

“Driving While Black” as “Living While Black”

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ABSTRACT: Black people have long faced obstacles when attempting to access the freedom of mobility represented by the “open road.” The phenomenon of “Driving While Black” is a manifestation of those obstacles. This Essay posits that the restriction of Black freedom through the racialization of space is the common thread that ties “Driving While Black” to the broader phenomenon of “Living While Black.” It examines “Driving While Black” through a lens of spatial structural racism enforced by state-sanctioned police violence in the guise of the pretextual traffic stop and concludes that banning such policing practices is the remedy for “Driving While Black.”

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I. INTRODUCTION

The phrase “Driving While Black” commonly refers to the use of pretextual traffic stops of Black¹ motorists by law enforcement officers.² However, “Driving While Black” also refers to the challenges Black people in the United States continue to face when attempting to establish and protect their right to freedom of movement, a right exercised through their use and enjoyment of the “open road.”³

The United States has a longstanding history of efforts aimed at keeping Black people from enjoying freedom of movement and restricting them from entering spaces that have been racialized as white. “Driving While Black” is one of the many incarnations of “Living While Black”—a term that describes both the explicit and implicit racism that is a part of Black people’s quotidian experience.⁴ In fact, the restriction of Black freedom through the racialization of space is the common thread that ties “Driving While Black” to the broader phenomenon of “Living While Black.”

“Living While Black,” “Driving While Black” and other “While Black” activities have spawned their own genre⁵ of social media hashtags. The

1. I capitalize the term “Black” when referring to people of African descent individually or collectively because “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991) (quoting Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988)). It follows then that “I do not capitalize ‘white,’ which is not a proper noun, since whites do not constitute a specific cultural group.” *Id.*

2. See generally Kathryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999) (exploring the phenomenon of Driving While Black and its implications in the criminal justice system).

3. See generally GRETCHEN SORIN, DRIVING WHILE BLACK: AFRICAN AMERICAN TRAVEL AND THE ROAD TO CIVIL RIGHTS (2020) (chronicling the experience of Blacks and automobiles in the United States). See discussion regarding the “open road” as both ideal and physical place/space, *infra* Part III.A.

4. See generally Taja-Nia Y. Henderson & Jamila Jefferson-Jones, #LivingWhileBlack: Blackness as Nuisance, 69 AMER. UNIV. L. REV. 863 (2020) (exploring Blackness as property and its intersection with criminal law).

5. Sociologist Tressie McMillan Cottom observed that 2018 marked the beginning of an explosion “in social media clips of white people calling the police on black people for merely

hashtag #LivingWhileBlack first appeared on social media to mobilize attention to incidents where white people called the police on Black people for engaging in non-criminal, everyday activities.⁶ In our article, *#LivingWhileBlack: Blackness as Nuisance* (“#LivingWhileBlack”),⁷ Professor Taja-Nia Henderson and I examined video recordings of “Living While Black” incidents posted to social media or recounted in traditional media in 2018 and 2019. We also examined transcripts of the 911 calls from those incidents. The results of our research highlighted the ongoing (and long-standing) phenomenon of spatial racialization through an examination of language that either explicitly called for the exclusion of victims racialized as Black or that employed racially-coded language to call for the police to remove Black people from various spaces in which they had a right to be.⁸ #LivingWhileBlack examined “Living While Black” incidents in public, private and “third places.”⁹ By contrast, this Essay is only concerned with a particular public space: the open road.

The hashtag #LivingWhileBlack was popularized on Twitter and other social media platforms as a means of drawing attention to a specific type of racialized incident—that in which a white person called 911 to request police intervention when they deemed suspicious the presence of a Black person or Black people engaging in everyday activities.¹⁰ The term “Living While Black” is not new. The hashtag, however, brought this term into the common lexicon of a wider audience.¹¹ “Living While Black” is itself a play on the term “Driving While Black,” which actually predates it in popular usage.¹² Both “Living While Black” and “Driving While Black” (and, ultimately all “While Black”) incidents are bound together by the burden that is placed on Black lives and Black living.¹³

existing.” “It’s a genre,” she quipped. TRESSIE MCMILLAN COTTOM, *The Price of Fabulousness, in THICK: AND OTHER ESSAYS* 153, 158–59 (2018).

6. See generally Henderson & Jefferson-Jones, *supra* note 4 (explaining that the #LivingWhileBlack hashtag arose out of viral recordings of 911 calls reporting Black people for innocuous behavior).

7. *Id.*

8. See *id.* at 872 (“[C]allers in #LivingWhileBlack incidents have consistently leveraged property concepts of entitlement and belonging to advocate for the physical ouster of Black people from shared spaces.”).

9. See *id.* at 871 n.32 (“‘Third places’ have been referred to as ‘a community’s living room’—places such as cafes, bars, salons and barbershops—where people of all backgrounds gather to exchange ideas.” (quoting Diana Budds, *It’s Time to Take Back Third Places*, CURBED (May 31, 2018, 5:21 PM), <https://www.curbed.com/2018/5/31/17414768/starbucks-third-place-bathroom-public> [<https://perma.cc/UW4U-KVMA>])).

