brennan-Marquez, *Outsourced Law Enforcement*, 18 U. PA. J. CONST. L. 797 (2016).

98. Henderson & Jefferson-Jones, *supra* note 1, at 914.

99. See BROWNE, *supra* note 33, at 16.