

Toward a Touchstone Theory of Anti-Racism: Sex Discrimination Law Meets #LivingWhileBlack

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ABSTRACT: White supremacy and anti-Black racism continue their pervasive and destructive paths in contemporary American society. From the murder of George Floyd to the daily exclusions of Black bodies from white spaces, the nation's failure to right the wrongs of chattel slavery and racism continues to be highlighted in stark relief. This article centers the racism made manifest through #LivingWhileBlack aggressions and examines it through the lens of two sex discrimination law doctrines: sex stereotyping and protections against sex discrimination in public accommodation laws. It asks what work can sex discrimination law do for the project of dismantling anti-Black racism and white supremacy, specifically in public and recreational spaces?

The article contends that these two threads of sex discrimination law are generative of a new lens through which to analyze and address #LivingWhileBlack aggressions. It does so by introducing the concept of a “White Privilege Stereotype,” a form of racial stereotyping through which white people seek to retaliate against Black people when Black people engage in activities coded as “white,” often in places that are also coded as “white.” Black people challenge the privileges of whiteness by seeking to enjoy those privileges in the same way they are enjoyed by white people, which causes white observers to lash out and retaliate. Conceptualizing #LivingWhileBlack aggressions in this way creates a link to sex stereotyping and thus to the body of sex discrimination law that both recognizes and prohibits sex stereotyping. The article makes this conceptual link by drawing an analogy between how gender and racial hierarchies have been preserved, in part, through stereotyping and the policing and punishing of the oppressed group's nonconformity with such stereotypes.

It proposes a “touchstone” theory of inquiry for understanding #LivingWhileBlack aggressions. This theory envisions multiple

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“touchstones”—legal, political, and cultural—that may inform our analysis of white supremacy. It asserts that lessons from sex discrimination law are one such analytical touchstone, while recognizing that a number of touchstones are necessary to fully unpack and address #LivingWhileBlack aggressions.

Analyzing #LivingWhileBlack aggressions through the lens of sex discrimination law may yield two positive results. First, looking at the problem with a new perspective may lead to different, additional, or more comprehensive strategies for disrupting and dismantling white supremacy. Second, utilizing a sex discrimination frame to consider #LivingWhileBlack aggressions holds the potential to make legible to white women, in particular, the connection between their own oppression and the oppression of Black people, and thus create the opportunity for coalition building.

INTRODUCTION 121

I. #LIVINGWHILEBLACK 126

II. SEX STEREOTYPING MEETS #LIVINGWHILEBLACK 131

 A. A Note on the Scope of this Article 132

 B. Racial Stereotyping Defined 134

 C. Price Waterhouse v. Hopkins and the Sex Stereotyping Theory 139

 D. Price Waterhouse, Racial Stereotyping, and White Privilege..... 144

 1. Running as White Privilege 147

 2. Birdwatching as White Privilege 148

 E. “Acting White” in #LivingWhileBlack Aggressions as an Extension of “Acting White” Performativity in Schools and Workplaces 150

III. SEX IN PUBLIC, RACE IN PUBLIC..... 152

 A. Sex in Public 152

 B. Connecting Sex in Public to Race in Public 155

IV. A TOUCHSTONE THEORY FOR INTERROGATING #LIVINGWHILEBLACK WITH PRINCIPLES OF SEX DISCRIMINATION LAW 157

 A. Sex Discrimination Law’s Connection with #LivingWhileBlack: A Touchstone Theory of Inquiry into Oppression and Inequality 157

 B. The Sex Discrimination Touchstone Creates Potential for a More Capacious Understanding of the #LivingWhileBlack Problem and Possible Solutions..... 158

 C. The Sex Discrimination Touchstone Creates Potential for Coalition Building with White People and with White Women in Particular..... 162

CONCLUSION 166

INTRODUCTION

Swimming¹ while Black.² Jogging while Black.³ Barbecuing while Black.⁴ White supremacy and anti-Black racism continue their pervasive and destructive paths in contemporary American society.⁵ From the senseless, brutal murder of George Floyd by Minnesota police officers to the daily exclusions of Black bodies from white spaces, the nation's failure to right the legal, social, and psychological wrongs of chattel slavery and racism has continued to be highlighted in stark relief in recent years. This article asks the question: what work can sex discrimination law do for the project of dismantling anti-Black racism and white supremacy, specifically in public and recreational spaces?

The achievements of the women's rights movement—from the inclusion of “sex” in state public accommodation laws in the 1970s⁶ to women outnumbering men in law school in the 2010s⁷—are deeply indebted to the ideals disseminated by and legal doctrine that grew from the civil rights movement.⁸ Generations of contemporary women's rights activists have analogized women's rights to racial civil rights in the hope that relying on the time-tested, successful blueprint of the civil rights movement would yield success for sex equality.⁹ It did: in many

1. Karen Given, ‘Are We Going To Become Hashtags?’ *Racism at a Florida Pool*, WBUR (July 31, 2020), <https://wbur.fm/321Do9L> [<https://perma.cc/G8AW-MBRG>].

2. Throughout this article, I will capitalize “Black” but not “white.” This stylistic practice reflects at least two principles. First, like the editors at the *New York Times*, I believe that “this style best conveys elements of shared history and identity” of people with a shared African origin. Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 5, 2020), <https://nyti.ms/32MNCd4> [<https://perma.cc/S8SP-RVA2>]. As a result, “the capital B makes sense as it describes a race, a cultural group, and that is very different from a color in a box of crayons.” *Id.* (internal citation omitted). Thus, “for many people the capitalization of that one letter is the difference between a color and a culture.” *Id.* (internal citation omitted). Second, “white doesn’t represent a shared culture and history in the way Black does, and also has long been capitalized by hate groups.” *Id.*

3. See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/X2E6-LRV8>].

4. See Gianluca Mezzofiore, *A White Woman Called Police on Black People Barbecuing. This is How the Community Responded*, CNN (May 22, 2018), <https://www.cnn.com/2018/05/22/us/white-woman-black-people-oakland-bbq-trnd/index.html> [<https://perma.cc/UW4B-DDP7>].

5. See, e.g., Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. F. 213, 217 (2020).

6. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 81, 111 (2019) (describing the history of the feminist movement’s campaign for inclusion of sex in public accommodation laws).

7. See Staci Zaretsky, *There Are Now More Women in Law School Than Ever Before*, ABOVE THE LAW (Mar. 7, 2018) (“In 2016, women outnumbered men in law school classrooms for the first time on record. 2017 data revealed that women’s enrollment as law students once again outpaced that of their male colleagues.”), <https://abovethelaw.com/2018/03/there-are-now-more-women-in-law-school-than-ever-before> [<https://perma.cc/9ZSM-L9E9>].

8. See generally Serena Mayeri, “A Common Fate of Discrimination”: *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1053 (2001); Sepper & Dinner, *supra* note 6, at 111 (“Building explicitly on the civil rights sit-ins of the 1960s, NOW, often joined by other groups, protested in the streets, litigated in the courts, and lobbied in legislatures for state laws prohibiting sex discrimination.”).

9. See generally Mayeri, *supra* note 8, at 1053; Sepper & Dinner, *supra* note 6, at 111.

contexts, law, policy, and cultural norms espouse a formal and explicit commitment to sex equality. However, while many of the achievements of the women's rights movement are entrenched in law and policy, the gains of the racial civil rights movement are increasingly under attack. Can the sex discrimination doctrine that emerged from the women's rights struggle now return the favor to the racial civil rights project? This article's answer is "yes."¹⁰

This article centers the racism made manifest through the #LivingWhileBlack phenomenon¹¹—the common practice of white people

10. Other scholars have begun the project of suggesting legal strategies and remedies for the victims of #LivingWhileBlack aggressions or describing legal reforms to address the phenomenon. *See, e.g.*, Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 911 (2020) (describing a proposed amendment to a Grand Rapids, Michigan, human rights code to prohibit biased crime reporting and the enactment of an Oregon statute that provides for a private right of action for #LivingWhileBlack victims); Chanelle N. Jones, *#LivingWhileBlack: Racially Motivated 911 Calls as a Form of Private Racial Profiling*, 92 TEMPLE L. REV. ONLINE 55, 66 (2020) (noting that claims under the Civil Rights Act of 1964 and § 1981 are available to victims of #LivingWhileBlack aggressions in some circumstances); *id.* at 75 (describing proposed legislation in four states to provide a legal remedy for some #LivingWhileBlack aggressions); *id.* at 78-93 (discussing potential legal remedies, including federal claims under § 1983, state law tort claims, and state criminal law prosecutions); Hon. Zuberi B. Williams, "If Only We're Brave Enough to Be It": How Judges, Law Enforcement, and Legislators Can Be the Light Against #LWB Incidents, 70 AM. U. L. REV. F. 135 (2021) (suggesting "pragmatic solutions that both honor safety and avoid the careless treatment of Black bodies in public spaces" and describing judicial and legislative efforts to remedy #LivingWhileBlack incidents); Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 387-92 (2019) (discussing potential legal solutions to #LivingWhileBlack incidents); Yazmine C'Bona Levonna Nichols, *Race Has Everything to Do With It: A Remedy for Frivolous Race-Based Police Calls*, 47 FORDHAM URB. L.J. 153, 184-93 (2019); Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 HASTINGS WOMEN'S L.J. 27 (2021); Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 990-99 (2019) (describing existing laws addressing improper racialized 911 calls and proposing SLAPP suits and anti-SLAPP legislation to address #LivingWhileBlack aggressions); Jaweed Kaleem, *#LivingWhileBlack: New Laws Could Outlaw Racially Motivated 911 Calls*, L.A. TIMES (May 27, 2019) (describing law reform efforts to address #LivingWhileBlack aggressions), <https://www.latimes.com/nation/la-na-living-while-black-police-20190527-story.html> [<https://perma.cc/W6A2-C759>]. This Article proposes that sex discrimination law may provide a new and additional lens through which to analyze and understand the racial and gender dynamics underlying #LivingWhileBlack aggressions. It saves for another day the analysis of how the remedies available in sex stereotyping discrimination cases might inform or inspire the envisioning of remedies and reforms for #LivingWhileBlack aggressions.

11. While the Article uses the phrase #LivingWhileBlack "problem," it recognizes that living while Black is *not* the problem, and to consider it so would erroneously pathologize and problematize Black lives. In contrast, the "problem" is decidedly white rather than Black: #LivingWhileBlack incidents are aggressions against Black people initiated by white people. Thus, the phrase #LivingWhileBlack "problem" is merely shorthand for the more accurate description of the #LivingWhileBlack phenomenon: white people deploying white privilege to sustain white supremacy. So, too, any description herein of Black people "claiming" white privilege is not intended to suggest that Black people desire to be in a position of relative privilege vis-à-vis another group of people. Rather, use of the verb "claim" is intended to convey the circumstance in which a Black person acts in ways that racism and white supremacy would dictate are reserved for whites; in such circumstances, Black people are making a claim that they have equal access to the privileges of whiteness. In the #LivingWhileBlack context, "claiming" white privilege means that Black people are making claims on equality, liberation, health and wellness, freedom of expression, and the like; white people who experience Black people making these claims (through running, bird watching, barbecuing in a park, etc.) consider such actions as encroaching on the privileges of whiteness. A similar dynamic occurs when some women "claim" male privilege—the circumstance in which a woman acts in ways that sexism and misogyny would dictate are reserved for men, creating a dynamic in which women are making a claim that they have equal access to the privileges of maleness.

calling 911 to report Black people engaging in lawful, routine, everyday activities¹²—and examines it through the lens of two specific sex discrimination law doctrines: sex stereotyping and protections against sex discrimination in public accommodation laws. It argues that these two threads of sex discrimination law are generative of a new lens through which to analyze and address #LivingWhileBlack aggressions. It does so by introducing the concept of a “White Privilege Stereotype,” a form of racial stereotyping through which white people seek to retaliate against Black people when Black people engage in activities coded as “white,” often in places that are also coded as “white.”¹³ By engaging in these “white” activities, or by engaging in activities not specifically coded as “white” in “white” spaces,¹⁴ Black people challenge the privileges of

Sex discrimination law in employment law and public accommodation law hold that retaliating against women for claiming male privilege in this way—for seeking access to the privileges of maleness without fear of reprisals—is unlawful. This article argues that this sex discrimination doctrine addressing “claims” of male privilege by women is a helpful way in which to analyze #LivingWhileBlack aggressions.

12. See Jones, *supra* note 10, at 55.

13. The central focus of this article is #LivingWhileBlack aggressions involving traditionally white-dominated leisure activities such as running and birding. Other #LivingWhileBlack incidents have involved activities with history and meaning unique to Black culture, like barbequing. Still others have involved activities not typically associated with any race, such as selling cigarettes. While the particular focus on “white” or “white coded” activities may at first blush seem to overgeneralize the #LivingWhileBlack problem, I contend that such activities put into stark relief the proposed White Privilege Stereotype because they are the most glaring illustration of that stereotype at work. Moreover, I contend that even for those #LivingWhileBlack aggressions involving activities associated with Black culture and traditions, or with no particular racial association at all, a racialized spatial element is at play: white people are punishing Black people for disregarding or not conforming to racial stereotypes that preserve a white supremacist racial order, where Black people engage in such activities in mixed-race spaces, like public parks, rather than in racially segregated spaces..

14. This special aspect of #LivingWhileBlack aggressions is, in large part, rooted in the history of vagrancy laws that were developed to criminalize Black presence in public spaces and maintain a white racial hierarchy. See, e.g., RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 117 (2016) (“Vagrancy laws . . . proved useful in keeping whites and minorities in prescribed social and cultural places. That meant apart, with whites on top Whether African Americans tried to challenge their prescribed place by moving farms, changing jobs, frequenting public spaces, or choosing sex partners, vagrancy charges seems always an option.”); Christopher Lowen Agee, *From the Vagrancy Law Regime to the Carceral State*, 43 *LAW & SOC. INQUIRY* 1658, 1662 (2018) (noting that in San Francisco in the 1950s, the “police department encouraged participating police to use broad codes like vagrancy to detain black citizens who were engaged in ‘victimless’ activities (including wearing articles of clothing—‘windbreakers and dungarees’—that police officers claimed to associate with crime)”; Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 *DUKE L.J.* 1473, 1495 (2020) (“Throughout the twentieth century . . . vagrancy laws that criminalized poverty were enforced most stringently against those who sought to upend the Black-white hierarchy.”); Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 *GEO. WASH. L. REV.* 1163, 1193 (2017) (“[Vagrancy statutes] targeted conduct and movement by individuals and groups associated with crime and disorder, particularly African-Americans. Indeed, these vagrancy laws, which came to be known as the Black Codes, were used to reassert control over newly freed African-Americans through the operation of the criminal law.”); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. CRIM. L. & CRIMINOLOGY* 775, 788 (1999) (describing the use of vagrancy laws by white people to dominate over and subjugate Black people); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *YALE L. J.* 2249, 2262 (1998) (describing the history of vagrancy laws and their connection to the policing of Black bodies: “Harsher than the Reconstruction-era laws that had preceded them, these new vagrancy laws served as primary tools in defining and policing the racial landscape that existed through the 1960s, until the Supreme Court invalidated the use of

whiteness by seeking to enjoy those privileges in the same way they are enjoyed by white people, which causes white observers to lash out and retaliate. Put another way, the White Privilege Stereotype is the likely “story” about Black people that many white perpetrators of #LivingWhileBlack incidents hold in their minds—a story about what Black people “do” in the world, specifically what they “do” for leisure and recreation, in addition to “where” they do it.¹⁵ In sum, when Black people do things that white people can do without fear of bodily, social, or legal harm, they are transgressing the boundaries of white privilege; when white people experience that transgression, they react with a #LivingWhileBlack aggression.

Conceptualizing #LivingWhileBlack aggressions as white people’s reactions to Black people seeking to enjoy the privileges of whiteness creates a link to sex stereotyping and thus to the body of sex discrimination law that both recognizes and prohibits sex stereotyping. Using this body of sex discrimination law as a springboard for theorizing #LivingWhileBlack aggressions provides one useful frame for generating solutions to this troubling phenomenon. The article makes this conceptual link by drawing an analogy between how gender and racial hierarchies have been preserved, in part, through stereotyping and the policing and punishing of the oppressed group’s nonconformity with such stereotypes.

Part I briefly summarizes the #LivingWhileBlack problem and the scholarly discussion that surrounds it. Part II describes *Price Waterhouse v. Hopkins*¹⁶ and its sex stereotyping theory. It then introduces a race stereotyping theory derived from *Price Waterhouse*’s sex stereotyping theory—the White Privilege Stereotype—and uses it to analyze the #LivingWhileBlack problem. The article does not, however, articulate a *Price Waterhouse*-derived racial stereotyping theory—White Privilege Stereotype—to make a legal argument within the context of employment discrimination, nor does it use that concept to argue for a particular outcome within any substantive area of the law. Rather, it uses employment discrimination law’s sex stereotyping as a springboard for the articulation of a White Privilege Stereotype theory that may help us theorize and understand the #LivingWhileBlack problem. Casting #LivingWhileBlack

ambiguous vagrancy laws in [1972]”). See also *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999) (observing that “vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865 . . . Alabama broadened its vagrancy statute to include ‘any runaway, stubborn servant or child’ and ‘a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.’”).