10. See *id.* at 867–70.

11. See *id.* at 869.

12. See also discussion of the origin of the term “Driving While Black” in the Black community and in case law *infra* Section III.B.

13. See Taja-Nia Henderson, *Living While Black: How Black People Are Policed Just for Being in Public Spaces*, TEEN VOGUE (July 8, 2020), <https://www.teenvogue.com/story/living-while-black-racism> [<https://perma.cc/4DXS-25SG>] (coining the phrase “[i]f Black lives matter, then Black living must also matter”).

Scholarly examinations of “Driving While Black” are plentiful. Historians have examined its roots, psychologists have observed the psychic harms it perpetuates, and legal scholars have scrutinized the constitutional issues it engenders. The goal of this Essay, however, is to begin to outline “Driving While Black” as a racialized spatial concern. Both “Living While Black” and “Driving While Black” incidents represent the use of police force to enforce the “racialization of space” and its resulting “racial territoriality.”¹⁴ It is this threat of state violence through police force—violence that includes the risk of death—that ties together “Living While Black” and “Driving While Black”—a tie that is strengthened by the underlying aims of maintaining the racial character of spaces that have been racialized as white. This Essay, therefore, expands the “Living While Black” scope by examining the role this particular subset (“Driving While Black”) of this genre (“Living While Black”) plays in the perpetuation of white supremacy and Black subordination, particularly as they function in spatial contexts.

Part II of this Essay briefly delves into the fraught history of the policing of Black peoples’ freedom of movement in the United States, tying present-day “Driving While Black” to its roots in the chattel slavery system. Part III revisits the “Living While Black” phenomenon as described in *#LivingWhileBlack*. In doing so, it explores the “open road” as both a physical space and an ideal evoking freedom in the American imagination. Part III also examines spatial structural racism, as manifested through the racialization of space and enforced by state-sanctioned police violence, which bars Black Americans from fully taking part in that ideal. Accordingly, Part III situates “Driving While Black” firmly within the universe of “Living While Black” by exploring “Driving While Black” incidents as manifestations of racialized spatial entitlement. Part III concludes by examining a remedy for “Driving While Black”: banning pretextual traffic stops.

II. THE HISTORICAL POLICING OF BLACK FREEDOM OF MOVEMENT IN THE UNITED STATES

Freedom of movement is one of the hallmarks of American liberty.¹⁵ It is enshrined in the canon of American origin stories—from the story of our founding by those who left home to roam across the ocean to a “New World” in search of religious and political freedom—to the story of freedom as

14. The terms “racialized space” and “racial territoriality” are explored in more depth in Section II.B.

15. SORIN, *supra* note 3, at 4; *see also* Daniel B. Rodriguez, *Road Wary: Mobility, Law, and the Problem of Escape*, 106 IOWA L. REV. 2397 (2021) (“[We the People] have long valorized the freedom of movement, the ability to choose where to live, where to visit, where to shelter from the storm.”) *Id.* at 2398–99; MIA BAY, *TRAVELING BLACK: A STORY OF RACE AND Resistance* 3 (2021) (“American identity has long been defined by mobility and the freedom of the open road . . .”).

expressed by the myth of Manifest Destiny through westward expansion.¹⁶ In the modern American context, the myth of freedom through movement has found expression in the automobile and the roads upon which it travels. As Professor Nancy Leong puts it, the road has a “place at the heart of the American dream” and “[a]s a symbol, the road represents the possibility of freedom, autonomy, and self-determination that the American dream promises.”¹⁷ However, this freedom of movement expressed in the American myth has largely been the privilege of white people.¹⁸ Throughout the course of American history, Black Americans’ access to the ideal of free movement has been systematically curtailed.

The roots of the restriction of Black freedom of movement are intertwined with the history of the enslavement of Black people in the United States. However, even long after Emancipation, Black people continued to face both *de jure* and *de facto* limitations on their ability to move about freely.

This Part explores the evolution of restrictions on Black freedom of movement, beginning with the era of slavery and moving into the Jim Crow South. This exploration illuminates the relationship between restrictions on Black freedom of movement and the enforcement of those restrictions through the use of state violence in the guise of police force. Additionally, this Part demonstrates that such police force has been used to reinforce whites’ claims to space—specifically the “open road.”

A. SLAVERY AND RECONSTRUCTION

*We would be sorry when dark, as de patrollers would walk through de quarters
and homes of de slaves all times of night wid pine torch lights to whip de niggers
found away from deir home.*¹⁹

During the era of chattel slavery in the United States, the law severely circumscribed travel by both enslaved and free Black people. The law permitted enslaved Black people to travel away from the property on which they were held captive only with permission, typically memorialized by written “travel” passes signed by their owners.²⁰ Slave states also enacted laws requiring free Blacks people to carry papers evidencing their free status in

16. See Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 306–07 (2012). It is not lost on this author that both these stories ignore the reality of non-whites—the Africans who were forced through the Middle Passage to the “New World,” as well as the indigenous tribes who paid the price of Manifest Destiny.

17. *Id.* at 307.

18. SORIN, *supra* note 3, at xi; BAY, *supra* note 15, at 3.

19. Interview with Ida Henry (Nov. 5, 1937), in 13 THE FED. WRITERS’ PROJECT, SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES 134, 134 (1941).

20. SORIN, *supra* note 3, at 5–7 (citations omitted); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 110 (2001).

order to safely travel the country's roads.²¹ Freedom papers, in theory, would not only permit such persons to travel, but would also protect them from being thrust into enslavement because they could not prove their free status.²²

Slave patrols, an ancestor of the modern-day American police force,²³ enforced the rules of Black mobility. Not only could members of slave patrols discipline enslaved persons who had left their enslavers' property without permission, but patrollers also had the authority "to kill those who resisted [capture]."²⁴ Thus, the constriction of the movement of Black people—who were either property or at peril of becoming property—was inextricably tied to the property rights of enslavers, and, enforced through state-sanctioned violence.²⁵

Emancipation did not bring an end to white power over Black movement. In the immediate postbellum period, former slave owners were desperate to rebuild the plantation system that was now in a shambles.²⁶ Their newly-freed labor force, however, had taken to the road. As Michelle Alexander notes, "[f]ormer slaves literally walked away from their plantations, causing panic and outrage among plantation owners. Large numbers of former slaves roamed the highways in the early years after the war."²⁷ In response, Black Codes and vagrancy laws were enacted to disrupt the freedmen's movement and tie them back to the land.²⁸

Vagrancy codes made it a crime for the new freedmen to enjoy their liberty by refraining from working.²⁹ Although vagrancy laws were written in race-neutral terms, they were routinely enforced only against Black people or, in some Southern states, only enacted in counties that had majority Black populations.³⁰ The penalty for vagrancy included forced labor, which could result in a Black "vagrant" being auctioned off to a private white person to

21. SORIN, *supra* note 3, at 8; HADDEN, *supra* note 20, at 114–15.

22. SORIN, *supra* note 3, at 5–6.

23. Jalila Jefferson Bullock & Jelani Jefferson Exum, *That is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 FORDHAM URB. L.J. 625, 632 (2021) ("It is well-documented that modern policing's ancestry lies in slave patrols.") (citations omitted); *see also* SORIN, *supra* note 3, at 8 (noting that slave patrols were "often the first policing units in a community").

24. MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 36 (2001).

25. As Professor Elise Boddie notes, whites' ability "to exclude, marginalize, and confine slaves and even free blacks . . . was premised on property rights and backed by the power of the state." Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 427 (2010).

26. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 28 (2010).

27. *Id.*

28. *See*, RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 116 (2016) ("With the end of slavery, southern whites turned even more aggressively to vagrancy laws as racial regulation. . . . [V]agrancy laws . . . were used to return black Americans to a state as close to slavery as legally and practicably possible.")

29. ALEXANDER, *supra* note 26, at 28.

30. GOLUBOFF, *supra* note 28, at 116.

serve his time. As most freedmen were unskilled and, thus, only able to perform agricultural labor, such punishments resulted in all but a return to enslavement.³¹ As Professor Elise Boddie noted, “[t]he clear purpose of these laws was to prevent blacks from moving uninhibited from place to place.”³² These laws were enforced by the state through the use of the police force, resulting in reimprisonment on plantations. Thus, even though Black people were no longer chattel, just as during slavery, their movement was restricted in part to enhance and safeguard white landowners’ ability to exploit their real property. These postbellum Black Codes and vagrancy laws led to the construction of the Jim Crow regime, which, in turn, instantiated into law limited Black mobility.³³

B. JIM CROW AND THE RACIALIZATION OF THE ROAD

JIM CROW MILE—A unit of measurement, peculiar to colored motorists, comprising both physical distance and random helpings of fear, paranoia, frustration, and outrage. It’s amorphous nature makes exact travel times impossible to calculate, and its violence puts the traveler’s good health and sanity constantly at hazard.

—The Safe Negro Travel Guide, Summer 1954 edition³⁴

Jim Crow was the logical backlash to the relative progress of Reconstruction—the answer to “the quest by dominant whites for a new racial equilibrium, a racial order that would protect their economic, political, and social interests in a world without slavery.”³⁵ As Michelle Alexander notes in *The New Jim Crow*, the institution of Jim Crow “disenfranchised blacks and discriminated against them in virtually every sphere of life, lending sanction to a racial ostracism that extended to schools, churches, housing, jobs, restrooms, hotels, restaurants, hospitals, orphanages, prisons, funeral homes, morgues, and cemeteries.”³⁶ Such disenfranchisement extended to the sphere

31. *Id.*; ALEXANDER, *supra* note 26, at 31; *see, e.g.*, Act of November 29, 1865, ch. 23, 1865 Miss. Laws 165, 167.

32. Boddie, *supra* note 25, at 428.

33. *See* Alexander, *supra* note 26, at 28 (“While some of these [Black] codes were intended to establish systems of peonage resembling slavery, others foreshadowed Jim Crow laws by prohibiting, among other things, interracial seating in the first-class sections of railroad cars and by segregating schools.”); Goluboff, *supra* note 28, at 116 (“[V]agrancy laws . . . regulated African American morality and social interactions with whites.”).