15. For example, a white employee of Smith College called the police on a Black Smith College student, Oumou Kanoute, who was eating lunch in the common area of a residence hall; the white employee stated her belief that Kanoute looked “out of place.” Bill Hutchinson, *From ‘BBQ Becky’ to ‘Golfcart Gail,’ List of Unnecessary 911 Calls Made on Blacks Continues to Grow*, ABC NEWS (Oct. 19, 2018), <https://abcnews.go.com/US/bbq-becky-golfcart-gail-list-unnecessary-911-calls/story?id=58584961> [<https://perma.cc/K4P9-D4WD>].

16. 490 U.S. 228 (1989).

aggressions as white individuals retaliating against Black individuals for “acting white”¹⁷—and thus seeking to enjoy the privileges of whiteness—parallels *Price Waterhouse*’s characterizing the rejection of Ann Hopkins as a partner in an accounting firm as punishing a woman for “acting like a man,” or seeking to enjoy privileges of maleness. Exposing the parallels between sex stereotyping and its derivative racial stereotyping, a White Privilege Stereotype, may engender a deeper understanding of the complex dynamics of #LivingWhileBlack, which may lead to different, additional, or more comprehensive strategies for disrupting and dismantling white supremacy.

Part III engages the history of discrimination against women in public spaces, the campaign for inclusion of “sex” in public accommodations laws, and how that history informs modern day controversies involving discrimination against LGBTQ individuals.¹⁸ Informed by this history, it describes how the history of sex discrimination in public can help us to understand the #LivingWhileBlack problem. In a sense, then, we have come full circle—racial civil rights provided a model for the women’s rights movement, which in turn laid the groundwork for LGBTQ civil rights and, as argued below, also provides insights and arguments for challenging the #LivingWhileBlack problem facing the racial civil rights movement today.

In overlaying employment discrimination law’s sex stereotyping theory and lessons from public accommodation sex discrimination law onto the #LivingWhileBlack problem, the goal of this Article is to contribute to the growing scholarly dialogue seeking to make legible this intractable problem and offer suggestions to dismantle it.¹⁹ Part IV proposes what I call a “touchstone theory” of inquiry for the intractable problem of white supremacy manifested through #LivingWhileBlack aggressions—a theory that encourages a multiaxial approach to analyzing white supremacy and its attendant white privilege. This theory envisions multiple “touchstones”—legal, political, and cultural, to name a few—that may inform our analysis of white supremacy. It asserts that lessons from sex discrimination law provide one such analytical touchstone.

In proposing a sex discrimination touchstone as one among many salient touchstones for analyzing #LivingWhileBlack aggressions, the Article builds on the notion of a symbiotic dynamic through which multiple systems of subordination work together.²⁰ This dynamic highlights that individuals who are “singly burdened” (those who “simultaneously occupy positions of privilege and subordination”) may engage in “compensatory subordination” (utilizing their

17. See Part II.A., *infra*.

18. See Sepper & Dinner, *supra* note 6, at 83-86.

19. For example, Taja-Nia Y. Henderson and Jamila Jefferson-Jones recently overlaid property law’s theory of nuisance onto the #LivingWhileBlack problem. See Henderson & Jefferson-Jones, *supra* note 10.

20. See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 253 (2002).

privilege to subordinate others), which then serves to fortify the very systems that subjugate them.²¹ As applied to the sex discrimination touchstone theory, this dynamic means that white (straight) women who are exercising white privilege in #LivingWhileBlack aggressions are doing so at the expense of reifying and reinforcing male privilege (to their own detriment). Exposing this dynamic through a sex discrimination touchstone inquiry of #LivingWhileBlack aggressions may encourage white women to work in coalition with Black individuals and organizations to engage in anti-racist work.

Rather than proposing a particular solution to the #LivingWhileBlack problem, this Article sets out to provide another framework for understanding and analyzing the problem—one built upon sex discrimination doctrine. In providing another touchstone for thinking about and resolving the contemporary manifestation of white supremacy and anti-Black racism that is the #LivingWhileBlack phenomenon, the Article seeks to contribute to the scholarly dialogue addressing this pervasive and violent phenomenon.²²

I. #LIVINGWHILEBLACK

The #LivingWhileBlack problem has been described in detail by the media and legal scholars.²³ It is the regulation of Black bodies by white people acting as private citizens, most commonly in places of public accommodation or in public spaces,²⁴ often through either the act of eliciting police intervention (e.g.,

21. *Id.* at 263.

22. The Article also contributes to the robust body of legal scholarship addressing racial stereotyping. Specifically, it builds on existing racial stereotyping scholarship that focuses on (1) negative stereotypes about Black people that originated in a false belief that race was the result of biology—that they are “animalistic, sexually depraved, and crime-prone”—and the impact of those stereotypes in the criminal justice context, and (2) racial stereotyping and assimilation in schools and workplaces. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857 (2006). See also Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: *Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 UC IRVINE L. REV. 873 (2015); Bernard E. Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC’Y REV. 179 (2000); Kathryn Russell-Brown, *Black Protectionism as a Civil Rights Strategy*, 53 BUFF. L. REV. 1, 3 (2005) (noting that “the prevailing image of Blackness as something loathsome, marginal, and deviant—the criminalblackman—persists”); Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014); Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355 (2008).

23. See, e.g., Jones, *supra* note 10; Henderson & Jefferson-Jones, *supra* note 10; Russell-Brown, *supra* note 22, at 12; Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014); Nichols, *supra* note 10; Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025 (2018); Fields, *supra* note 10; McNamara, *supra* note 10.

24. Some #LivingWhileBlack incidents have also occurred in private spaces where the Black target was entitled to be. See Henderson & Jefferson-Jones, *supra* note 10, at 881-88 (describing #LivingWhileBlack incidents at private universities and pools). Similarly, #LivingWhileBlack aggressions are not limited to aggressions against Black individuals; non-Black people of color are also victims. See also Kristine Phillips, *After Native American Bias Incident, College Says Those Against*

calling 911, the generic telephone number for emergency services) or threatening to do so.²⁵ These white people report innocuous, normally lawful behavior by Black people engaged in everyday activities, often recreational or leisure activities,²⁶ such as barbecuing in a public park,²⁷ shopping,²⁸ frequenting a coffee shop,²⁹ exercising,³⁰ golfing,³¹ or dining at a restaurant.³²

Diversity Can Go “Elsewhere,” WASH. POST (May 6, 2018), <https://www.washingtonpost.com/news/grade-point/wp/2018/05/06/after-native-american-bias-incident-college-says-those-against-diversity-can-go-elsewhere/> [<https://perma.cc/R43-FDH4>] (describing an incident in which a white woman called the police to report two teenage Native American boys who joined a college tour with the caller; she described them as “suspicious” and “odd”). Moreover, some #LivingWhileBlack aggressors are non-Black people of color, a prominent example of which is the killing of Trayvon Martin, a Black boy, by George Zimmerman, a Latinx man. See Manuel Roig-Franzia et al., *Who Is George Zimmerman?*, WASH. POST (Mar. 22, 2012), https://www.washingtonpost.com/lifestyle/style/who-is-george-zimmerman/2012/03/22/gIQAkXdbUS_story.html [<https://perma.cc/5FAP-2FDZ>]. This Article situates its critique of white supremacy within the Black/white binary because of the power of that binary to illustrate the White Privilege Stereotype proposed here. In so doing, it does not seek to diminish (1) the prevalence of anti-Blackness within non-Black communities of color and #LivingWhileBlack aggressions that arise in that context, or (2) the likelihood that white supremacy may interact in overlapping yet divergent ways in #LivingWhileBlack aggressions that involve non-Black people of color as either victims or aggressors.

25. Jones, *supra* note 10, at 68.

26. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 697 (2020).

27. See Henderson & Jefferson-Jones, *supra* note 10, at 873-75.

28. *Id.* at 889-91 (describing #LivingWhileBlack incidents in retail establishments).

29. *Id.* at 896.

30. *Id.* at 892-93; see, e.g., Otis R. Taylor, Jr., *Even in Oakland, Calling the Cops on Black People Just Living Their Lives*, S.F. CHRON. (May 17, 2018), <https://www.sfchronicle.com/news/article/Even-in-Oakland-calling-the-cops-on-black-people-12920652.php> [<https://perma.cc/272N-3NZ5>]; Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html> [<https://perma.cc/LF3M>]; Niraj Chokshi, *White Woman Nicknamed ‘Permit Patty’ Regrets Confrontation over Black Girl Selling Water*, N.Y. TIMES (June 25, 2018), available at <https://www.nytimes.com/2018/06/25/us/permit-patty-black-girl-water.html> [<https://perma.cc/3LFL-85WJ>]; Daniel Victor, *A Woman Said She Saw Burglars. They Were Just Black Airbnb Guests*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html> [<https://perma.cc/T8VZ-HTJ9>]; Lorraine Kahneratokwas Gray, *A Woman Called the Police on My Native American Sons While They Were on a College Tour*, ACLU (June 5, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/woman-called-police-my-native-american-sons-while-they> [<https://perma.cc/68AE-S9W4>].

31. Jones, *supra* note 10, at 55.

32. *Id.* While outside the specific scope of this Article, it is notable that Black people who enter traditionally “white” occupations may face a similar dynamic. For example, Black farmers and Black winemakers face obstacles both to entry into their field as well as discrimination once within their field. See, e.g., Will Peischel, *California’s Black Winemakers Navigate the Barriers of a Lily-White Industry*, *Mother Jones* (July 27, 2020), <https://www.motherjones.com/food/2020/07/heres-what-its-like-to-be-black-in-the-lily-white-wine-industry/> [<https://perma.cc/HYW5-HHFU>]; Nicole Hannah-Jones, *The 1619 Podcast: The Land of Our Fathers, Part 2*, N.Y. TIMES (Oct. 19, 2019), <https://www.nytimes.com/2019/10/11/podcasts/1619-slavery-farm-loan-discrimination.html> [<https://perma.cc/GL7T-JUNU>]. Black female doctors also face intersectional discriminatory dynamics. See, e.g., Derek Hawkins, *Flight Attendant to Black Female Doctor: “We’re Looking for Actual Physicians”*, WASH. POST (Oct. 14, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/10/14/blatant-discrimination-black-female-doctor-says-flight-crew-questioned-her-credentials-during-medical-emergency> [<https://perma.cc/EU7P-JSPE>] (describing an in-flight medical emergency to which a Black female physician, Tamika Cross, responded; a white flight attendant stated, “Oh no, sweetie, put [your] hand down. We are looking for actual physicians or nurses or some type of medical personnel, we don’t have time to talk to you,” before choosing a white male physician to assist).

Black people report that #LivingWhileBlack is pervasive. Recounting even the highest profile incidents to occur since the term was coined would overwhelm the present article.³³ However, two recent, well-publicized #LivingWhileBlack incidents provide examples of the phenomenon. First, in February 2020, Ahmaud Arbery, a Black man, was jogging in his neighborhood when he was shot and killed by two white men.³⁴ The men mistakenly believed that Arbery was the suspect in a spate of burglaries in the neighborhood.³⁵ Second, in May 2020, a white woman walking her dog in New York's Central Park called the police on Christian Cooper, a Black man who was in the park to birdwatch.³⁶ She was angry at Cooper because he asked her to leash her dog (which the park's rules require).³⁷ Video of the incident shows the white woman changing the pitch of her voice when talking to the 911 operator—to a pitch widely understood to express fear and panic. In that call, she falsely reported that Cooper was threatening her life.³⁸

A *Washington Post* article describing a #LivingWhileBlack incident of a white Yale college student who called the police to report that a Black Yale college student was sleeping in the lounge of her student dorm provides a succinct overview of the #LivingWhileBlack problem:

And for anyone keeping score, it adds “napping” to the long and apparently still growing list of things it is unacceptable to do while black. Other entrants include: couponing while black, graduating too boisterously while black, waiting for a school bus while black, throwing a kindergarten temper tantrum while black, drinking iced tea while black, waiting at Starbucks while black, AirBnB'ing while black, shopping for underwear while black, having a loud conversation while black, golfing too slowly while black, buying clothes at Barney's while

33. See, e.g., Christine Hauser, *Starbucks Employee Who Called Police on Black Men No Longer Works There, Company Says*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/us/starbucks-philadelphia-arrest.html> [<https://perma.cc/8LHJ-69H8>]; Jason Johnson, *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-starbucks-to-hashtags-we-need-to-talk-about-why-w-1825284087> [<https://perma.cc/MS9V-27PA>]; Momo Chang, *Kenzie Smith Speaks Out: One of the Men Targeted by “BBQ Becky” Reflects on the Incident and What the Aftermath Means for Oakland*, EAST BAY EXPRESS (May 30, 2018), <https://eastbayexpress.com/kenzie-smith-speaks-out-2-1> [<https://perma.cc/L533-YN8D>] (describing an incident in which “BBQ Becky” called the police to remove two Black men from a popular urban lakeside park after they refused to obey her demands that they halt using a charcoal grill for their barbecue); Dakin Andone & Hollie Silverman, *A Mom on a College Tour Called the Cops on Two Native American Teens Because They Made Her “Nervous”*, CNN (May 5, 2018), <https://www.cnn.com/2018/05/04/us/colorado-state-university-racial-profiling-trnd/index.html> [<https://perma.cc/WZ5V-YA7Y>] (describing an incident at Colorado State University in which a parent effectively had police remove two Native American prospective students from a school tour after she alleged “[t]hey’re not—definitely not—a part of the tour”).

34. See Fausset, *supra* note 3.

35. *Id.*

36. See David Betancourt, *Christian Cooper Hopes America Can Change. Because He’s Not Going To.*, WASH. POST (June 23, 2020), <https://wapo.st/32NUKpJ> [<https://perma.cc/9CJ9-UQDQ>].

37. *Id.*

38. *Id.*

black, or Macy's, or Nordstrom Rack, getting locked out of your own home while black, going to the gym while black, asking for the Waffle House corporate number while black and reading C.S. Lewis while black, among others.³⁹

Put another way, in #LivingWhileBlack aggressions, Black people are living wholly integrated lives—unabashedly recreating or engaging in leisure activities. In fact, Black people who are ensnared in a #LivingWhileBlack moment often are not paying attention to the white people around them, but rather are just going about their business. It seems that it is this fact, the fact that Black people are living their lives in public spaces without noticing or deferring to the white people around them, that triggers white people to rely on the White Privilege Stereotype proposed herein (along with other racial stereotypes) as a reason to engage in the private policing of Black bodies that constitutes the #LivingWhileBlack problem.

The #LivingWhileBlack phenomenon thus is a mix of racial profiling and private policing, both grounded in white supremacy.⁴⁰ The instinct of some white people to immediately categorize Black people as interlopers is embedded in a white supremacist worldview, a system that insists on putting bodies into a hierarchy, a phenomenon Frank Rudy Cooper calls “the scaling of bodies.”⁴¹ White people who engage in #LivingWhileBlack attacks send Black people a message “about their belongingness in the ‘white space’—and their social citizenship more generally.”⁴² Monica Bell describes the #LivingWhileBlack phenomenon as one of “border patrol”—“a general project of racial boundary maintenance [that] . . . functions as a form of exclusionary social closure by Whites against Black and Brown people to protect White space.”⁴³ Collectively, these incidents demonstrate whites’ “perceived entitlements to racial exclusivity”⁴⁴ in shared spaces, based on racialized ideas about who “belongs” in such spaces.⁴⁵ #LivingWhileBlack aggressions result in a multitude of harms to Black people, including the risk of, or actual, physical violence; psychological trauma; expressive harms; dignitary harms, diminished liberty and freedom; and citizenship harms.⁴⁶

Scholars have addressed the #LivingWhileBlack problem from various perspectives. For example, Pamela J. Smith frames the problem as one that

39. Cleve R. Wootson, Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police.*, WASH. POST (May 11, 2018), <https://wapo.st/2YOkVvm> [<https://perma.cc/6BN3-YQ36>].

40. See generally Jones, *supra* note 10, at 68.

41. Cooper, *supra* note 22.

42. Bell, *supra* note 26, at 698.

43. *Id.* at 700.

44. Henderson & Jefferson-Jones, *supra* note 10, at 897.

45. See Angelia Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” From Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1165 (2017) [hereinafter Onwuachi-Willig, *Policing the Boundaries*].

46. See McNamara, *supra* note 10, at 363-83.

emerges from the social construction of race: “regardless of whether Blacks are driving while Black, standing while Black, purchasing while Black, walking while Black, teaching while Black, traveling while Black, living while Black, or doing or not doing any manner of activities, all while Black, tells the tale of the social immutability of race. Race for Blacks is both socially defined and socially confined.”⁴⁷

Taja-Nia Henderson and Jamila Jefferson-Jones theorize the #LivingWhileBlack problem through the lens of “Blackness as nuisance,”⁴⁸ an exploration of “how white complainants in a subset of #LivingWhileBlack incidents weaponized the language of land use, particularly that of nuisance and trespass, in their efforts to exclude Blacks from various shared spaces.”⁴⁹ Their nuisance argument builds on the history of the prosecution of Black people—beginning at emancipation and intensifying during the Civil Rights Movement—for the crimes of trespass and vagrancy to enforce “racial boundaries and property entitlements.”⁵⁰ Vagrancy laws were long used to selectively target Black people for criminal prosecution, resulting in high rates of imprisonment.⁵¹ All 50 states and the District of Columbia had vagrancy laws on their books until the early 1970s;⁵² these laws “criminalized a broad range of behaviors and statuses such as ‘being idle, poor, immoral and dissolute, wandering about with no apparent purpose, being a habitual loafer or disorderly person and more.’”⁵³ These laws were applied to police the boundary of “white” spaces and maintain a white racial hierarchy.⁵⁴ The through-line from these early vagrancy laws to #LivingWhileBlack aggressions is a clear one.⁵⁵

47. Pamela J. Smith, *Reliance on the Kindness of Strangers: The Myth of Transracial Affinity Versus the Realities of Transracial Educational Pedism*, 52 RUTGERS L. REV. 1, 91 (1999) [hereinafter Smith, *Reliance*].