34. MATT RUFF, *LOVECRAFT COUNTRY 1* (2016) This quote opens the dark fantasy horror novel *Lovecraft Country* that explores the intersection between the horror fiction of H.P. Lovecraft and the horrors of racism during the Jim Crow Era. The Safe Negro Travel Guide is a fictitious version of the very real travel guides that Black motorists used to find amenable lodging and services during Jim Crow. *See infra* n.72.

35. Alexander, *supra* note 26, at 32.

36. *Id.* at 35; *see also* Boddie, *supra* note 25, at 429–30 (“Blacks and whites were required to remain separate across a seemingly limitless range of institutions—schools, buses, railways, parks, hospitals, private and public housing, bars and cocktail lounges, golf courses, boxing arenas,

of transportation as well.³⁷ Consequently, Black people were consigned to separate and unequal accommodations on common carriers such as busses and trains.³⁸

In the face of challenges to these transportation polices, the Supreme Court affirmed that such arrangements were sufficient to provide Black people “full and equal enjoyment of” common carriers.³⁹ Being relegated to the literal and proverbial “back of the bus” was endorsed by the state and could, therefore, be enforced by those acting under its power to police. Thus, as Professor Deborah Archer notes, “For decades, using public transportation was a daily reminder of the legal and social inferiority of Black people.”⁴⁰

Access to private automobiles gave Black Americans some relief from this daily humiliation. Historian Gretchen Sorin has chronicled the history of Black automobile travel, remarking that the automobile brought a distinct measure of freedom to Black life in the United States:

The automobile expanded the freedom of movement and the opportunity to travel throughout the country for all Americans, but this freedom meant something different—and often, simply more—to blacks than to whites. Automobiles provided a means of escape from the Jim Crow South. They were a tremendous source of pride for African Americans and they changed the etiquette of travel on the road. Most important, the automobile became a tool in the battle to end discrimination in public accommodations.⁴¹

However, embarking on the “open road” meant entering what sociologist John Urry terms the “system of automobility,” which encompasses not just the automobile, but all of the attendant services related to car ownership, maintenance and travel – most of which were racially segregated or inaccessible to Black people.⁴² As historian Mia Bay notes, “[T]ravelling Black could involve greater dangers than simply being refused service.”⁴³ Likewise, Sorin notes that traversing the thoroughfares of this country brought with it a distinct measure of physical, even mortal danger to Black people:

African Americans faced a wide variety of difficulties and potential dangers on and off the interstate highways and whenever they

pools, restaurants, movie theaters, even snack bars, bathrooms, elevators, vending machines, telephone booths, and cemeteries.”) (footnotes omitted).

37. SORIN, *supra* note 3, at 21–23. See generally BAY, *supra* note 15.

38. *Id.*

39. Plessy v. Ferguson, 163 U.S. 537, 546 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

40. Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2132 (2021); see also BAY, *supra* note 15, at 1–2.

41. SORIN, *supra* note 3, at xiii.

42. See John Urry, *The System of Automobility*, 21 THEORY CULTURE & SOCIETY 25, 25–39 (those services included “hotels, roadside service areas and motels; . . . [and] repair workshops).

43. BAY, *supra* note 15, at 8.

traveled – whether for vacation, to visit family, or for business. They encountered racist law-enforcement officers and gas-station attendants, bigoted auto repairmen, threatening road signs, restaurants and hotels that denied them service. They faced the possibility of mob violence.⁴⁴

Thus, despite the increasing ability to travel across the nation, these ever-present dangers made Black peoples’ right to the freedom of movement illusory. As Bay concludes, “Rather than offering an escape from Jim Crow, instead the invention of the automobile introduced new and complex forms of traveling Black.”⁴⁵ Whether the dangers and rules of the “open road” were explicitly enforced by law or implicitly enforced by society, they ensured the “open road” was a racialized space.

Throughout U.S. history, various streets, avenues, boulevards, interstates and country roads have been racialized. To “racialize” space is to claim or assign space as belonging to one racial group to the exclusion of other racial groups. As sociologist Kevin Fox Gotham writes, “Racialization refers to the way in which racial categories sort people, society distributes resources along racial lines, and state policy shapes and is shaped by the racial contours of society.”⁴⁶

The term “racial territoriality” was coined by Professor Elise Boddie who, in her article of the same name argued “that “antidiscrimination law should place significant emphasis on the ‘whiteness’ of a subject space in judging racial discrimination.”⁴⁷ To “territorialize” space is to behave in a manner that reinforces and protects a claim to space.⁴⁸ Thus, “racially territorial conduct” or “racial territoriality” arises in order to maintain racialized space.⁴⁹ This is particularly true in the context of racial hierarchies in the United States. Members of the empowered racial group (white people) exhibit racially territorial conduct in order to maintain their position of racial supremacy over subordinated racial groups (Black people and other people of color). Thus, historically, in the context of the United States, once a space is racialized as “white,” racial territoriality works to protect that racialized identity. One of the ways that it does so is through state-sponsored violence administered by the police force. As Boddie explains, “[r]acial territoriality occurs when the state excludes people of color from—or marginalizes them

44. SORIN, *supra* note 3, at xiv.

45. BAY, *supra* note 15, at 110.

46. KEVIN FOX GOTHAM, RACE, REAL ESTATE AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900-2010, at 13 (2d. ed. 2014).

47. Boddie, *supra* note 25, at 405.

48. *See id.* at 442-46 (describing “[t]he [m]echanics of [t]erritoriality,” generally, and of “racial territoriality,” specifically).

49. *Id.* at 438 (“[R]acialized spaces . . . correlate with and reinforce cultural norms about spatial belonging and power. These norms have a dynamic and symbiotic relationship with racially territorial conduct.”).

within—racialized white spaces that have a racially exclusive history, practice, and/or reputation.”⁵⁰ This characterization is apt in the context of “Driving While Black.”

III. “DRIVING WHILE BLACK” IS “LIVING WHILE BLACK”

*#DrivingWhileBlack is the hashtag normalization of traffic stops as dignity assaults & deadly attacks.*⁵¹

One of the common threads among the 2018 and 2019 “Living While Black” incidents that my coauthor and I chronicled in *#LivingWhileBlack* is the use or threat of police violence to remove Black people from spaces claimed by individual white people or groups of white people—those places that have been or are in the process of being racialized as white.⁵² The phenomenon of white racialization of space has been operative throughout the history of the United States, whether the country was under the historical *de jure* system of racial segregation or the modern *de facto* system that permeates most aspects of American life.⁵³ As Professor Addie Rolnick notes, “Segregation today is not necessarily absolute, but cities and neighborhoods may still be regarded as Black or White spaces, and the racial character of these neighborhoods is neither accidental nor divorced from law and history.”⁵⁴ Not only are certain neighborhoods and majority-dominated institutions racialized as white, but in historically majority-minority enclaves, the clashes between new white residents and incumbent Black residents are often existential battles for the racial identities of those places.⁵⁵

50. *Id.* at 406.

51. Cornell William Brooks (@CornellWBrooks), TWITTER (Nov. 21, 2020, 3:34 PM), <https://twitter.com/CornellWBrooks/status/1330278361164296192?s=20> [https://perma.cc/Z4DVNBGH]. Although this Essay is not directly concerned with dignity takings, the phenomenon of “Driving While Black” traffic stops are ripe for exploration as such. Bernadette Atuahene explains that a taking of property, which includes intangible “status property” such as dignity itself, can be classified as a “dignity taking” “when the state confiscates property from groups that have been dehumanized or infantilized.” BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM* 26 (2014). “Driving While Black”-related dignity takings could be analyzed as both individual and community dignity takings. *See generally* Jamila Jefferson-Jones, “Community Dignity Takings”: *Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, 66 U. KAN. L. REV. 993 (2018) (discussing individual and community dignity takings).

52. *See generally* Henderson & Jefferson-Jones, *supra* note 4 (discussing technological advancements that are used to police and exclude Blacks from spaces traditionally racialized as “white”).

53. Gotham, *supra* note 46, at 13–14.

54. Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1703 (2019) (citing Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1850–51 (1994); Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER J. 117, 127 (1992)).

55. *See, e.g.*, Henderson & Jefferson-Jones, *supra* note 4, at 877 (noting that two of the most notorious “Living While Black” incidents of 2018 took place in the rapidly-gentrifying San Francisco Bay Area).

There are, few spaces in the American landscape that have escaped racialization⁵⁶ and the “open road” is no different. In fact, the “open road” has long been a battle ground of spatial racialization.⁵⁷ For Black Americans, it represents both the mainstream American ideal of freedom of movement and the uniquely Black experience of race-based restrictions on free movement. In the modern context, this clash of ideal and experience coalesces as “Driving While Black.”

Section A of this Part begins by exploring both the physical and metaphysical aspects of the “open road,” staking it out as both place/space and an ideal. Section A also examines how Black people have carved out their own spaces on the “open road,” even in the face of state-sponsored obstacles. In Section B, this Essay examines how police force, in the guise of pretextual traffic stops, is used to maintain the racialization of space and enforce spatial structural racism. Section B also delves into the connection between “Driving While Black” and “Living While Black” incidents. In Section C, this Essay outlines the geography of racial exclusion in the “Driving While Black” context. Section D of this Part concludes that banning pretextual traffic stops in the most effective remedy for “Driving While Black.”

A. THE “OPEN ROAD” AS PLACE, SPACE, AND IDEAL

Scholars have often noted the automobile’s unique status as a symbol of American freedom.⁵⁸ Notably, the roads upon which automobiles travel predate the automobile itself as an icon of that freedom. As Professor Nancy Leong notes:

The road is . . . more than a pathway toward the American dream. The road, in itself, is *already* a realization of the dream. Simply to travel the road is to exercise the freedom of movement and choice of destination intrinsic to our [American] ideals. A traveler on the road is, in that moment, living the dream of making his own way in the world, of pursuing his own happiness. . . . Regardless of the

56. For instance, Gotham notes that, in the United States, “race [is the] organizing principle of housing markets.” GOTHAM, *supra* note 46, at 13. The resulting racial residential segregation, for example, produces racialization of other spaces, such as schools—spaces in which *de facto* racial segregation is persistent. *See id.* at 4.