48. *Id.* See also Henderson & Jefferson-Jones, *supra* note 10, at 870.

49. *Id.* at 871.

50. *Id.* at 879.

51. *Id.*

52. In 1972, the U.S. Supreme Court struck down Florida’s vagrancy law, holding that it was unconstitutionally vague. See *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Many cities and states, however, enacted “twenty-first-century functional replacement[s] for vagrancy” laws in the form of laws forbidding camping, sleeping in public, and or begging in public places. Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. 1, 9 (2011); see also James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1528-29 (2019) (“No sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage. States criminalized such activities as ‘gang loitering,’ panhandling, and sleeping on park benches, and imposed harsh sentences on minor crimes such as drug possession, especially drugs such as crack cocaine that were favored by poor city dwellers.”) (internal citation omitted).

53. *Id.* at n.72 (citation omitted).

54. *Supra* note 13.

55. *Id.* See also Jones, *supra* note 10, at 58 (describing #LivingWhileBlack aggressions as “institutional racism under another name” and linking these aggressions to vagrancy laws); Bell, *supra* note 26, at 698 (considering police reform efforts through a lens focused on the noncriminal functions of policing; applying that lens to #LivingWhileBlack aggressions; noting: “Historically, vagrancy laws were one major conduit through which police officers criminalized human location, often to maintain racial

Angela Onwuachi-Willig uses the term “spacism” as an umbrella term to describe various ways in which white people “work to maintain white advantage through policing physical racial segregation.”⁵⁶ Others have focused on the problem as at the intersection of policing and individual bias,⁵⁷ suggesting changes to emergency dispatcher policies⁵⁸ and identifying federal and state laws that may provide remedies for Black people targeted for #LivingWhileBlack.⁵⁹ Still others have argued for a theologically-based analysis of #LivingWhileBlack,⁶⁰ analyzed the problem through the lens of “anti-SLAPP” legislation,⁶¹ or conceptualized it as a “systematic phenomenon” described as “racialized police communication.”⁶² In addition, several states and municipalities have considered or enacted legislation to punish those who make racially-motivated 911 calls.⁶³

In naming a White Privilege Stereotype, this Article engages with the growing scholarly discussion of the #LivingWhileBlack problem and contributes another point of entry for conceptualizing, problematizing, and addressing the phenomenon.

II. SEX STEREOTYPING MEETS #LIVINGWHILEBLACK

This section builds on the theory of sex stereotyping—the idea that women who “act like men” are punished when they act against stereotypes assigned to their gender. It articulates a derivative theory of racial stereotyping, dubbed a White Privilege Stereotype, which incites retaliation against Black people who act “like” white people (therefore perceived by white people as acting against expectations assigned to their Black race). Just as white⁶⁴ women like Ann

segregation. Simply existing in a public space unwelcomed could give officers a legitimated reason to engage, without needing to rely on vague justifications of suspicious behaviors or ‘furtive movements.’”); McNamara, *supra* note 10, at 354 n.88 (in the context of analyzing #LivingWhileBlack aggressions, observing that with the decline of *de jure* segregation came a *de facto* segregation in the form of law enforcement using vagrancy laws to “maintain[] racial apartheid”).

56. Onwuachi-Willig, *Policing the Boundaries*, *supra* note 45, at 1165.

57. See, e.g., Jones, *supra* note 10, at 68-69; see also Henderson and Jefferson-Jones, *supra* note 10, at 869 n.27 (summarizing media and scholarly discussions of the problem along this analytical axis).

58. Jones, *supra* note 10, at 87-88.

59. *Id.* at 78-84.

60. See Nichols, *supra* note 10, at 159 (contending that “[i]ncorporating theological analysis more effectively highlights the group-based injury that Black people experience as a result” of the phenomenon).

61. See Fields, *supra* note 10, at 992-93.

62. McNamara, *supra* note 10, at 343.

63. See Jones, *supra* note 10, at 75-76; Henderson & Jefferson-Jones, *supra* note 10, at 911-12.

64. The women’s rights movement is not just indebted to the racial civil rights movement by analogy. The sexual harassment movement, and its resulting recognition as a core component of sex discrimination law, is directly indebted to the experience and activism of Black women. This cadre of Black women, who were at the forefront of the sexual harassment movement, included Diane Williams, Paulette Barnes, Sandra Bundy, and Mechelle Vinson. In the 1970s, Bundy, a Black woman, sued her employer, the District of Columbia Department of Corrections, after suffering sexual harassment from multiple men for several years. See generally, Luke Mullins, *#HerToo: The Story of the DC Woman Who Helped Make Sexual*

Hopkins are punished for seeking to access male privilege (i.e., for engaging with the world in ways that violate gender role expectations as dictated by sexism and misogyny), Black people who are targeted for #LivingWhileBlack aggressions are punished for seeking to access white privilege (i.e., for engaging with the world in ways that violate race role expectations as dictated by racism and white supremacy).

A. *A Note on the Scope of this Article*

A common critique of some feminist legal theory scholarship authored by white women is that it erases women of color by writing from a perspective that assumes all women are white and all men are Black.⁶⁵ To be sure, Black women exist at the intersection of sex stereotyping *and* race stereotyping.⁶⁶ Moreover, the sex stereotyping of Black women differs from the sex stereotyping of white women.⁶⁷

Harassment Illegal, WASHINGTONIAN (Mar. 4, 2018), <https://www.washingtonian.com/2018/03/04/hertoo-40-years-ago-this-woman-helped-make-sexual-harassment-illegal-sandra-bundy> [https://perma.cc/RKA7-PZG8]. That lawsuit “is considered a seminal event in the establishment of sexual harassment as a legal concept in America.” *Id.* Bundy followed in the footsteps of Diane Williams and Paulette Barnes, two Black women, who previously had successfully sued their employers for sexual harassment. *Id.* All three of these 1970s cases supported the outcome in 1986 of *Meritor Savings Bank v. Vinson*, in which the U.S. Supreme Court held for the first time that sexual harassment is actionable under Title VII. 477 U.S. 57 (1986). Mechelle Vinson, a Black woman, endured years of sexual harassment and sexual violence at the hands of her supervisor. *See generally* DeNeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault*. Her Sexual Harassment Case Would Make Legal History, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/> [https://perma.cc/DM3X-6YUF]. Her case “redefined sexual harassment in the workplace.” *Id.* Without these Black women, there would be no *Price Waterhouse*, yet Black women—empirically and jurisprudentially—benefit the least from these legal protections. *See, e.g.*, Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J. L. & SOC. CHANGE 1 (2019); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. FORUM 105 (2018); Lua Kamal Yuille, *Liberating Sexual Harassment Law*, 22 MICH. J. GENDER & L. 345, 363-64 (2015); Pamela J. Smith, *Part II—Romantic Paternalism—The Ties that Bind: Hierarchies of Economic Oppression that Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181 (1999); Andrea L. Dennis, *Because I am Black, Because I am Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555 (1996). Although this Article addresses #LivingWhileBlack aggressions, it is important to recognize that it relies on a sex discrimination theory—sex stereotyping—that was an outgrowth of the courage and activism of Black women, who in turn receive less protection than white women under the very doctrine that they had a foundational role in establishing. The irony and injustice of this historical reality (as manifested in contemporary sex discrimination cases) is important to note, lest it be obscured from today’s racial and gender justice agendas.

65. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139.

66. *See id.* at 139-40.

67. *See, e.g.*, Banu Ramachandran, *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking from Experience*, 98 COLUM. L. REV. 1757, 1777-78 (1998) (noting that “African-American women . . . were historically viewed as the antithesis of the idealized, nineteenth-century white woman” and comparing stereotypes of white women as nurturing, virtuous, chaste, and compassionate with stereotypes of Black women as lustful and evil); Ann C. McGinley, Ricci

The example of workplace harassment illustrates the unique, intersectional experiences of Black women. Black women experience that harassment in ways different from white women and at disproportionately higher rates than white women.⁶⁸ The unique experience of Black women with workplace harassment results from a “mutual construction of gender and race.”⁶⁹ This mutual construction subjects Black women to “the racialized gender stereotypes of women of color as ‘wanton’” which in turn “predisposes women of color to being objectified and equates them with sex as a consumer good.”⁷⁰ White women, in contrast, “are constructed as sexual subjects with agency to consent to or rebuff sexual advances, as long as they conform to patriarchal gender norms.”⁷¹

Extrapolating Black women’s experiences with workplace harassment suggests that Black women may experience #LivingWhileBlack aggressions—also a type of harassment—differently than do Black men. Moreover, given the sex plus race stereotyping of Black women, the motivation of white #LivingWhileBlack aggressors may differ depending on whether the intended victim is a Black man or a Black woman. The racialized gender stereotypes thrust upon Black women may explain these differences. In addition, when white women are #LivingWhileBlack aggressors or are complicit bystanders to such aggressions, *their* racialized gender—their position as *white* women—likely also contribute to these differences, as might be extrapolated from harassment that occurs in the workplace:

Women of color become interchangeable in their ability to serve as a contrast to White womanhood. The stereotypes of Black women as animalistic wantons . . . disciplines White women who consider disrupting the gendered construction of purity. These stereotypes threaten to diminish their White race privilege by punitively viewing such norm violators as engaging in Black-like . . . conduct. In effect, White womanhood is constructed by its juxtaposition with stereotypes of non-White women. Tagging Whiteness as pure and racial difference as sexual is simultaneously implicated in policing racial differences and

v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 609 (2010) (“Black and white female firefighters were also subject to stereotypes, but the stereotypes they experienced differed. Negative stereotypes of the black women characterized them as welfare recipients and ‘beasts of burden.’ As a result, they were expected to shoulder heavier loads and to do more chores. White female firefighters were considered fragile, a stereotype that led to the perception that they had insufficient stamina to do the job. In order to counter the stereotype, white women worked harder and covered up their injuries.”) (internal citations omitted); Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 Geo. L.J. 1659, 1675-76 (1991) (“Discrimination against women of color often operates differently, is fueled by different factors, and results in different stereotypes, than discrimination against either men of color or white women.”).

68. See Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 186 (2001).

69. *Id.* at 208.

70. *Id.* at 209.

71. *Id.*

notions of gender difference all in the service of “hetero-sexist patriarchy.”

These stereotypes define true women as White women and true men as White men, with rightful access for the latter to White women and illicit access to women of color. . . . In short, race and gender not only intersect—they construct one another.⁷²

The “raceXgender”⁷³ experiences of Black women subject to #LivingWhileBlack aggressions warrant deeper consideration and theorizing—a project that is outside the scope of this Article. At the risk of being critiqued for essentializing, this Article sets aside an intersectional consideration and theorizing that complicates any analysis of #LivingWhileBlack aggressions. It sets aside this additional issue for future interrogation for two reasons. First, the Article’s connecting of the *Price Waterhouse* sex stereotyping theory to #LivingWhileBlack aggressions is arguably cabined in by the shortcomings of that case—one that involved a white woman plaintiff that has been criticized for not adequately redressing discrimination against Black women in the workplace. The White Privilege Stereotype, which builds on *Price Waterhouse*, is thus just a first step in building a more robust analysis of the intersection of sex stereotyping and #LivingWhileBlack aggressions. Second, one of the article’s goals is to speak to white women in particular, to encourage them to unpack how #LivingWhileBlack aggressions also implicate their own gender subordination within a white supremacist patriarchy.⁷⁴

Leaving for another day the issue of intersectionality is not intended to signal that it is unimportant or unnecessary—it is both. In flagging this as an issue for future interrogation, this Article acknowledges its importance. And in articulating a White Privilege Stereotype grounded in sex discrimination law, it seeks to lay an analytical groundwork for such future inquiry.

B. Racial Stereotyping Defined

There are many anti-Black racial stereotypes, and many scholars rightly focus on the pervasive and relentless negative ones that have been around at least since chattel slavery reached the colonial United States in 1619.⁷⁵ These

72. *Id.* at 210-11.

73. MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 8 (Stanford University Press 2019). Deo uses the term “raceXgender” because it “highlights the compound effects often caused by holding multiple devalued identity characteristics, namely the intersection of race and gender. Rather than thinking of a woman of color as Black ‘plus’ female, or female ‘plus’ Black, utilizing the raceXgender nomenclature emphasizes the multifactorial effect of race ‘times’ gender for women of color.” *Id.*

74. *See infra* Part IV.C.

75. *See* Fields, *supra* note 10, at 933-34.

For nearly 350 years, from the arrival of the first slave ships to Virginia in 1619 . . . 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,

dehumanizing, anti-Black stereotypes include the notion that Black people “are always and already a criminal threat”⁷⁶ because they are by their nature “savage and incapable of ‘rising above their violent passions.’”⁷⁷ This stereotype leads to “perceived connections between race and crime [that] are . . . powerful and ubiquitous.”⁷⁸

Foundational to these stereotypes is the belief held by white Europeans, beginning in the sixteenth century, that Black people are biologically inferior to white people and less than fully human.⁷⁹ This belief grew out of the erroneous idea that race is based in biology and thus any perceived differences among races was biologically based and inherent.⁸⁰ This unfounded notion of Black people has persisted to the present day and informs modern-day anti-Black stereotypes.⁸¹

warning white America about the inherent criminality and violent propensities 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.

Id.

Racist ideas, however, originated well before 1619. The origins of racist ideas can be traced back to Europe in the fifteenth century. *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 22-27 (2016) (quoting a narrative from Portugal in the 1400s that justified the enslavement as Africans because “[t]hey lived like beasts, without any custom of reasonable beings” and “they had no understanding of good, but only knew how to live in bestial sloth”). Moreover, Africans arrived to what is now the United States prior to 1619: they first arrived in the sixteenth century to what was then the Spanish colonial territories. *Id.* at 26 (noting that the first enslaved Africans arrived in Hispaniola in 1502).

76. Markovitz, *supra* note 22, at 921. *See also* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 35 (2010) (tracing the history of the development of stereotypes on black criminality in the United States).

77. Markovitz, *supra* note 22, at 921 (citations omitted). *See also* Russell-Brown, *supra* note 22, at 63 (noting “centuries-old stereotypes of Black deviance”).

78. Markovitz, *supra* note 22, at 889. *See also, e.g.*, Harcourt, *supra* note 22, at 199 (describing “pernicious racial stereotypes about criminality”) (internal citation omitted); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (charting image of “bestial black man”); D. Marvin Jones, “We’re All Stuck Here for a While”: Law and the Social Construction of the Black Male, 24 J. CONTEMP. L. 35 (1998) (describing stereotypes of Black men); Hutchinson, *supra* note 22, at 29-30 (“Historically, . . . persons of color were portrayed as savages, violent, promiscuous, slaves, and foreigners. According to implicit bias research, these same constructs impact how many white Americans perceive persons of color today”) (citations omitted); Charles R. Lawrence III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

79. Cooper, *supra* note 22, at 877.

80. *Id.* at 1561. *See also* Spann, *supra* note 23, at 1030 (“Belief in the racial inferiority of blacks was an integral part of American chattel slavery, which is traceable to the importation of the first African slaves into the colony of Jamestown in 1619.”); Katie R. Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L.J. 1002, 1066 (2019) (“Whether defined as it initially was as a matter of biology, as it was in the post-Brown era as a matter of African American culture, or as it is today as the pathologies of the ‘inner city,’ the core set of racist stereotypes of African Americans as dangerous, lazy, less competent, less refined, and lacking in moral values has a very long and deep history.”).

81. *Id.* at 876-77; *see, e.g.*, Fields, *supra* note 10, at 934.

Scholars have explored how these forgoing negative anti-Black stereotypes play out in the criminal justice system,⁸² such as how these stereotypes are deployed by criminal defendants claiming that they acted in self-defense in response to an interaction with a Black person.⁸³ Allowing a fear based in the anti-Black stereotype of inherent and violent criminality to support a claim of self-defense allows that stereotype to be perpetuated and “used to enforce or maintain a system of racial subordination.”⁸⁴

Frank Rudy Cooper argues that this same set of stereotypes, which emerged from Western Enlightenment thinking that “presumed not only that able-bodied middle-class white male bodies were the ideal, but also that persons with those qualities were intellectually, aesthetically, and morally superior to other people[,]”⁸⁵ compels “the scaling of bodies,” a phenomenon through which “people of color, non-Christians, women, the old, and other non-normative groups are deemed degenerate.”⁸⁶ A number of other scholars have addressed these racial stereotypes in various yet related contexts.⁸⁷

These anti-Black racial stereotypes are persistent, ingrained, and so common as to go unrecognized (and thus to be seen as “natural” or “truths”) by many white people. The White Privilege Stereotype is a different variety of racial stereotyping, one that does not explicitly or directly refer to the foregoing pervasive and destructive negative stereotypes. This White Privilege Stereotype is, instead, the likely “story” about Black people that many white perpetrators of #LivingWhileBlack incidents hold in their minds—a story about what Black people “do” in the world, specifically what they “do” for leisure and recreation, in addition to “where” they do it.⁸⁸ When Black people act contrary to this “story” they are claiming privileges of whiteness, namely, the freedom to engage

82. See, e.g., Hutchinson, *supra* note 22, at 40, 57, 63-70.

83. See, e.g., Markovitz, *supra* note 22, at 874; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

84. Markovitz, *supra* note 22, at 924. See also Harcourt, *supra* note 22, at 201 (“The myth of Black criminality is part of a belief system deeply embedded in American culture that is premised on the superiority of whites and inferiority of Blacks.”) (quoting Dorothy Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999)).