57. *See* BAY, *supra* note 15, at 108 (“[T]he technological transformations of the automotive age offered African American travelers both new forms of mobility and new sites of racial contestation.”).

58. *See* SORIN, *supra* note 3, at ix (“Since the beginning of the twentieth century, no feature of modern life has been more emblematic of, or deeply connected to, American identity and the American dream than the automobile.”); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 159 (2019) (referring to automobiles as “freedom machines” and noting that “[i]n film, song, and literature, the car represented freedom” and “the ‘American Way of Life’”).

destination, . . . the act of the journey is an exercise of the American dream.⁵⁹

The “open road” is both a physical space and an idea, while the automobiles that travel upon it are spaces that move people from place to place, furthering the ideal of freedom in the American context.

1. “Place” vs. “Space”

In common parlance, the terms “place” and “space” are often used interchangeably. However, scholars have noted that these terms are distinguishable from one another. For instance, philosopher Michel de Certeau defines place (*lieu*) as “an instantaneous configuration of positions.”⁶⁰ Thus, he posits that two things cannot be in the same place at the same time.⁶¹ A “space” (*espace*), on the other hand “exists when one takes into consideration vectors of direction, velocities, and time variables.”⁶² It is defined as being “composed of intersections of mobile elements.”⁶³ As he puts it, “in short, *space is a practiced place.*”⁶⁴ De Certeau further elaborates that “the street geometrically defined by urban planning is transformed into a space by walkers.”⁶⁵ As such, I argue that one’s automobile is both “place” and “space,”⁶⁶ while individual roads are mere “places.” The “open road” of the American imagination, on the other hand, is a “space,” transformed into such by the practice of its facilitation of movement between locations—between *places*.

2. Black Space on the “Open Road”

For Black Americans traveling during the Jim Crow Era, automobile travel allowed them to carve out a space—their cars—free from the humiliation of segregation, while also permitting them to move between and

59. Leong, *supra* note 16, at 307.

60. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 117 (Steven F. Rendall trans., Univ. of Cal. Press 1984).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Some scholars use the term “S/p[]ace” to designate that which has both “space” and “place” characteristics. See, e.g., Amanda Reid, *Place, Meaning, and the Visual Argument of the Roadside Cross*, 2 SAVANNAH L. REV. 265, 276 & n.85 (2015) (“The slash and bracket purposefully highlights the relatedness of [the] concepts [of space and place].”); see also Jamila Jefferson-Jones, *Using Historic Preservation Laws to Halt the Destruction of “Porch Culture” in the Lower Ninth Ward of New Orleans*, 2 SAVANNAH L. REV. 211, 216–17 (2015) (discussing porches in the American South, particularly those of Black residents in pre-Katrina New Orleans as “s/p[]ace[s]”).

among physical places.⁶⁷ While both the starting point and the ending point of their journey might have been haunted by Jim Crow, the autonomy provided by the automobile and the “open road” gave Black people some agency in deciding when, how, and if their sense of freedom would be interrupted by the outside world.

An example of Black people carving out such spaces of autonomy on the open road and between and among destinations was related to me by one of my maternal uncles, Kyle Green, who, as a preteen, traveled with a Black youth group from New Orleans to New York City for the 1964 World’s Fair:

Let me tell you how the trip went: We had two school buses of young Black boys . . . We drove from New Orleans [, Louisiana] to Tuskegee [, Alabama]. We stayed on Black college campuses. That was during the summertime where you didn’t have a full student body on campus. So, the idea was to stay on Black college campuses because . . . my dad [the lead trip chaperone] would be assured we’d be all right. . . . We didn’t have hotel rooms available for us—two busloads of Black kids back then.⁶⁸

The trip my uncle recounts was with the “Junior Deputy” program that was administered by the sheriff’s office in Jefferson Parish, Louisiana. In the mid-1960s, the sheriff’s office had a “Junior Deputy” program for white boys.⁶⁹ My grandfather, Herman Green, Sr., one of the parish’s Black deputy sheriffs, helped to create a similar program for Black boys.⁷⁰ These trips gave the boys a chance to see the country and to see sights of historical and political importance to Black people. As the New Orleans Times-Picayune newspaper noted upon my grandfather’s death in 1998:

In that [“Junior Deputy”] program, Mr. Green took the youths on cross-country cultural, historical and recreational trips from 1964 through 1974. He arranged the travel routes to include Washington, D.C., Atlanta and every Southern town that had a historically black college or university or that had elected a black mayor or chief of police. He also took the junior deputies to world’s fairs in New York City and San Antonio.⁷¹

67. See BAY, *supra* note 15, at 109 (“Privately owned cars would provide those [Black people] who could afford them with a small space in which to escape some of segregation’s humiliations.”).

68. Interview with Kyle M. Green, Sr., (Nov. 1, 2020) (describing a summer road trip to the 1964 World’s Fair taken by the Black participants of the Jefferson Parish “Junior Deputies” program).

69. Obituary, *Herman A. Green Sr., Retired Sheriff’s Deputy*, NEW ORLEANS TIMES-PICAYUNE, Nov. 10, 1998, at B–3.

70. *Id.*

71. *Id.*

The newspaper whitewashed the story. As my uncle noted, the group did not stay at Historically Black Colleges and Universities (“HBCUs”) merely because my grandfather wanted the boys to see those institutions; they stayed there because my grandfather had to solve the problem of where to house a group of Black travelers, as hotels were not a reliable option throughout the South.⁷² As my uncle recollected:

... we drove from New Orleans to Tuskegee, and we stayed on campus[at Tuskegee University]. Then we drove from Tuskegee to North Carolina A&T [University] [another Black college campus] . . . We traveled for the most part during the daytime and stayed at A&T for the same reasons that we stayed at Tuskegee. And my recollection [is that] we stayed on Howard [University]’s campus . . . and from there we went to New York City [where we were able to stay in a motel].⁷³

While in the South, the boys and their chaperones took their meals either on HBCU campuses or on their buses.⁷⁴ When HBCU campus accommodations were not available, the travelers had to keep driving:

Coming back what I recall mostly is I believe we stayed at one of the campuses after we left [New York to return to New Orleans]. . . But one time we drove all night. We drove all night and we didn’t have any restaurants where we [could] stop and eat. So, the adults stopped at a couple stores and bought sandwiches and soft drinks and potato chips. . . I don’t remember us stopping at any restaurants. I don’t think there were any restaurants that would accommodate us [because of our race].⁷⁵

Like Black travelers before them, the Black Junior Deputies and their chaperones had to create spaces in which they could safely enjoy the freedom of the “open road.” Their story illustrates both the American “open road” ideal and its limitations in the experience of Black Americans. On the one hand, my grandfather was able to help the children in his charge see the world

72. In large metropolitan areas in the South, like New Orleans and Atlanta, there were Black-owned hotels that catered to Black patrons, but in smaller towns, like Tuskegee, Alabama, available housing options were guest houses that would not have been large enough to house two busloads of boys and their chaperones.

For information on Black hotels, guesthouses and other Black-owned businesses catering to Black clientele, Black motorists often relied on travel guides, the best-known of which was the *Negro Motorist Green*, which was published from 1936–1966 (except during World War II) by Victor Green, a mail carrier in New York.

73. Interview with Kyle M. Green, Sr., *supra* note 68.

74. *Id.*

75. *Id.*; see also Russell, *supra* note 2, at 720 (“During the era of Jim Crow, separate and unequal laws and racial discrimination by white business owners meant that Blacks could not secure hotel accommodations or eat in public restaurants. This forced many of those Blacks driving long distances to sleep and eat in their cars.”).

outside of their neighborhoods in the segregated South. At the same time, their story demonstrates that Black travelers were faced with race-based obstacles to their exercise of “open road” freedom—obstacles that forced them to think and act creatively in order to safely reach their destination.

According to my uncle, the Junior Deputies were never pulled over by the police during their travels.⁷⁶ However, during the Jim Crow Era, the risk of facing hostile police was ever-present. After Jim Crow and with the rise of the War on Drugs,⁷⁷ Black motorists continued to face police threat in the form of the pretextual traffic stop.

B. *PRETEXTUAL TRAFFIC STOPS AS MECHANISMS OF
SPATIAL EXCLUSION*

Traffic stops have been used to harass Black people, to police Black bodies, and to circumscribe Black movement since the invention of the automobile and the rise of traffic enforcement. As automobile ownership became more accessible, more and more Black Americans were able to purchase them and take to the road.⁷⁸ This meant that Black people were more likely to encounter policing in this arena. This policing—couched in traffic enforcement—was often used to squelch Black freedom on the road. As historian Sarah Seo notes, “Beginning in the late 1930s and with increasing frequency each decade, [Black motorists] wrote to the NAACP about traffic stops for minor or fabricated charges that left them terrified.”⁷⁹ Thus, even in these early years, police used pretextual traffic stops as a common tactic to further criminalize Black people. The term “Driving While Black” originated in the Black community to describe such traffic stops predicated on race rather than reasonable suspicion of actual criminal activity.⁸⁰

1. Traffic Stops and Racial Territoriality

The term “Driving While Black” entered mainstream usage outside of the Black community in the 1990s—around the time of the Supreme Court’s decision in *Whren v. United States*,⁸¹ in which the Court effectively sanctioned

76. Interview with Kyle M. Green, Sr., *supra* note 68.

77. Scholars trace the origin of the War of Drugs to the early 1970s. See, e.g., John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L.J. 621, 630 (2016); Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 4–5 (2014). This policy initiative included international components such as the provision of military aid to and intervention in drug-producing countries and domestic components such as the prohibition of drug possession and the adoption of stringent enforcement policies. See generally ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *WHITEOUT: THE CIA, DRUGS AND THE PRESS* (1998) (chronicling the history of the War on Drugs).