85. Cooper, *supra* note 22, at 871.

86. *Id.* at 871-72.

87. See, e.g., Lawrence, *supra* note 78; Russell-Brown, *supra* note 22; Hutchinson, *supra* note 22; Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52 (2008); Lee, *supra* note 83; Smith, *Reliance*, *supra* note 47; Eyer, *supra* note 80; Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L. J. 193 (2018).

88. *Supra* note 15.

in everyday activities without fear of surveillance or retaliation.⁸⁹ As such, it is a descriptive, rather than prescriptive, racial stereotype.⁹⁰

Put another way, one possible explanation for white people's #LivingWhileBlack aggressions is that they perceive their Black victim as "acting white" when engaging in everyday activities like dining at a restaurant, golfing, or having a BBQ at a public park; white people have coded such activities as "white" activities that Black people do not "do," at least not in particular spaces.⁹¹ As a result, white #LivingWhileBlack perpetrators target Black victims both for "acting white"—trying to partake in the privileges of whiteness—and for violating the boundary around white-raced spaces while doing it.⁹² It is this stereotyping dynamic that the article describes as a White Privilege Stereotype.

The dynamics embodied in a White Privilege Stereotype reflect Judith Butler's suggestion that "racism pervades white perception, structuring what can and cannot appear within the horizon of white perception."⁹³ #LivingWhileBlack is thus fueled by both spatial and behavioral stereotypes, by both "spacism"⁹⁴ and racism.⁹⁵ As described below, this variant of racial stereotyping—punishing a Black person for "acting white"⁹⁶ and seeking to enjoy the benefits of white privilege—parallels the sex stereotyping of Ann Hopkins, who was punished for "acting like a man" and, in so doing, sought to enjoy the benefits of male privilege without reprisal.

89. In this way, the variant of racial stereotyping posited in this article builds on and compliments the property-based and space-based analyses of #LivingWhileBlack offered by Henderson, Jefferson-Jones, Onwuachi-Willig, and others.

90. See, e.g., Kyle C. Velte, *So You Want to Have a Second Child: Second Child Bias and the Justification Suppression Model of Prejudice in Family Responsibilities Discrimination*, 61 BUFF. L. REV. 909, 916 (2013).

91. See Cooper, *supra* note 22, at 872.

Whiteness can be the baseline because 'to be white is not to think about it.' All people in the United States recognize race, but whites often view their own racial identity as immaterial. Hence, the racial norm is unidirectional: whites often ignore the significance of their own racial identity (but not the significance of other people's racial identity) while racial minorities cannot afford to ignore the impact of their own racial identity. This type of thinking effectively limits race to a status of subordinated.

Id. (citations omitted).

92. See, e.g., Henderson & Jefferson-Jones, *supra* note 10, at 905-06; Onwuachi-Willig, *Policing the Boundaries*, *supra* note 45, at 1156-57.

93. Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in READING RODNEY KING/READING URBAN UPRISING at 15-16 (1993).

94. Onwuachi-Willig, *Policing the Boundaries*, *supra* note 45, at 1156.

95. Of course, these two variants of racial stereotypes—the negative Black stereotypes and the White Privilege Stereotype—are connected and rely on each other. Without the negative Black stereotypes creating for white people an expectation of how Black people "should" act (prescriptive stereotype), there is no conclusion that a Black person is "acting white" in ways that need to be disciplined and corrected. This Article, however, focuses on and centers the White Privilege Stereotype and connects it to the male privilege-enforcing stereotype deemed improper and impermissible in *Price Waterhouse*.

96. In this context, the phrase "acting white" refers to Black people's participation in activities that white people think are exclusively white. This meaning of "acting white" is distinct from the meaning of "acting white" referenced in the following paragraph, where it uses the phrase to describe a survival tactic of assimilation sometimes used by Black people.

Another line of scholarship explores a related “acting white” phenomenon, that of Black people making a deliberate choice to assimilate—to “act white” or “cover” in the specific contexts of education⁹⁷ and the workplace.⁹⁸ These articles examine the notion of identity performance—the phenomenon of Black students or employees engaging in “behavior that conforms to corporate expectations”⁹⁹ so as to assimilate into the predominantly white corporate culture that purports to embrace colorblindness.¹⁰⁰ Colorblindness, in turn, comes to mean that “white norms [become] . . . the model for everyone’s behavior.”¹⁰¹ Such assimilation, however, creates a “false inclusiveness”:¹⁰² in these contexts, “many whites expect [Black professionals] to engage in acts that make whites comfortable with his blackness.” This in turn leads Blacks (and other marginalized groups) to assume a “working identity”¹⁰³ or to engage in “covering”¹⁰⁴ any signs of racial difference, so that they are “phenotypically black, but culturally white.”¹⁰⁵

Kenji Yoshino explains that the contours of racial discrimination shift over time, such that today “individuals no longer need[] to be white, male, straight, Protestant, and able-bodied; they need [] only to *act* white, male, straight, Protestant, and able-bodied.”¹⁰⁶ In considering the “strategic actions that people take to work their racial identities,”¹⁰⁷ these scholars center the intentional choice by Black employees or students to act in ways that are consistent with white norms—to perform whiteness—so as to actively “disabuse [whites] . . . of negative stereotypes and expectations.”¹⁰⁸ At least in the workplace and some educational contexts, then, Black individuals are included and accepted *if* they choose to perform their racial identity in ways that white people find acceptable—as long as they “act white.”¹⁰⁹ Other scholars describe this tactic as

97. See, e.g., Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. & PUB. POL’Y 117, 148 (2017); Cooper, *supra* note 22, at 882-85.

98. See, e.g., Cooper, *supra* note 22, at 882-85.

99. *Id.* at 884.

100. *Id.*

101. *Id.* at 885.

102. *Id.* at 894-96.

103. Carbado & Gulati, *supra* note 22, at 1267.

104. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771-72 (2002) (using the term in article reviewing requirement for gays, racial minorities, and women to “cover,” or downplay, their difference); see also Cooper *supra* note 22, at 894.

105. See, e.g., Cooper, *supra* note 22, at 896.

106. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 26 (2006).

107. *Id.*; Harris, *supra* note 87, at 60 (“For example, when non-whites seek to succeed in white-dominated environments, they may disclaim interest in leisure activities associated with minority racialized groups, avow interest in leisure activities coded ‘white,’ distance themselves from non-whites perceived as angry or political, and so forth.”).

108. Harris, *supra* note 87, at 59.

109. See, e.g., Angela Onwuachi-Willig and Mario Barnes, *By Any Other Name? On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1295 (2005); Harpalani, *supra* note 97, at 155-56. See also Lua Kamál Yuille, Rúhiyyih Nikole Yuille & Justin Ali-Akbar Yuille, *Love as Justice*, 26 LANGSTON HUGHES REV. 49, 49-76 (2020), <https://ssrn.com/abstract=3626202> [<https://perma.cc/5QQZ-2B5Y>]; Cheryl I. Harris, *Whiteness as*

“emulation”—“a long-standing form of resistance within Black space” in which Black people “respond to structural racism by individually behaving in a ‘respectable’ manner that elicits the esteem of Whites as a way to insulate the self from attack while also promoting a positive group image that can ‘uplift’ the reputation of the group.”¹¹⁰

As argued below, a White Privilege Stereotype is an extension of the performativity (at schools and workplaces) line of scholarship, both of which center around the idea of Black individuals “acting white.”¹¹¹ This racial stereotyping literature described above does more than just describe the existence of these negative and assimilationist stereotypes. Instead, these scholars demonstrate that these kinds of racial stereotyping produce negative prescriptions for what it means to “act Black.” The construction of that meaning underlies spacism and white privilege and creates the framework within which it makes “sense” for white people to sanction black people for acting white through #LivingWhileBlack aggressions. In this way, the White Privilege Stereotype builds on and extends the exemplary and impactful canon of racial stereotyping scholarship that preceded it.

C. *Price Waterhouse v. Hopkins* and the Sex Stereotyping Theory

The background of this still influential case is very well-known. In 1982, Ann Hopkins, a white woman, was considered for partnership at Price Waterhouse, the accounting firm at which she was a successful senior manager.¹¹² By every measure, Hopkins met the requirements for becoming a partner. The partners did not admit her to the partnership; they instead held their decision in abeyance and indicated that they would consider it again the following year.¹¹³ That did not happen, and Hopkins sued Price Waterhouse under Title VII, alleging that she had been discriminated against because of her sex.¹¹⁴

Property, 106 HARV. L. REV. 1707, 1711 (1993) (describing how her Black grandmother “passed” as a white person to get a job in a department store); John Hagan & Carla Shedd, *A Socio-Legal Conflict Theory of Perceptions of Criminal Justice*, 2005 U. CHI. LEGAL F. 261, 284 (2005) (describing that some Black parents teach their children to “code switch” in interactions with police to reduce the risk of being harmed by the police: “In essence, code-switching is a device to change one’s public identity (i.e. race, presumed class, etc.) to elicit a more favorable outcome in an otherwise threatening situation. There is a class as well as race component to the use of code-switching among peers who we have noted are sometimes referred to as acting white, and this device may play a key role when the situation involves the police.”) (citation omitted).

110. Yuille, Yuille & Yuille, *supra* note 109, at 63-64 (citation omitted).

111. It differs from that body of scholarship because it describes situations in which Black people are not intentionally deciding to perform their racial identity in ways that facilitate acceptance by white people or assimilation into “white” spaces. Rather, it describes situations in which Black people are going about their daily lives without regard for the gaze of white people.

112. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

113. *Id.* at 231.

114. *Id.* at 232.

Her case was a strong one, both statistically and personally. Statistically, the numbers of women partners at Price Waterhouse were dismally low: When she went up for partner, there were 662 partners in the firm, only seven of whom were women; the year that she sought partnership, she was the only woman of the 88 people proposed for partnership.¹¹⁵ Personally, Hopkins had excelled in her five years at the firm: she had won a \$25 million contract with the U.S. State Department, which partners called “an outstanding performance” that Hopkins executed “virtually at the partner level.”¹¹⁶ Her performance was praised by clients and partners in her office.¹¹⁷ In fact, the trial court found that no other candidate for partner had a record comparable to Hopkins’s record.¹¹⁸

Her bid for partnership was rejected, however, because of her “interpersonal skills”—she was deemed to be too abrasive and brusque, especially toward staff members.¹¹⁹ But the critiques of Hopkins’s interpersonal skills did not stop there. Partners criticized Hopkins’s personality and manner in terms that reflected gender bias:

One partner described her as ‘macho’ . . . ; another suggested that she ‘overcompensated for being a woman’ . . . ; a third advised her to take ‘a course at charm school.’ . . . Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only ‘because it’s a lady using foul language.’¹²⁰

Another described her as a “somewhat masculine hard-nosed” manager.¹²¹ Finally, the partner who delivered the bad news to Hopkins (that her candidacy was being held over for a year) also offered her some advice on increasing her chances of becoming partner: “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹²²

Title VII prohibits discrimination in employment because of an individual’s sex, race, religion, national origin and, as pertinent to Ann Hopkins’s case, sex.¹²³ The U.S. Supreme Court held that Hopkins had, indeed, been denied a promotion to partner because of her sex. In reaching this conclusion, the Court articulated a newly cognizable Title VII sex discrimination claim: sex

115. *Id.* at 233.

116. *Id.*

117. *Id.* at 234.

118. *Id.*

119. *Id.* at 234-35.

120. *Id.* at 235 (citations omitted).

121. *Id.*

122. *Id.* (citations omitted).

123. See 42 U.S.C. §§ 2000e-2(a)(1), (2). The meaning of the term “sex” for the purposes of Title VII has evolved over time. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (holding that discrimination because of sexual orientation or gender identity is prohibited by Title VII notwithstanding that, at the time of enactment in 1964, most people would not have contemplated such an outcome). At the time of *Price Waterhouse*, it did not differentiate between sex assigned at birth and gender and had no cognizable notion of gender performance.

discrimination based on sex stereotyping.¹²⁴ In Hopkins's case, that meant that if Price Waterhouse acted "on the basis of a belief that a woman cannot be aggressive, or that she must not be, [it] has acted on the basis of gender."¹²⁵ More generally, the Court explained that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"¹²⁶ In sum, Hopkins was improperly denied partnership because she acted too "masculine;" she sought to enjoy the male privilege of assertiveness and aggressiveness in her leadership style. Women "are traditionally expected to be caring, warm, deferential, emotional, sensitive," while men "are expected to be assertive, rational, competent and objective. So, when it comes to promotion, these traits are sometimes automatically prescribed to people as per their gender without detailed information about their personalities, thereby a man, in general, is assumed to be a better fit as a leader."¹²⁷ When she acted contrary to her sex stereotype, Ann Hopkins was, in short, punished for "acting like a man."¹²⁸

Although the *Price Waterhouse* Court did not utilize the language of "male privilege," conceptualizing Hopkins' behavior as seeking access—without retribution—to behaviors permitted or celebrated in men because of male privilege is a logical flip side of the sex stereotyping coin.¹²⁹ When men act in the ways that Ann Hopkins acted, they are seen in a positive light—as competent

124. *Price Waterhouse*, 490 U.S. at 250-51.

125. *Id.* at 250.

126. *Id.* at 251 (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

127. Pragya Agarwal, *Not Very Likeable: Here Is How Bias Is Affecting Women Leaders*, *Forbes* (Oct. 23, 2018), <https://www.forbes.com/sites/pragyaagarwaleurope/2018/10/23/not-very-likeable-here-is-how-bias-is-affecting-women-leaders/?sh=4ad2beed295f> [<https://perma.cc/7634-MP68>] ("[W]hen a woman is decisive, she might be perceived as 'brusque' and 'abrupt.' Therefore, for the same kind of leadership behavior, women might be penalized while a man is commended.").

128. See, e.g., Joan C. Williams, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 637-38 (2011) ("Women managers who adopt a direct, assertive style tend to trigger strongly negative evaluations. Women who act assertively tend to be less popular than men who do so. The risks for women are particularly pronounced when macho behavior is rewarded ('Rainmakers and aggressiveness are important factors,' noted one respondent), given that aggressiveness is often admired in men but faulted in women.").

129. See, e.g., Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & L. 171, 186 (1995) ("What is missing in the [*Price Waterhouse*] Court's analysis of sex stereotyping is that it only sees in one direction when examining discrimination. This view misses privilege. A system of male privilege means that men are setting the standard to which women must conform."). Accord Anastasia M. Boles, *Valuing the "Race Card": Teaching Employment Discrimination Using Culturally Proficient Instruction*, 44 T. MARSHALL L. REV. 25, 66-70 (2019) (describing her approach to teaching Employment Discrimination classes, including discussing the issue of male privilege as part of their consideration of *Price Waterhouse*).

leaders and go-getters—and rewarded with promotion to partner.¹³⁰ The masculine-coded personality traits that are seen as indicative of competence and success result in professional successes when exhibited by men¹³¹ but in professional punishment when exhibited by women;¹³² this is male privilege. Ann Hopkins wanted not only to claim access to the freedoms offered to men through this male privilege, namely the freedom to act in ways deemed to be “aggressive,” but also to enjoy access to that male privileged behavior without retaliation. Thus, sex stereotyping and male privilege are two sides of the same coin: women are punished when they “act like a man” while men are rewarded for, and thus privileged by, acting in the same manner.¹³³

Conceptualizing *Price Waterhouse* as a case about male privilege (and sex stereotyping) articulates and centers an underutilized framing of that case. It contributes to both sex discrimination law and to addressing the #LivingWhileBlack phenomenon in its suggestion that *Price Waterhouse* should be characterized as a case involving the appropriation of male privilege and the negative consequences that adhere to such an appropriation. In turn, characterizing *Price Waterhouse* as holding that an employer punishing a woman for claiming the freedoms afforded to men because of male privilege¹³⁴ is sex

130. See generally I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1187 (1991) (“[T]he binary gender system now rewards and penalizes women and men in accordance with how well they conform with this gender system; men who are competitive, aggressive, and independent and women who are demure, passive, and dependent are rewarded. This reward schema reinforces gender stratification in the workforce and the barriers that exist for women in higher management and power jobs.”).

131. See, e.g., Agarwal, *supra* note 127.

132. See, e.g., Kathy Caprino, *Gender Bias At Work—Why Men Call Forceful Women “Hysterical” and Try To Silence Them*, FORBES (June 15, 2017), <https://www.forbes.com/sites/kathycaprino/2017/06/15/gender-bias-at-work-why-men-call-forceful-women-hysterical-and-try-to-silence-them> [<https://perma.cc/4K2A-9R4X>] (“Often, women are punished by our society and in their roles in leadership and management for speaking in confident ways. And they are perceived far more negatively than men for communicating in the same forceful way and manner as men do.”).

133. See, e.g., Joan C. Williams, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 100 (2003) (“Women who live up to the ideals of the ‘go-getter’—women who are assertive, analytical, and commanding—may well find themselves viewed in a negative light.”).

134. The work of Onwuachi-Willig, Cheryl Harris, and Henderson and Jefferson-Jones is useful in considering the applicability of my characterization of *Price Waterhouse* as involving the appropriation of male privilege to cases in which effeminate gay men were found to state a sex stereotyping claim under Title VII. See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009). These men cannot be described as claiming access to behaviors protected by female privilege, given that women are lower in the gender status hierarchy than men. They can, however, be characterized as falling short of claiming their male privilege, or unable to access it because of their female-gendered mannerisms or presentation. Onwuachi-Willig’s idea of the policing of racialized space, Henderson and Jefferson-Jones’s notion of Blackness as nuisance, and Harris’s proposition that whiteness is property, all point to the idea that we should recognize privilege as spatial and propertized. See Onwuachi-Willig, *Policing the Boundaries*, *supra* note 45; Harris, *supra* note 109; Henderson & Jefferson-Jones, *supra* note 10. This body of work demonstrates that white, straight men who harass gay men in the workplace are policing the boundaries of male/white privilege. Those privileges are a common good for white men, but their value demands that people who *can* use them *do* and people who cannot do not.

stereotyping provides a lens that is useful—by analogy—to considering the #LivingWhileBlack problem.¹³⁵

135. Analogizing racial discrimination to gender discrimination always carries with it the risk of obscuring the experiences of Black women, who often are subject to discrimination along both gender and racial axes. The law has largely proven inadequate in redressing these intersectional claims. See generally note 64, *supra*. See also Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger, Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 993 (2011) ("The key insight of intersectionality theory is that discrimination and disadvantage are not just additive; categories may intersect to produce unique forms of disadvantage. For example, an employer might hire both white women and black men but refuse to hire black women because he stereotypes them as desperate single mothers (Kennelly 1999); since this stereotype is specific to black women, it cannot be explained as the summed effects of racism and sexism"); Marcia L. McCormick, *Decoupling Employment*, 16 LEWIS & CLARK L. REV. 499, 519 (2012) ("[I]f a black woman is fired because of stereotypes of black women, she may be found not to have suffered any discrimination at all if those stereotypes differ from stereotypes of white women or of black men. In such a situation, a decision-maker would be likely to find that the woman was not discriminated against because of her race, because other members of her race (black men) did not suffer from application of the same stereotype. That decision-maker would also likely find that she was not discriminated against because of her sex, because other members of her sex (white women) did not suffer from application of the same stereotype."); Cheryl I. Harris, *Ricci v. DeStafano: Lost at the Intersection*, 91 DENV. U.L. REV. 1121, 1139 (2015) (noting, in the context of firefighting, that "the experience of women of color in firefighting remains highly fraught, as racism and sexism interact to render them particularly vulnerable to discrimination"). Because this Article seeks to illustrate for white women the relationship between their gender subordination and the oppression of Black people, an extensive analysis of #LivingWhileBlack aggressions against Black women in particular are outside of its scope. However, given that sex-based stereotypes differ based on race (i.e., there are different sex-based stereotypes about white women and about Black women) and that there are different racial stereotypes unique to Black women, the development of a #LivingWhileBlack analysis that centers on Black women victims of such aggressions warrants further exploration and theorizing by scholars. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40 (contending that "the tendency to treat race and gender as mutually exclusive categories of experience and analysis . . . creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon"); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 1998, at 23-26 (describing, in the context of domestic violence law, the differing stereotypes about Black and white women: "'According to governing stereotypes, chastity could not be possessed by Black women,' which, of course, meant they could not be truthful. The inability to be perceived as chaste, the absence of the appearance of truthfulness, and the attribute of strength, characteristic of the stereotype for black women and contrary to the stereotype of frailty for white women, are also directly opposed to the stereotypes for victimhood.") (citations omitted); Gowri Ramachandran, *Intersectionality as Catch 22: Why Identity Performance Demands Are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 311 (2005) ("[D]iscrimination against Black women has its own specific history and employs specific stereotypes about Black women, such as the Jezebel or Mammy stereotypes, rather than being equivalent to the 'sum of discrimination against Black men and discrimination against white women.'"); Samone Ijoma, *False Promises of Protection: Black Women, Trans People, and the Struggle for Visibility as Victims of Intimate Partner and Gendered Violence*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 255, 273 (2018) ("[C]ultural stereotypes and portrayals of the 'angry' and 'independent' Black woman have contributed to the perception that Black girls and women need 'less protection' than other women, especially white women.") (citations omitted); Pamela J. Smith, *Part II—Romantic Paternalism—The Ties that Bind: Hierarchies of Economic Oppression that Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181, 223 (1999) ("Black women can be subject to being called separate racial insults, separate gender insults, or combined gender/racial insults."); D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 565-68 (2008) (describing how racial stereotypes about Black men and Black women differ); Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL. 317, 320 (2018) (noting that "the stereotype of black aggression affects black men differently from black women"); Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law's Power to Advance Equality*, 13

D. Price Waterhouse, Racial Stereotyping, and White Privilege

Before using *Price Waterhouse*'s sex stereotyping to argue for a derivative White Privilege Stereotype through which to interrogate the #LivingWhileBlack problem, it is useful to consider the extension of the sex stereotyping theory in employment discrimination cases to a theory of racial stereotyping applied in employment and related discrimination cases. Scholars have persuasively argued that the sex stereotyping theory should be extended to racial stereotyping claims under Title VII.¹³⁶ Although courts considering employment discrimination cases have not yet embraced *Price Waterhouse*'s sex stereotyping theory to develop a robust racial stereotyping jurisprudence,¹³⁷ there is a fledgling body of employment discrimination case law recognizing a racial stereotype claim that derives from sex stereotyping precedent.¹³⁸ Moreover, the application of sex stereotyping in employment discrimination cases involving LGBTQ employees demonstrates that the theory is both durable and portable.¹³⁹ Though not

TEX. WESLEYAN L. REV. 515, 530 n.82 ("Black women may be treated differently from all men and differently from non-Black women. Thus, they may be subject to discrimination because they are Black women, and not simply because they are Black, and not simply because they are women. Stereotypes of Black women differ from those of Black men and from those of non-Black women. However, under our legal categories, this is often found not to be discrimination because they are not discriminated against because of their sex by itself, and they are not discriminated against because of their race by itself."); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 128 (1994) (contending that Black women "encounter a set of stereotypes different from those of both black men and white women"); Best et al., *supra*, at 994 ("Employers . . . hold different stereotypes about black men and black women."); Smith, *supra*, at 232 ("Black men . . . face different stereotypes than Black women.").

136. See, e.g., Onwuachi-Willig & Barnes, *supra* note 109, at 1325-28; Eyer, *supra* note 80, at 1068; Greene, *supra* note 22, at 1355 (addressing employment appearance policies through the lens of stereotyping jurisprudence, connecting it with racial stereotypes); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 963-72 (2016).

137. See Eyer, *supra* note 80, at 1065 ("In both the statutory and the constitutional context, equality law has long had a developed jurisprudence of gender stereotyping. But efforts to instantiate a comparable jurisprudence of racial stereotyping have not been nearly as successful.").

138. See, e.g., Thomas v. Eastman Kodak, 183 F.3d 38, 58, 61-65 (1st Cir. 1999); Kimble v. Wisconsin Dept. of Workforce Development, 690 F. Supp. 2d 765, 768-69, 770-71, 775-78 (E.D. Wis. 2010); see also Bornstein, *supra* note 136, at 964-68 (comparing stereotyping in race discrimination cases and sex discrimination cases; discussing *Eastman Kodak* and *Kimble*). Eyer notes that "at least in the constitutional law context, there are certainly cases that do express concerns regarding racial stereotyping that could potentially buttress the development of a true racial-stereotyping jurisprudence." Eyer, *supra* note 80, at n.302 (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (Rehnquist, C.J., concurring); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 511 (1989) (plurality opinion); See also *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869-70 (2017); *Batson v. Kentucky*, 476 U.S. 79, 104-05 (1986) (Marshall, J., concurring)). Cf. *Harden v. Hillman*, 993 F.3d 465, 481 (6th Cir. Apr. 6, 2021) (holding that the no-impeachment rule of Federal Rule of Evidence 606(b) must "give way to a civil litigant's equal protection rights when jurors rely on racial stereotypes or bias in the deliberation room").

139. It is durable because it has withstood the test of time, given that it has been applied to LGBTQ cases more than 25 years after first being articulated in *Price Waterhouse*. That it is portable is demonstrated by its application by courts to sexual orientation and gender identity—categories not enumerated in Title VII. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 120-21 (2d Cir. 2018) ("Applying *Price Waterhouse*'s reasoning to sexual orientation, we conclude that when, for example, "an

numerous, the courts that have recognized a racial stereotyping employment discrimination claim derived from *Price Waterhouse's* theory of sex stereotyping illustrate that sex discrimination law has already done some positive, constructive work for Black individuals, at least in the context of the workplace. Sex discrimination law can do similar positive work in interrogating the #LivingWhileBlack problem.

“For whites, race rarely, if ever, negatively determines their day-to-day interactions.”¹⁴⁰ There is no #LivingWhileWhite hashtag because white privilege, born of white supremacy, structures the daily lives of white people, including white people’s interactions with Black people. White privilege allows white people to go on about their daily leisure and recreational activities without a thought or worry about enjoying their BBQ in the public park, their birdwatching excursion in Central Park, or their daily jog in the neighborhood. Because of historical *de jure* residential and educational segregation and today’s *de facto* residential and educational segregation, Black people are “distance” strangers to many white people—“a person who does not share your experiences or knowledge because of a lack of proximity.”¹⁴¹ Thus, when Black people go on about their daily lives in those same ways, racial stereotypes about what “white people do” or “don’t do” and what “Black people do” or “don’t do” for leisure and recreation—particularly in certain spaces—may cause white people to engage in #LivingWhileBlack aggressions.¹⁴²

The flip side of the racial stereotyping coin is white privilege/white supremacy. When Black people “act white,” they not only cut against the negative racial stereotypes assigned to them,¹⁴³ but they also seek to enjoy the privileges of whiteness. When she was perceived by her employer as “acting like a man,” then punished for that gender role/sex stereotype transgression, Ann Hopkins sought to benefit from behavior accepted when done by men because of male privilege, namely, being promoted to partner while exhibiting

employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,” but takes no such action against women who are attracted to men, the employer “has acted on the basis of gender.”); *Hively v. Ivy Tech Comm. College of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (holding that same-sex orientation “represents the ultimate case of failure to conform” to gender stereotypes). At its core, then, and across Title VII’s protected classes, *Price Waterhouse's* recognition of sex stereotyping claims “suggests that stereotypes may simply serve as evidence of disparate treatment.” Eyer, *supra* note 80, at 1067 (“[I]n the area of race, the context provided by racial stereotypes might help us understand as raced evidence that courts currently too often dismiss as race neutral—such as an employer’s unsubstantiated beliefs that an African American employee was ‘lazy’ or ‘unprofessional,’ or a legislator’s unsubstantiated belief that the ‘dangerousness’ of a predominantly African American community justifies harsh criminal penalties.”).

140. Smith, *Reliance*, *supra* note 47, at 96.

141. *Id.* at 102.

142. See generally *id.* at 97 (“With their daily lives filled with racial macro and micro aggressions, Blacks receive confirmation every day that race still is an important, if not a defining, component to their day-to-day treatment. Racial treatment, at one time or another in a Black person’s life, is inescapable and unavoidable. Indeed, for many Blacks, race is not a passive noun; rather it is the most active of verbs, determining how they will be identified, perceived, and treated by the rest of society.”).

143. See *supra* Part II.A.

“aggressive” interpersonal skills. There is a parallel in #LivingWhileBlack incidents. When white people perceive Black people as “acting white,” then retaliate for that race role/racial stereotype transgression, Black people are seeking to benefit from benefits that white people enjoy when engaging in the same behavior, namely, the white privilege of living freely and with dignity in public spaces and the white privilege of freedom of movement throughout public spaces and engaging in the daily activities of living and recreating without fear of reprisal. For those white individuals who perpetrate #LivingWhileBlack aggressions, the actions of these Black individuals cut against a racial stereotype about what Black people “do” as well as where they *should* do it; these white people thus retaliate against their Black targets for acting in ways that encroach on white privilege.

Like the retaliatory discrimination against Ann Hopkins for trespassing into male privilege, #LivingWhileBlack aggressions constitute retaliatory discrimination against Black people, not solely because white people have internalized the negative stereotypes of Blackness as criminal, hypersexualized, and pathological, but also for trespassing into the privileges of whiteness. Thus, one way to analyze #LivingWhileBlack aggressions is to frame them as instances in which Black people are cutting against the White Privilege Stereotype, which functions along lines of activities coded white and activities coded Black. This is where the *Price Waterhouse* sex stereotyping framework provides an analogy that may provide a useful lens through which to interrogate the #LivingWhileBlack problem. Because “American society remains defined by socially salient stereotypes and attitudes that privilege and normalize Whiteness[,] . . . stereotypes . . . impact real world behavior.”¹⁴⁴ Moreover, “race is defined just as much by stereotypes and the way one behaves in any particular moment and context as it is by the way one looks.”¹⁴⁵ The *Price Waterhouse* holding implicitly acknowledges that gender similarly is “defined just as much by stereotypes and the way one behaves in any particular moment and context as it is by the way one looks.”¹⁴⁶ Just as Ann Hopkins was punished for “acting like a man,” Arbery received the ultimate punishment—loss of life—for “acting white.”

One common misperception by white people about white privilege is that it defines all white people as racist in both mind and deed and is thus deployed to make white people feel guilty or bad about themselves.¹⁴⁷ Another common

144. Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707 (2018).

145. Onwuachi-Willig, *Policing the Boundaries*, *supra* note 45, at 1183.

146. *Id.*

147. See, e.g., Martie Sirois, *The Most Common Misconceptions About White Privilege*, MARTIE SIROIS (May 12, 2019), <https://cutt.ly/tjVWB31> [<https://perma.cc/N264-QN38>]; Brando Simeo Starkey, *Why Do So Many White People Deny the Existence of White Privilege?*, BLACK HISTORY ALWAYS (Mar. 1, 2017), <https://cutt.ly/7jVWXMT> [<https://perma.cc/L3N2-8HZG>]; Cory Collins, *What is White*

misperception that some white people hold about white privilege is that it erases the reality of their own struggles and challenges, such as underemployment or poverty.¹⁴⁸ The next two subparts illustrate what white privilege actually is: the reality that one's whiteness is not an impediment or risk factor in many areas of life. It is unrelated to the intentions of white people.¹⁴⁹ Rather, it reflects that social and legal structures have been organized around white supremacy, thus easing the path for many white people along many societal vectors, while simultaneously erecting barriers along those same vectors for Black people. Instead, "white privilege should be viewed as a built-in advantage[.]"¹⁵⁰ Another way to conceptualize white privilege is that it gives white people and their actions "the power of the benefit of the doubt."¹⁵¹ The two examples below illustrate common recreational activities in which Black people are not given the power of the benefit of the doubt. The result was a #LivingWhileBlack aggression.

1. Running as White Privilege

The recent #LivingWhileBlack incident of the murder of Ahmaud Arbery serves as an illustrative example of the variant of racial stereotyping described in this article—a White Privilege Stereotype. When Arbery went out for a jog in the neighborhood and two white men pursued him with guns and then murdered him, they likely targeted him, at least in part, because he was "acting white" by jogging for health, fitness, and recreation.

Running and jogging as an activity has distinctively white origins. While running is often billed as one of the most democratic of recreational activities—"all you need is shoes"—its history as a "white" sport means "it's not really that simple."¹⁵² While the running community and larger society has highlighted the safety of (white) women while running, little attention has been paid to the safety of runners of color.¹⁵³

The origin of jogging as a pastime goes back to the 1960s, when white people moved to the newly created suburbs in large numbers. This resulted in a sedentary white middle class that caused public health officials to worry about cardiac disease; they thus urged this new, white middle class to jog—an activity

Privilege, Really?, TEACHING TOLERANCE (Fall 2018), <https://cutt.ly/EjVlxc> [<https://perma.cc/2N3C-Z7UB>].

148. See, e.g., Collins, *supra* note 144 (noting that "the word privilege, especially for poor and rural white people, sounds like a word that doesn't belong to them—like a word that suggests they have never struggled").

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

promoted by a bestselling 1966 book titled *Jogging*.¹⁵⁴ The hotbed of the jogging craze of the 1960s and 1970s was “the lily-white state of Oregon,” the “only state that was admitted to the union with a charter that explicitly barred Black people from living there.”¹⁵⁵ The “whiteness of that . . . original founding [running] culture . . . is reflected in the way that Nike” promoted running by depicting it as an activity for “an archetypal white runner.”¹⁵⁶ As the 1970s faded into the 1980s, “running became more inextricably coded as white.”¹⁵⁷ It largely has remained so until the present.¹⁵⁸

As a result, many white people likely hold the racial stereotype that Black individuals do not “do” running for recreation or as a leisure activity, at least in particular spaces. While there is a rich and long history of elite Black runners, in #LivingWhileBlack aggressions, it is the *place* in addition to the activity of running while Black that amounts to the transgression on white privilege. Put another way, the White Privilege Stereotype likely emerges in these instances not because many Black people do not jog, but because this particular Black runner is perceived by the white aggressor as not belonging in that particular neighborhood; as a result, the Black runner is perceived as making a claim upon a privilege of whiteness, which, in turn, signals to the white #LivingWhileBlack aggressor that the running must, therefore, be illicit.¹⁵⁹ When a Black person, like Arbery, engages in the “white” recreational activity of running in a space or place where a white person deems he does not belong, he is “acting white” and seeking to enjoy a privilege of whiteness. That White Privilege Stereotype may lead to a #LivingWhileBlack incident like the one that resulted in Arbery’s death.

2. *Birdwatching as White Privilege*

The recent #LivingWhileBlack aggression against Christian Cooper for birdwatching in Central Park is another example of the *Price Waterhouse-*

154. *Id.* One of the co-authors of that book, Bill Bowerman, founded Nike several years later.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. See generally, e.g., Franciska Coleman, *Between the “Facts and Norms” of Police Violence: Using Discourse Models to Improve Deliberations Around Law Enforcement*, 47 HOFSTRA L. REV. 489, 504-05 (2018) (noting that the historic discourse surrounding police power to “serve and protect” is a “central tool in the preservation of white privilege” particularly around place and space: “This discourse model views policing and the unique discretion afforded to police officers as flowing from their historic role in controlling black bodies by criminalizing physical and discursive transgression of racial boundaries. In this view, the police were originally designed to keep black Americans in their “place” in American society by exposing them to the coercive power of the state whenever they are ventured outside of physical spaces constructed as black or outside of the discursive spaces of submission and deference when interacting with white police and citizens.”). Coleman also posits that #LivingWhileBlack aggressions are “embedded in this larger discourse model of policing and police discretion as a tool for preserving white privilege, sometimes described as the weaponizing of police to maintain white spaces. In this context, white privilege becomes freedom of movement and freedom from the state violence inflicted on black bodies.” *Id.* at 505 (citations omitted).

derived White Privilege Stereotype posited by this Article. When Cooper went birdwatching in Central Park, the white woman who perpetrated a #LivingWhileBlack aggression against him likely acted, in part, on her negative reaction to him “acting white” by birdwatching.

Like running for recreation or leisure, birdwatching has a “white” origin in the United States.¹⁶⁰ It emerged as a recreational activity in the 1930s, when a pocket field guide was published and “binoculars became more available after World War II.”¹⁶¹ Despite the vast increase in the number of birdwatchers in recent decades and the general, low-barrier access to birdwatching—every U.S. county has at least one place designated for birdwatching¹⁶²—only seven percent of the 69 million adult birdwatchers in the United States are Black.¹⁶³ Moreover, “[m]ost people who have been birding for over twenty years meet fewer than three African American birdwatchers in their lifetime. Furthermore, 34 percent of birdwatchers surveyed have never encountered an African American birdwatcher, and 67 percent of African Americans have never met a birdwatcher.”¹⁶⁴ As one Black bird photographer stated:

Personal safety is a big issue. Racial violence has a long history. This weighs heavily on the minds of African-Americans when they think of outdoor activities. You’re not sure who lives where you might go. There’s concern about finding yourself in the wrong place at the wrong time. It’s amazing that we still factor this into our recreational activities or travel plans, but we do.¹⁶⁵

Social science scholarship has explored the role of whiteness and white privilege in the striking underrepresentation of Black birders.¹⁶⁶ These scholars posit that the whiteness of birdwatching is born of white supremacy, namely the legacies of slavery and Jim Crow, with its *de jure* racial discrimination, including redlining, restrictive covenants, mortgage discrimination, employment discrimination, and school segregation.¹⁶⁷ The white privilege that was in turn borne of these white supremacist institutions included things like growing up in suburbs with wooded backyards; access to trails and open spaces; an ability to purchase field guides and binoculars; and opportunities to be exposed to

160. See generally Oliver Cashman-Brown, *Birds of a Feather: The Whiteness of Birding*, in ON WHITENESS 173 (Nicky Falkof & Oliver Cashman-Brown eds., 2012).

161. *Id.* at 174.

162. *Id.*

163. See Erin Carver, *Birding in the United States: A Demographic and Economic Analysis*, U.S. FISH & WILDLIFE SERVICE, at 6 (2013), <https://www.fws.gov/southeast/pdf/report/birding-in-the-united-states-a-demographic-and-economic-analysis.pdf> [<https://perma.cc/DJK3-S4U5>]. See also Cashman-Brown, *supra* note 157, at 174.

164. Cashman-Brown, *supra* note 157, at 174.

165. *Id.* at 176 (quoting DUDLEY EDMONDSON, *THE BLACK AND BROWN FACES IN AMERICA’S WILD PLACES: AFRICA AMERICANS MAKING NATURE AND THE ENVIRONMENT A PART OF THEIR EVERYDAY LIVES* (2006)).

166. See, e.g., Cashman-Brown, *supra* note 157, at 174-75.

167. *Id.* at 177-78.

birdwatching as a recreational activity through experiences such as summer camps and birdwatching clubs.¹⁶⁸ Finally, birdwatching may also be a “reproduction of Enlightenment, colonialist hegemony, further entrenching it as a product of white privilege.”¹⁶⁹

Thus, when a Black person like Christian Cooper engages in the “white” recreational activity of birding, he is emulating whiteness¹⁷⁰ and thus making a claim on white privilege. That racial stereotype may lead to a #LivingWhileBlack incident like the one that involved Cooper.

An alternative or additional way to think about this example is that not only can Black people not “be” birdwatchers, but also that Black people have a “place” in the racial status hierarchy from which they step out when they regulate the behavior of white people, like Cooper attempted to regulate the behavior of the white dog owner by asking her to comply with the leash law. So not only was Cooper triggering the White Privilege Stereotype by birdwatching, he also did so by being a Black person trying to enforce rules of land use against a white person. White supremacy, history, and law teach that white people are the ones who police conformity with such laws, so Black people trying to enforce norms of behavior are “acting white” in a way that is sanctionable. In short, policing is decidedly what white people “do”; for a Black man to police a white woman is, perhaps, the ultimate transgression of the White Privilege Stereotype.¹⁷¹

E. “Acting White” in #LivingWhileBlack Aggressions as an Extension of “Acting White” Performativity in Schools and Workplaces

The White Privilege Stereotyping embraces the notion of “acting white” discussed in the performativity line of racial stereotyping scholarship on schools and workplaces and is an extension of it. In workplaces or schools, Black people “act white” to emulate white people and thus keep their job, get promoted, etc. In contrast, Black victims of #LivingWhileBlack aggressions seemingly are neither “covering” nor making a conscious decision to assimilate and perform their racial identity for a white audience. “To cover is to make someone feel comfortable with a quality that marks you as an outsider by downplaying that quality.”¹⁷² It is “[t]he idea . . . that if people see me as an X, and if being an X in this society has negative connotations, then I have to convince people on a daily, interpersonal basis that I am either not an X at all, or else that I am ‘the

168. *Id.*

169. *Id.* at 178 (“White culture stems from western European traditions, including the tradition of rationalism, mastery over nature, the Enlightenment and colonialism, constructing whites as being ‘the most rational, and, therefore, the most superior of all beings.’”).

170. See, e.g., Yuille, Yuille & Yuille, *supra* note 109, at 15-16.

171. Cf. Armstrong, *supra* note 10, at 30-36 (framing some #LivingWhileBlack aggressions as examples of white women who weaponize white womanhood).

172. Cooper, *supra* note 22, at 894.

good kind' who does not fit the negative stereotypes associated with being an X."¹⁷³ When engaged in identity performance, covering, or "working identity," then, Black people are *deliberately* and *intentionally* sending signals to "function as a marketing device" for whites.¹⁷⁴

Because the performative line of racial stereotype scholarship describes the intentional choice of Black "people [to] think strategically about how they are perceived by others, and undertake various kinds of long-term and short-term action projects to influence others' perception of them[.]"¹⁷⁵ it provides the foundation for, but does not squarely encompass, a complete analysis of what occurs during a #LivingWhileBlack incident. #LivingWhileBlack aggressions involve circumstances in which Black people are living their lives in a unified manner, wherein their Blackness is merely one of many aspects of their personhood, as they engage in leisure or recreational activities. In these instances, they are not consciously working to minimize their Blackness, nor are they consciously deciding to "act white." In fact, Black people victimized by #LivingWhileBlack aggressions usually are just going about their daily lives and are not focused on the gaze of white bystanders. Thus, the #LivingWhileBlack problem appears to result from this dynamic—Black people living public lives without deference or attention to the white people around them. This provokes the White Privilege Stereotype (along with other racial stereotypes) as a justification for the policing of Black bodies.

That the impact of "acting white" varies between #LivingWhileBlack and working makes some sense: in the work environment, "especially in corporate environments, whites screen racial minorities for racial palatability in the form of a *willingness* to cover."¹⁷⁶ In the employment context, Black individuals are forced to make the choice to "act white" to gain entry. While "acting white" in the workplace may inure to the benefit of Black workers,¹⁷⁷ the opposite result

173. Harris, *supra* note 87, at 59.

174. *Id.*

175. *Id.*

176. *Id.*

177. The broad-brush description of "acting white" for assimilation purposes at work or in school contained in this article is a general one, included to situate the proposed White Privilege Stereotype within the relevant scholarly landscape. A deeper dive into the performative strand of scholarship would reveal one problematic assumption within the assimilationist tactic is that it suggests that one culture has a monopoly on the things that make one successful in business. One example relates to leadership roles in companies. Black leaders in these companies, when they exercise authority, may nonetheless be sanctioned for "acting white." This is because Black leaders often are criticized for their management style, even when it is the same as the style used by white managers. This criticism results from the fact that these Black managers breach the racial hierarchy and the social rule of Black subordination by being in a leadership position. Former President Obama is an example of this phenomenon. *See, e.g.,* Terence Samuel, *The Racist Backlash Obama Has Faced During His Presidency*, WASH. POST (Apr. 22, 2016), <https://cutt.ly/AjVPuIO> [<https://perma.cc/K9JX-4L2Q>]. Another example is Black law school faculty. *See, e.g.,* Carmen G. Gonzalez, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, FED. LAW. (July 2014), <https://cutt.ly/xjVFbTj> [<https://perma.cc/2ZYY-824N>]. Thus, while I highlight the ways in which Black people "acting white" in a business setting can be advantageous, that is not categorically true in all employment settings.

appears to follow when Black people “act white” in public spaces. In the #LivingWhileBlack context, Black individuals likely are not thinking about performing their racial identity for white people; they are simply living. What white people see as a natural hierarchy is disrupted by the brazen gall of Black people to simply live their lives fully and openly, a phenomenon described by one scholar as “racecraft.”¹⁷⁸

Of course, there is a unifying truth connecting all variants of anti-Black stereotypes, and that is white privilege as instantiated by white supremacy. “Part of the privilege of whiteness is its foundational status. Whiteness functions as the identity against which all other identities are measured,”¹⁷⁹ whether in the criminal justice system, the classroom, the workplace, or in public accommodations and public spaces of leisure and recreation. As a result, thinking about #LivingWhileBlack aggressions through the lens of a White Privilege Stereotype provides another layer of critical interrogation of this problem.¹⁸⁰

III. SEX IN PUBLIC, RACE IN PUBLIC

A. *Sex in Public*

Jim Crow laws forced Black men and women from many places of public accommodation and limited access to opportunities for recreation and leisure.¹⁸¹ *De jure* racial segregation ended with the passage of the Civil Rights Act of 1964, Title II of which prohibited race-based discrimination in public accommodations.¹⁸² Notably, the Civil Rights Act of 1964 did not protect against sex-based discrimination in public accommodations. Thus, both before and after the passage of the Civil Rights Act, women “confronted rampant sex discrimination in commerce, leisure, and civic life.”¹⁸³

The kinds of commercial spaces where the Mad Men of the business world congregated refused to open their doors to women. Bars and diners hung signs: “No unescorted women.” Professional organizations often confined women to second-class membership. Credit institutions would not lend married women money in their own names. Civic

178. Rasul A. Mowatt, *A People's History of Leisure Studies: Leisure, the Tool of Racecraft*, LEISURE STUD., Vol. 40, No. 7, 663-74 (2018).

179. Devon W. Carbado & Muti Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1777 (2003).

180. See Cooper, *supra* note 22, at 873 (“[R]ace is the way that the skin is made to mean hierarchy. . . . Gender is the way that sex is made to mean hierarchy. . . . Class is the way that gestures and habits and locutions come to be associated with ownership and non-ownership. . . . In other words, each supposedly discrete system is a restatement of the principle that identities must be hierarchized.”) (citation omitted).

181. See, e.g., Sepper & Dinner, *supra* note 6, at 97-98.

182. Of course, *de facto* discrimination and segregation persist today, with the #LivingWhileBlack problem being one manifestation.

183. Sepper & Dinner, *supra* note 6, at 81.

institutions from Little League baseball to the Junior Chamber of Commerce excluded girls and women. United Air Lines even flew “Executive Flights” reserved for male customers.¹⁸⁴

Women thus experienced barriers to living public lives through the 1970s,¹⁸⁵ by which time many states prohibited sex-based discrimination in public accommodations.¹⁸⁶ The women’s movement was the catalyst for this dramatic shift in the legal landscape, and it explicitly modeled its agenda and its activism after the racial civil rights movement.¹⁸⁷

Elizabeth Sepper and Deborah Dinner’s article, *Sex in Public*, offers a rich descriptive account of the exclusion of women from public spaces and the grounding of that exclusion in “anxiety over gender roles and sexuality.”¹⁸⁸ It analyzes the legal reforms of the 1970s and connects the lessons learned from the success of the women’s rights movement in securing sex-based public accommodations protections to today’s debate over public accommodations laws’ protections of sexual orientation and gender identity.¹⁸⁹ In pushing for sex-based protection in public accommodations law, women’s rights advocates sought to end the practice of women being punished for claiming access to activities or spaces which were then reserved largely or solely to men through male privilege. “Beyond any economic effect, the denial of rights of access acted as a vivid symbol of women’s subordination and second-class citizenship. Crossing into public spaces and roles that had belonged to men, feminists demanded these harms be remedied[.]”¹⁹⁰

Because sex-segregation was based on an outdated notion that men and women lived in separate spheres,¹⁹¹ women were viewed in one-dimensional,

184. *Id.*

185. These barriers were exacerbated for women of color. *See, e.g., id.* at 116 (noting that the 1970s practice of credit agencies ignoring a wife’s wages based on an assumption that she may leave the workforce at any time “disproportionately harmed African Americans, who were more likely than white couples to form dual-earner marriages with relatively commensurate salaries”).

186. *Id.* at 81.

187. *Id.* (“Building explicitly on the civil rights sit-ins of the 1960s, NOW, often joined by other groups, protested in the streets, litigated in the courts, and lobbied in legislatures for state laws prohibiting sex discrimination.”); *see also* Mayeri, *supra* note 8.

188. Sepper & Dinner, *supra* note 6, at 83 (“The sex segregation of public spaces derived from three sources: the separate-spheres ideology of the mid-nineteenth century, which assigned women to the home and men to the market; heterosexual norms that emphasized the sexual vulnerability of respectable white women while simultaneously constructing other women as sources of sexual disorder; and defensive impulses to preserve dominant masculinity in male-only spaces such as gyms and barber shops.”).

189. *Id.* at 144. This history of “sex in public” may also offer an analytical lens that is useful for considering discrimination against non-binary and gender non-conforming individuals. For example, nonbinary people and people who defy traditional gender roles through their dress or gender performance have an enormous stake liberating people from sex stereotyping in order to dismantle the system of the gender binary that subordinates them.

190. *Id.* at 82 (“[E]quality was not limited to mere access. . . . Sex integration, its supporters hoped and its opponents feared, would transform institutions central to dominant masculinity, from baseball fields to bathrooms.”).

191. *Id.* at 88 (“The ‘separate-spheres’ ideology, which accompanied the advent of industrialization in the mid-nineteenth century, rigidified previously more fluid boundaries between the public and private. It assigned men to the economic and political realms and women to the domestic realm.”).

stereotyped ways, namely as caregivers and dependent upon men.¹⁹² When women were permitted to enter the public world in the nineteenth century, it was largely limited to women-only leisure and shopping spaces; men's spaces continued to be spaces of power.¹⁹³ Thus, part of the goal of sex equality in public was to emphasize the dignitary and citizenship interests in women's full participation in society.¹⁹⁴ These advocates made clear that "public accommodations discrimination sent the message that 'activities of females can and should be regulated by others, because . . . females . . . have and always will be secondary to men.'" ¹⁹⁵ These advocates "understood exclusion and segregation to constitute a harm, even when they had other places to eat and to socialize. Nothing less than full and equal citizenship as workers and consumers was on the line. Such citizenship would involve not only access but also freedom in public" ¹⁹⁶

Part of gaining that full citizenship and freedom in public would require a dismantling of stereotypes about what it meant to be "masculine" and what it meant to be "feminine"—a project met with skepticism by many male stakeholders.¹⁹⁷ During debates over sex-based protections in public accommodation law, men explicitly clung to their male privilege as a basis for opposition.¹⁹⁸ Thus, in passing sex-based protections in public accommodations

192. *Id.* at 88.

193. *Id.* at 89-90.

194. *Id.* at 110-11 (noting that access to places of public accommodation "means the right to human dignity, the right to be free from humiliation and insult, and the right to refuse to wear a badge of inferiority at any time or place") (citations omitted). *See also* Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1620 (2001) (noting that "state public accommodations statutes literally grew out of debates over the scope of an individual's civil rights as a citizen").

195. Sepper & Dinner, *supra* note 6, at 112-13 (citations omitted).

196. *Id.* at 114. For example, the common law doctrine of coverture institutionalized the exclusion of women from public spaces and the denial of financial opportunities such as credit on women's own name. *Id.* at 115. Coverture was also deployed in recreation and leisure activities; for example, women's access to golf clubs, country clubs, and boating clubs was only available through a husband's membership and came with limited benefits. *Id.* at 119.

197. *See id.* at 84 ("Feminist public accommodations activists aspired to use the laws to destabilize prevailing understandings of bodily sex difference, to challenge assumptions about the need for sexual privacy, and to reconfigure institutions ranging from athletic fields to bathrooms. Business owners, politicians, and courts all struggled with the implications of sex integration for masculinity.").

198.

As feminists sought full access to commerce, business owners and some members of the public sought to barricade the doors. Resistance to sex integration of professional forums and meeting places often acknowledged their significance for economic and political life. Journalist Jack Kofoed expressed his resentment of the 'lassies' whose protest of the Roosevelt Hotel 'came a little closer to home,' threatening his professional privilege of 'drop[ping] into the men's bar' at 'five in the evening' whenever he 'wanted to catch somebody in the publishing, advertising, public relations or related fields.' When in a 'most prominent victory,' the exclusively male National Press Club voted to admit women in 1971, the bartender Harry Kelly served cocktails to female journalists for the first time: 'Here you are, and I hope you choke on it.'

Id. at 109-10 (citations omitted); *Id.* at 113 ("Legislative retrenchment of some forms of public accommodations discrimination frequently aimed to safeguard space for men. Massachusetts's passage of a public accommodations law in 1971, for example, triggered considerable cultural anxiety. The *Boston*

laws, legislatures were cognizant that such protections would result in a dismantling of compulsory “femininity” according to prescribed sex stereotyping.¹⁹⁹ Put another way, “actors on all sides understood these laws to reach sexual regulation and gender performance.”²⁰⁰

B. Connecting Sex in Public to Race in Public

Sepper and Dinner’s work is helpful to understanding the complex dynamics of the #LivingWhileBlack problem. Where Sepper and Dinner reveal that the foundation of *de jure* discrimination against women in public spaces was grounded in misogyny and male privilege, one way to consider the *de facto* discrimination in the #LivingWhileBlack phenomenon is grounded in the lens of sex discrimination law, in particular the opposition to sex equality grounded in notions of male privilege. Just as women were punished for attempting to live their “sex in public” by claiming a right to spaces and activities that were, at that time, reserved only for the privilege of men, so too are Black people today punished for attempting to live their “race in public” by claiming a right to the spaces and activities that continue to be considered by some white people as reserved only for white people.²⁰¹ Revealing this parallel illustrates an additional way in which sex discrimination law may offer a useful lens through which to consider the #LivingWhileBlack problem.

Just as sex discrimination “was pervasive, structuring interaction between the sexes and shaping relations among women,”²⁰² so too is race discrimination through #LivingWhileBlack aggressions pervasive, so too do #LivingWhileBlack aggressions structure interactions between Black people and white people in ways that reinforce white privilege. The concerns that including

Globe reported that when ‘[t]ipping in taverns becomes a women’s right,’ it ‘jeopardize[s] 330 all-male sanctuaries across the state.’ *Globe* editors queried ‘why the ladies would even want to invade,’ suggesting that sex-segregated spaces in public as in the home, where men’s ‘dens’ and women’s ‘sewing rooms’ preserved ‘domestic felicity,’ were a social necessity.” (citations omitted).

199. *Id.* at 144 (“[D]uring the period when ‘sex’ was added to public accommodations statutes, advocates, legislators, and courts understood sex equality to entail not only the same treatment of the sexes but also an end to the regulation of sexuality and gender performance. Through their efforts to enter and freely enjoy public space through public accommodations law, feminists successfully challenged heteronormative sexual norms, in arenas ranging from bars to credit lending.”).

200. *Id.*

201. Suggesting that the Women’s Rights Movement’s campaign for “sex in public”—which took place in the 1960s and 1970s—is a useful lens through which to consider contemporary #LivingWhileBlack aggressions is *not* a suggestion that sex discrimination (or the lessons gleaned from its history) predated or preceded policing of Black people in public. Thus, the article’s organization is not intended to suggest a linear, chronological timeline from the Civil Rights Movement to the Women’s Rights Movement to today’s #LivingWhileBlack phenomenon, which would obfuscate the long history of policing for race and gender transgressions—a history explored within the article. Rather, the “sex in public” lens for considering #LivingWhileBlack aggressions is proposed as an *additional* frame (not a better frame, temporally or otherwise) of analysis, one that builds on a long history of scholarly interrogation of the policing of Black people.

202. *Id.* at 83-84; see also Ehrenreich, *supra* note 20, at 253.

sex in public accommodation laws would infringe on male-privileged leisure and recreational activities (patronizing bars, playing golf at a club) have parallels in the dynamics of the #LivingWhileBlack problem. When a white person engages in a #LivingWhileBlack aggression, that white person is reacting to a Black person challenging the notion of a “white space,” to a Black person’s rejection of white supremacy, and to the Black person’s destabilization of white privilege.

Just as some men in the 1970s objected to including sex in public accommodations laws because they “sought to preserve the status quo,” so today’s #LivingWhileBlack aggressors are similarly seeking to preserve the status quo of white privilege engendered by white supremacy. Just as the feminists of the 1970s fought for the right to live their sex in public untethered to stereotypes about how women should “do” in public, so too are Black people ensnared in #LivingWhileBlack aggressions asserting, through their actions, the right to live their race in public untethered to stereotypes about what Black people should “do” in public. One challenges male privilege;²⁰³ the other challenges white privilege. Just as opponents of sex equality in public “struggled with the implications of sex integration for masculinity,”²⁰⁴ so today’s white #LivingWhileBlack aggressors struggle with the implication of racial integration—of Black people living their race in all spheres of public life—for white supremacy and its attendant white privilege.

Moreover, similar dignitary and citizenship concerns inform both anti-racist advocates fighting against #LivingWhileBlack aggressions and the women’s right advocates of the 1960s and 1970s fighting against aggressions resulting from women trying to live public lives. Just as “the feminist campaign for public accommodations law makes evident, equality in public means not only material interest but also full citizenship in social and civic institutions.”²⁰⁵ Black people subjected to #LivingWhileBlack aggressions are seeking to live equally in public with white people. Those attempts at lived, public equality reflect efforts to embrace full social and civic citizenship, in ways that white perpetrators find objectionable as impermissible attempts to enjoy what white people enjoy as a matter of course because of white privilege. Put another way, accepting Black people’s engagement in public leisure and recreational activities would be a step toward “remedy[ing] the second-class status and indignity of less-than-full inclusion in public life”²⁰⁶ that has marked the collective Black experience in America. Demonstrating the parallels between the right to live one’s sex in public and the right to live one’s race in public reinforces that for both groups, the interests at stake are beyond economic, recreational, or leisure interests.²⁰⁷

203. *Id.* at 144 (noting that “advocates, legislators, and courts understood sex equality to entail not only the same treatment of the sexes but also an end to the regulation of . . . gender performance.”).

204. *Id.* at 84.

205. *Id.* at 143.

206. *Id.* at 144.

207. *Id.*

The history of sex in public undergirds our contemporary understanding and appreciation of what sex equality *means* as both a legal and a normative matter—an appreciation that sex in public is more about than marketplace access; it is also about contesting male supremacy, male privilege, and second-class citizenship for women. Making a parallel argument that allowing Black people to similarly live their race in public, which can only happen if #LivingWhileBlack aggressions are stopped, may facilitate white people’s—and particularly white women’s—understanding of the white privilege that is at work in #LivingWhileBlack aggressions. Making this connection between the male privilege behind barriers to sex in public and white privilege behind the #LivingWhileBlack barrier to race in public may make legible for white people the #LivingWhileBlack problem in a new way, one that may engage white people more fully in the project of finding solutions to the #LivingWhileBlack phenomenon. This history of sex discrimination law, and its connection to understanding the #LivingWhileBlack problem, gives anti-racist advocates, legislators, and courts—all actors in today’s racialized spaces—a richer body of material from which to reason.”²⁰⁸

IV. A TOUCHSTONE THEORY FOR INTERROGATING #LIVINGWHILEBLACK WITH PRINCIPLES OF SEX DISCRIMINATION LAW

This Part first describes an expository device for organizing inquiry into the #LivingWhileBlack problem, which it calls a “touchstone” theory of inquiry. It articulates the utility of using sex discrimination law as one touchstone for understanding and addressing the #LivingWhileBlack problem, asserting that it is useful because (1) it allows for a more capacious understanding of the #LivingWhileBlack problem, and (2) it may allow for more robust coalition building between social justice-minded Black people and anti-racist organizations on the one hand and white people, particularly white women, on the other hand.

A. *Sex Discrimination Law’s Connection with #LivingWhileBlack: A Touchstone Theory of Inquiry into Oppression and Inequality*

While some scholars, most notably Catharine MacKinnon, seek a unifying theory of oppression and inequality, such as finding a “linchpin” of

208. *Id.* at 145-46. For example, these actors might rely on the lessons learned from this history of sex discrimination law to recognize that one normative function of legislative responses to the #LivingWhileBlack problem should be to free public leisure and recreational activities from constraints based on racial stereotypes, or to connect current legislative or litigation efforts to curtail #LivingWhileBlack incidents to the history of women’s rights advocates’ fight to include girls in boys sports (for example, Little League Baseball) as a site of resistance to sex discrimination.

oppression,²⁰⁹ others advocate for a multifaceted approach.²¹⁰ White supremacy, and its attendant white privilege, does not appear susceptible to a linchpin organizing theory. Rather, white people appear to have deployed various rationales, informed by various white interests, in promulgating and advancing white supremacy. As a result, there is utility in considering white supremacy and privilege through multiple lenses in order to achieve a comprehensive understanding of it, as well as to enable a comprehensive strategy to dismantle it.

As a result, this Article proposes what it calls a “touchstone theory” of inquiry into issues of oppression and equality. This approach imagines that there are multiple touchstones that may inform an analysis of white supremacy and white privilege, such as legal touchstones, political touchstones, historic touchstones, economic touchstones, social touchstones, and psychological touchstones, to name a few. This Article proposes sex discrimination law as one of many touchstones that may be used to theorize the #LivingWhileBlack manifestation of white supremacy. This theoretical approach—this “method of discovery”²¹¹—allows for the consideration of multiple touchstones—such as Henderson’s and Jefferson-Jones’s nuisance theory of #LivingWhileBlack—in analyzing the #LivingWhileBlack problem, which in turn may suggest multiple approaches to tackling this manifestation of white supremacy.

B. The Sex Discrimination Touchstone Creates Potential for a More Capacious Understanding of the #LivingWhileBlack Problem and Possible Solutions

Parts II and III laid out the arguments about how and why considering #LivingWhileBlack aggressions through the sex discrimination law doctrines of sex stereotyping (*Price Waterhouse*) and “sex in public” (public accommodations law) may provide useful theoretical touchstones for addressing these aggressions. Under a touchstone theory, inquiry into oppression and inequality is multifaceted; a particular theoretical position—here, the use of sex discrimination law as a lens through which to understand and counter

209. See Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 752 (1989) (describing “MacKinnon’s relentless search for a ‘linchpin theory’—a single, unifying structure of explanation, criticism, and plan for resistance and change”).

210. See, e.g., Ehrenreich, *supra* note 20, at 316 (conceptualizing the subordination and discrimination faced by various identity groups as overlapping and symbiotic; these mutually reinforcing systems of subordination thus require an attack “made with the multiplicity of identity and the dynamics of symbiosis in mind”).

211. Littleton, *supra* note 206, at 752 (noting that while MacKinnon seeks a unifying theory, “[w]hat MacKinnon has thus far discovered is, however, less a unified field theory of women’s situation than a unified *method* of discovery. In the long run, this may be more important, for MacKinnon justifiably believes that the substance of feminist jurisprudence can only be developed through the unique mechanism of inquiry known as feminist method”).

#LivingWhileBlack—may intersect with larger, categorical theories in ways that amplify our understanding of the problem. This Part applies the sex discrimination perspective to various theories of inequality to demonstrate the value of the sex discrimination law touchstone to understanding the #LivingWhileBlack problem.

Social dominance theory suggests that “if a significant number of whites are motivated to preserve their dominant racial status, they could engage in behavior . . . that negatively impact[s] persons of color and privilege[s] whites.”²¹² Antisubordination theory teaches that all hierarchies are illegitimate and harmful to the project of true equality. Just as sex stereotyping in employment impermissibly limits women’s freedom to move up in the workplace, the White Privilege Stereotype impermissibly limits Black people’s freedom to engage in leisure and recreational activities in public spaces. Just as women must be free to live their sex in public to have the agency necessary to fully exercise their citizenship rights, so too do Black people need to be free to live their race in public—to be free from #LivingWhileBlack aggressions—to do that same. Of course, Black women need *both* freedoms to live fully self-actualized lives.

Sex stereotyping and denying women the chance to live their sex in public both serve a gatekeeping function that harms women by preventing them from partaking in actions and behaviors facilitated by male privilege. The White Privilege Stereotype and the inability of Black people to fully live their race in public similarly serve a gatekeeping function that prevents Black people from sharing in and engaging in actions and behaviors facilitated by white privilege.²¹³ In this sense, the variant of racial stereotyping described here with regard to #LivingWhileBlack aggressions overlaps with the work of the performativity school of racial stereotyping: “Instead of seeking to have their groups treated the same as non-discriminated-against groups, these [performativity school] advocates and scholars are trying to articulate a mandate for full social inclusion. The obligation of the state, in this view, is to do whatever is necessary to make full inclusion possible—including protecting individuals from the effects of harmful social norms and stereotypes.”²¹⁴ The performativity school of racial stereotyping seeks to free Black people from stereotypes that *force* Black people to make the choice to “act white” in the workplace in order to have access to that workplace; the White Privilege Stereotype seeks to free Black people engaged in leisure and recreational activities from being punished for *being seen* as transgressively “acting white” by white people. Moreover, the lessons learned

212. Hutchinson, *supra* note 20, at 48.

213. See generally Harris, *supra* note 87, at 65. Again, Black women are subject to this gatekeeping along both axes of their identity—race and sex.

214. *Id.* at 65. See also *id.* at 66 (“The performativity school similarly seeks to disrupt the enforcement of racialized norms, whether by the state or by non-state institutions. Like transgender activists, the performativity school wants racial performances to be costless, so that one’s racial identity has no impact on his or her ability to function in the world.”).

from the fight for women to be able to live their sex in public also aligns with the goal of performativity scholars, namely that Black people be able to live their race in public in ways that free them from constantly thinking about living their race in relation to the white people around them.

Philosopher Elizabeth Anderson has articulated a theory of “democratic equality” that problematizes inequality not because it is a system of inequitable distribution of goods and resources, but because it is a system that creates unequal *social* status hierarchies based on identity.²¹⁵ It teaches that “regardless of the various material inequalities that are pervasive and may be inevitable—each of us deserves to be treated as an equal member of our community.”²¹⁶ Under this view of equality, advocates “seek to abolish oppression—that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others.”²¹⁷ A “social order in which persons stand in relations of equality”²¹⁸ is the goal of advocates of democratic equality, sometimes referred to as “social equality.”²¹⁹

While democratic equality is not the only way to theorize equality, because it is a “relational theory of equality—it views equality as a social relationship”²²⁰—it offers a particularly useful theoretical frame for the #LivingWhileBlack problem, a problem arguably based in large part on social inequality. Because “racial integration, including the repeal of miscegenation laws, did not put an end to the dominance of the ideology of white supremacy,”²²¹ white aggressors in #LivingWhileBlack incidents are seeking to establish boundaries around public spaces to exclude Black people, an inherently social form of exclusion, and one that deprives Black citizens of the ability to live their race in public.

The White Privilege Stereotype introduces a new way of thinking about #LivingWhileBlack’s attempt to promote an inherently social form of exclusion. “First class citizenship necessarily entail[s] freedom of movement within public space.”²²² #LivingWhileBlack aggressions deprive Black people of the ability to be full and free participants in the polity, much like women were precluded from living their sex in public before public accommodation laws included sex as a protected characteristic. Harnessing sex discrimination law’s stereotyping doctrine and lessons from its fight to permit “sex in public” may encourage a

215. See Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 312-14 (1999) (emphasis added).

216. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 232 (2013).

217. Anderson, *supra* note 212, at 313.

218. *Id.*

219. Bagenstos, *supra* note 213, at 234-35.

220. Anderson, *supra* note 212, at 313.

221. Sandi Farrell, *Reconsidering the Gender Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605, 674 (2004).

222. Sepper & Dinner, *supra* note 6, at 112.

more capacious understanding of the #LivingWhileBlack scourge as contributing to social inequality and encourage us to expand our imagination about solutions.²²³

Using sex discrimination in this way is an explicit reminder that hierarchy is often attained through “processes of differentiation and polarization. This has been chronicled in the context of race, perhaps best exemplified by the ‘one-drop rule.’ Similarly, the hierarchy of males over females is maintained by extreme differentiation of the sexes In a similar dynamic, then, ‘the hierarchy of whites over blacks is greatly strengthened by extreme differentiation of the races, [just as] the hierarchy of males over females is greatly strengthened by extreme differentiation of the sexes’”²²⁴

Lolita Inness aptly notes that Henderson’s and Jefferson-Jones’s nuisance theory of #LivingWhileBlack is “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.”²²⁵ She goes on to describe the nuisance theory as “cogently” noting that “‘racialized territoriality and entitlements to space and place are at the heart of the problem.’”²²⁶ What remains, according to Inness, “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.”²²⁷ The White Privilege Stereotype is offered as one way to redefine those performances that shape the production of such norms. Building on the lessons learned from the campaign for “sex in public,” the White Privilege Stereotype offers another analytical and descriptive frame for mapping the #LivingWhileBlack problem, at least along one of its axes.²²⁸

223. Moreover, the White Privilege Stereotyping articulated herein—a “focus on stereotyping rather than on identity”—is “consonant with critical race theory’s aim to de-naturalize identities generally[,]” one goal of which includes “understanding discrimination not as a phenomenon of individual conscious intent, but of shared cultural norms, which are enforced through social interactions and often nonconscious behavior”—like the stereotype described herein. See Harris, *supra* note 87, at 68-69.

224. Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender Conscious Analysis*, 21 BERKELEY J. GENDER L. & JUST. 213, 237 (2006) (citing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 257, 202 (1994)).

225. Inness, *supra* note 5, at 219.

226. *Id.* at 232 (citing Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingMileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 914 (2020)).

227. *Id.*

228. See generally, e.g., Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 6-7 (1999) (contending that “anti-racist scholars often exhibit a misunderstanding of (or a lack of concern for) the relationship between racial oppression and other forms of subordination, particularly heterosexism and patriarchy”); see also Ehrenreich, *supra* note 20, at 255 (“[I]t is often difficult, and may even be impossible, to eliminate one form of subordination without attacking the entire edifice of interlocking oppressions.”).

C. *The Sex Discrimination Touchstone Creates Potential for Coalition Building with White People and with White Women in Particular*

While the sex discrimination frame for #LivingWhileBlack proposed herein may be fruitful for engaging white people of all genders in understanding and then becoming invested in fighting for solutions to the #LivingWhileBlack problem, it may hold a particularly salient valence for white women. Anecdotal evidence shows that white women engage in #LivingWhileBlack aggressions slightly more frequently than white men.²²⁹ The sex discrimination touchstone thus holds potential for educating white women about the connections between their own ability to live their sex in public and in the workplace and the ability of Black people to do the same vis-à-vis their race. One result of drawing the connections for white women between male privilege and white privilege may be more coalition building between white women and the Black people, as well as anti-racist organizations and campaigns, to engage in anti-racist work.

Nancy Ehrenreich describes white (straight) women as “singly burdened”—individuals who “simultaneously occupy positions of privilege and subordination.”²³⁰ In examining interlocking systems of subordination, Ehrenreich argues, perhaps counter-intuitively, that the privilege held by the singly-burdened (here, white, straight women) is not “an unadulterated benefit to those individuals.”²³¹ Rather, she asserts that “when singly burdened individuals compensate for the powerlessness they experience by using their privileged positionality to subordinate others, they often actually end up reinforcing the very systems that oppress them.”²³² Ehrenreich thus challenges the notion, common among scholars of intersectionality, that “privileged members of subordinated groups benefit from their privilege, and therefore resist giving it up.”²³³ Ehrenreich adopts a “hybrid intersectionality” approach, in which she analogizes the relationships among systems of subordination to the biological phenomenon of symbiosis.²³⁴

229. For example, research into the #LivingWhileBlack incidents described in this article revealed nine of them were committed by white women, three of them were committed by women of unidentified race, six of them were committed by white men, and two of them were committed by people whose race and gender were not identified. While not a systematic study of the question, these numbers do suggest the possibility that white women more frequently engage in #LivingWhileBlack aggressions. Empirical research on this question would, of course, provide a more accurate and complete picture of perpetrators, and such data might shed light on how to better address the problem by revealing the demographic characteristics of the primary perpetrators.

230. Ehrenreich, *supra* note 20, at 256. Thus, white, straight women are singly burdened because they are subordinated (burdened) by their sex but not by their race or sexual orientation.

231. *Id.* at 257 (“Thus, white women’s race privilege (for example) may sometimes actually sustain and reinforce their gender subordination.”)

232. *Id.*

233. *Id.*

234. *Id.* at 257-58. Ehrenreich identifies three mechanisms through which subordinating systems reinforce each other: exclusion, vulnerability, and obfuscation.

Utilizing principles of sex discrimination law in the #LivingWhileBlack context may create opportunities for all white people, but for white women in particular, to recognize Ehrenreich's lesson—that the manifestation of white women's privilege through #LivingWhileBlack aggressions (or being complicit in those aggressions through their failure to act) supports their own subordination as women. Both individual white women and women's rights advocacy organizations may benefit from these opportunities to connect their own subordination as women to the interlocking subordinating system of white supremacy and the white privilege they enjoy in that system. Connecting principles of sex discrimination law to the #LivingWhileBlack problem may thus encourage white women to "explor[e] general patterns of connection that sometimes emerge within mutually reinforcing structures of inequality"²³⁵—white supremacy and male supremacy. That exploration, in turn, may lead to a deeper recognition by white women (and the women's rights advocacy groups that they often lead) of the divide-and-conquer strategy of conservative lawmakers, who seek to pit one identity group against another, resulting in the continued subordination of both groups.²³⁶ These connections, therefore, may demonstrate to white women that their "preference for the immediate benefits of white supremacy was arguably short-sighted, and the benefits of their privilege, though real, were perhaps less than they imagined."²³⁷

Ehrenreich encourages us to be attentive to "the effect of dominant group norms on members of dominant groups."²³⁸ The sex discrimination touchstone for considering #LivingWhileBlack aggressions may encourage white women, in particular, and hopefully white progressives, more generally, to engage with Ehrenreich's invitation for such attentiveness. It could be true that most white women would rather not follow the dominant norm of asserting white privilege in recreational and leisure spaces.²³⁹ Encouraging such white women to see #LivingWhileBlack aggressions through a lens of sex discrimination—allowing

235. *Id.* at 258.

236. *Id.* at 259.

237. *Id.* at 295. Katerí Hernández describes this dynamic in the context of harassment in the workplace:

The mutual construction of gender and race is even apparent in the male articulation of sexual desire as an excuse for sexual harassment.... [T]he articulation of desire in many sexual harassment cases is simply a mechanism to subordinate women in the workplace.... [S]exual desire is used as the discursive vehicle for regulating the workplace as the domain of male competence and authority. "By subverting women's capacity to perform favored lines of work, harassment polices the boundaries of work and protects its idealized masculine image—as well as the identity of those who do it." Sexual harassment casts doubt upon the capability of women . . . in order to systemically maintain gender subordination. Accordingly, the reliance upon racialized gender stereotypes to disproportionately target women of color functionally polices White women as well by preserving the image of the workplace as the domain of White heterosexual masculinity.

Katerí Hernández, *supra* note 68, at 211-12 (internal citations omitted).

238. *Id.* at 301.

239. *Id.* at 301-02. "[T]aking seriously the coercive nature of dominant group norms raises the possibility that most members of the dominant group, rather than just a few, would rather not follow the articulated norm." *Id.*

white women to see the interlocking nature of the systems of male supremacy and white supremacy—may help them disrupt the dominant norm of white privilege manifested in #LivingWhileBlack aggressions. It may empower them to resist this norm notwithstanding their “fear of how they will be treated if they do fail to conform.”²⁴⁰

Applying a sex discrimination lens thus creates an opportunity to expose the fallacy of conservative lawmakers’ suggestion that “the interests of identity groups are at cross-purposes, so that it is impossible to accommodate all of them.”²⁴¹ The sex discrimination touchstone for analyzing the #LivingWhileBlack problem may highlight the connection between male privilege and white privilege in ways that disabuse white women of the notion that there are “discrete and warring interests groups”—white women and Black victims of #LivingWhileBlack aggressions—as well as of the “perception that such groups necessarily compete with each other for a finite amount of rights in a zero-sum universe.”²⁴² That may, in turn, disrupt the common public dialogue about the social and legal issues underlying the #LivingWhileBlack problem in ways that expand society’s and the law’s understanding of #LivingWhileBlack aggressions; this may then lead to broader coalitions fighting to address the #LivingWhileBlack problem or to additional progressive reform efforts to the problem.²⁴³

Framing the #LivingWhileBlack problem with reference to the sex discrimination touchstone may also disrupt another dynamic identified by Ehrenreich: obfuscation.²⁴⁴ She describes this dynamic as resulting from the promotion of the false idea that systems of subordination are distinct and separate,²⁴⁵ which in turn legitimizes and obscures the subordination itself. This “discourse of distinctness” thus “disables individuals both from recognizing the oppression of others and from seeing the subordination in their own situations.”²⁴⁶ Accordingly, describing the #LivingWhileBlack problem in relation to the dynamics experienced in sex discrimination may help white women understand that “the privilege [white women] enjoy comes not just at the

240. *Id.* at 302.

241. *Id.* at 259. “[T]he intersecting and overlapping nature of systems of oppression produces opportunities for antiprogressive forces to play groups off against one another.” *Id.* at 272.

242. *Id.* at 261.

243. *See generally id.* at 275 (“Appreciating the complex, symbiotic relationships among oppressive practices can help identity groups to counteract the idea that their interests are in conflict and to form meaningful coalitions aimed at challenging social inequality.”).

244. *Id.* at 303-04.

245. *See id.* at 304 (“[T]o see identity groups as separate and distinct is to deny the longstanding history of relationship among them, the impact that relationship has had on each, and the resulting difficulty of drawing neat lines between them.”).

246. *Id.* at 303 (emphasis omitted); *see also id.* at 303-04 (“The distinctness thesis does this by ignoring and obscuring both the fact that identity groups are relationally defined and the impact of that mutual definition on groups’ self-understanding.”).

expense of [Black people], but at their own expense as well.”²⁴⁷ Ehrenreich notes that stereotypes are double-edged: “Because groups are defined in relation to each other, the same stereotypes that privilege a subgroup in one context often serve to justify its subordination in another. Thus, the privilege comes at a price.”²⁴⁸ Put another way, white women’s race privilege also works to reinforce their gender subordination.

Applied to white women and Black victims of #LivingWhileBlack aggressions, the principle may look like this: white women are expected to conform to particular respectability norms—vis-à-vis white men, a “respectable” white woman is one who is not too aggressive, is caring and kind, is modest and deferential, and is vulnerable. In other words, a “respectable” white woman is one who does not seek to access the freedoms that men enjoy due to white male privilege; a “respectable” white woman is one who is *not* like Ann Hopkins. When white women hew closely to these stereotyped gender norms of what a white woman *is* and what a white woman *should* be, they are accepted by the white men among them and enjoy the benefits of exercising their white privilege. Part of that white privilege includes engaging in #LivingWhileBlack aggressions; as long as these white women conform to gender norms—norms that in fact contribute to their own subordination—they are protected by race privilege and permitted to punish Black people whom they perceive as exercising the white privilege of engaging in leisure and recreation activities when and where they chose.

Thus, white women #LivingWhileBlack aggressors are a paradigmatic illustration of the idea that “the source of white women’s gender subordination was also the source of their racial privilege.”²⁴⁹ Viewing #LivingWhileBlack aggressions as derivative of, or analogous to, sex discrimination may bring to the fore the fact that the fates of white women and the fates of Black people are linked.²⁵⁰ Amplifying that dynamic may increase the potential for white (women) allies—whether activists, legislators, or policymakers—to think about the #LivingWhileBlack problem in new ways and thus offer new approaches or solutions to the problem.²⁵¹

247. *Id.* at 306 (“What I want to suggest here is that the privilege such a person enjoys often both supports and obscures the subordination he suffers.”) (emphasis omitted).

248. *Id.* at 306-07.

249. *Id.* at 310 (emphasis omitted).

250. This is because “the opposing images of relationally defined groups not only reinforce each other, but also obfuscate that reinforcement,” which in turn “mak[es] it difficult to perceive the interconnections between the experiences of the groups.” *Id.* at 313. It is thus important to challenge conservatives’ message that identity groups are distinct, separate, and opposite. *Id.* See also Ehrenreich, *supra* note 20, at 319 (“When approached from a symbiotic perspective, explorations of difference can actually increase the ability of groups to see behind the justifications usually offered for their respective situations, and can motivate them to come together to challenge the system that is accountable for those situations.”).

251. Persuading white women to actively work in coalition with Black people to engage in anti-racist work—by highlighting the connections between #LivingWhileBlack aggressions and sex discrimination

Finally, considering #LivingWhileBlack aggressions through the lens of sex discrimination law and its role in making space for women to access male-privileged activities without retaliation may allow white people to see #LivingWhileBlack aggressions as the result of (among many things) whiteness as a social construct that “[b]ecause of its privileged position, . . . serves as an invisible norm for other racial forms, a norm against which all other racial forms are judged.”²⁵² “[M]aking whiteness visible to whites”—through reference to sex discrimination law’s rejection of male privilege in employment and public accommodations—may be one tactic through which “to dismantle white privilege and to foster anti-racist forms of white[ness]. Once whiteness is visible, then white people can work toward confronting and eliminating [the] white privilege”²⁵³ that accompanies #LivingWhileBlack aggressions.

CONCLUSION

The multiple sources of the #LivingWhileBlack problem—structural racism, white supremacy, history, political division, individual biases (both implicit and explicit), and the like—call for multiple analytic frames for theorizing and tackling it. Henderson and Jefferson-Jones offer a compelling theory of Blackness as nuisance. Other scholarship suggests that considering the problem through the lens of trauma and mental health may be fruitful.²⁵⁴ This Article has offered another framework, a White Privilege variant of racial stereotyping

via the White Privilege Stereotype—is the central prescription of this article. Another, more nuanced argument to encourage white women to join forces with Black people to dismantle white supremacy has been articulated by my colleague, Najarian Peters:

[W]hite women who need whiteness . . . will always settle for their positionality and closeness to white maleness because they see it as their best option. But, the trick of white supremacy is its delusion of immortality—and white women who need whiteness buy in to this to their own detriment in the not so long run. With the changing demographics of the country the argument should not only be that white women are oppressed too and their performativity of spacism reinforces their oppression[,] but also that this is an unsustainable and ever increasingly dangerous game. These women are human shields/pawns for the delusion of whiteness and white supremacy—and they are no longer able to simply walk away unscathed—not even white men can protect them anymore. From Black Twitter rampages that lead to firings and resignations [of white women who perpetrate #LivingWhileBlack aggressions] to business shutdowns to literally having to deal with death threats and bodily safety of themselves and their family members. There are real repercussions to the kind of hyper-whiteness performativity that makes this behavior unsustainable and an existential threat to performing whiteness and white-womanhood. Karenism is . . . despised[.]

Email from Najarian Peters to the author (Dec. 23, 2020) (on file with author). Thus, there may be additional interest convergence—beyond the connection between sex stereotyping and #LivingWhileBlack aggressions that are the central focus of this article—such as those raised by Peters, that racial and gender justice movement should also center in their campaigns for full equality. See generally Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

252. Cashman-Brown, *supra* note 157, at 175 (citations omitted).

253. *Id.* at 175.

254. See, e.g., Michael Harriot, *Post-Traumatic Blackness Disorder: The Mental Toll of Surviving Racism*, ROOT (July 17, 2020), <https://www.theroot.com/post-traumatic-blackness-disorder-the-mental-toll-of-s-1844409750> [<https://perma.cc/4H7D-FYHH>].

derived from sex stereotyping in employment discrimination law and the lessons for “race in public” that we can learn from the “sex in public” struggles of the 1970s, through which to theorize and address the #LivingWhileBlack problem.

Comprehensive solutions to complex problems of white supremacy and anti-Black racism require a multitude of analytical and theoretical perspectives. Contributing to the growing numbers of such perspectives, this Article has endeavored to provide another point of entry for conceptualizing, problematizing, and addressing the #LivingWhileBlack problem. Considering the #LivingWhileBlack problem through the sex discrimination touchstone described herein may allow us to see and make legible the #LivingWhileBlack problem in a different light and in a way that adds to the analytical lenses offered by other scholars. Scaffolding critiques of white supremacy with multiple legal descriptive and analytical frames enhances the chances that it will be dismantled. The more ways we “see” and understand its dynamics, the more ways we “see” to intervene and disrupt the problem.²⁵⁵ Adopting a touchstone theory of inquiry of #LivingWhileBlack aggressions, and considering sex discrimination as one touchstone among many, contributes a useful conceptual framework that has the potential to help in the important work of “understanding subordination as a complex, symbiotic process”²⁵⁶ and, in turn, the potential for broader anti-racist coalitions, as well as imagining more and different solutions.²⁵⁷

255. See, e.g., Cashman-Brown, *supra* note 157, at 178-79 (“White privilege and all the factors that support it, from institutional racism to microaggressions, must be unveiled and then dismantled and transformed.”).

256. Ehrenreich, *supra* note 20, at 316.

257. See *id.* at 281 (“By recognizing that their situations are interlocking, their fates often linked, such groups will be better able to rebut the divide-and-conquer tactics of the right and articulate a more persuasive and integrated critique of existing social inequalities.”).