78. SORIN, *supra* note 3, at x–xi; SEO, *supra* note 58, at 36–38.

79. SEO, *supra* note 58, at 183.

80. Russell, *supra* note 2, at 717–18; see also BAY, *supra* note 15, at 315.

81. *Whren v. United States*, 517 U.S. 806 (1996).

the pretextual traffic stop as a legitimate law enforcement tool.⁸² In *Whren*, police officers used a driver's minor traffic violation—turning without signaling—as a pretext to stop him and his passenger and search for illegal drugs.⁸³ When the police stopped the vehicle, they observed bags of cocaine in plain sight.⁸⁴ The stop, however, was not made because of existing probable cause or reasonable suspicion of illegal drug activity.⁸⁵ Rather, it was made because of the officers' likely racially-motivated hunch regarding potential crime: Both defendants were Black, and they were in a neighborhood known for its high rate of illegal drug activity.⁸⁶ In the face of the defendants' argument that the police officers had violated their Fourth Amendment rights against unreasonable search and seizure, the Court held that the traffic violation established probable cause for the stop which, in turn, opened the door for the investigation of the drug crimes for which the defendants were charged—the true purpose of the initial (pretextual) traffic stop.⁸⁷ The Court confirmed that “[previous Supreme Court] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”⁸⁸ Thus, *Whren* displays that the true reason behind a stop is immaterial, as long as the underlying traffic stop is predicated on an actual traffic violation.

Attempting to meticulously follow traffic laws provides no protection for Black drivers. There are so many traffic regulations that it is nearly impossible for even the most conscientious driver to avoid an infraction.⁸⁹ This reality, coupled with the Supreme Court's decision in *Whren*, invites police officers to lawfully stop Black motorists for minor traffic infractions, even when the officers' actions are driven by a racially-biased suspicion of criminality.⁹⁰ The

82. Russell, *supra* note 2, at 718.

83. *Whren*, 517 U.S. at 808–09.

84. *Id.* at 809.

85. *Id.*

86. *See id.* at 808–10.

87. *Id.* at 811–15 (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the *subjective* intent.”).

88. *Id.* at 813.

89. *See* Leong, *supra* note 16, at 327 (referring to “the vehicle code’s myriad obscure provisions”); *see also* SEO, *supra* note 58 at 24–26 (chronicling the exponential proliferation of local traffic regulations); Noel King & Avie Schneider, *Law Professor: Police Hold ‘Extraordinary’ Power of Black People in Traffic Stops*, NPR (April 16, 2021, 1:52 PM), <https://www.npr.org/2021/04/16/988087507/law-professor-police-hold-extraordinary-power-over-black-people-in-traffic-stops> [<https://perma.cc/N5ZT-724B>] (describing a game called “Pick that Car” that a police officer friend of Georgetown Law Professor Paul Butler plays with students on ride-alongs. Butler recounts that his police officer friend “can follow any car for four or five minutes and he’ll find a reason [to stop the driver]. There are so many traffic infractions that any time you drive, you commit one.”)

90. *See* Russell, *supra* note 2, at 718 (“The *Whren* decision thus made clear that, in the Court’s eyes, traffic stops motivated by the racial prejudices of individual officers do not violate

police force thus becomes an agent of racial territoriality, staking out the road as white space, and Black movement and presence within that space as inherently suspicious.

In the modern context, most people may think of the pretextual traffic stop as drug enforcement-related—“motivated not by any desire to enforce traffic laws, but instead motivated by a desire to hunt for drugs in the absence of any evidence of illegal drug activity.”⁹¹ But, as Professor Kathryn Russell notes, pretextual traffic stops include “a wide range of race-based suspicion of Black . . . motorists.”⁹² This description affirms the lived experiences of the decades’ worth of Black motorists who appealed to the NAACP for help in combatting racially-motivated traffic stops.⁹³

2. Race and the Risk of Motorist Death in Traffic Stops

Scholars have noted the racialized nature of both the ideal of the “open road” and of the policing of that actual physical space: “[T]he open road narrative is racialized as white, while the traffic stop narrative is racialized as non-white,”⁹⁴ or “in many instances, [an] explicitly black—narrative.”⁹⁵ For white people, the law, as embodied by the traffic stop, is an occasional speed bump interrupting the “open road” fantasy. For Black people, however, the law litters every inch of the “open road”—so much so that the traffic stop “has supplanted the open road narrative for blacks in America[.]”⁹⁶

Regardless of race, traffic stops are the most common reason for civilian-police contact.⁹⁷ The incidence of traffic stops is, however, higher for Black people than for white people.⁹⁸ In fact, Black people who are merely in a parked car are at a higher risk than white people of being “stopped” by the police.⁹⁹ This police-civilian contact can have fatal consequences—especially for Black people. In all circumstances, Black people are twice as likely to be killed by the police as white people.¹⁰⁰ Overall, women are at much lower risk

the Fourth Amendment’s search and seizure guarantees, at least when there are other reasons for the stop.”).

91. ALEXANDER, *supra* note 26, at 66.

92. Russell, *supra* note 2, at 717.

93. SEO, *supra* note 58, at 183.

94. Leong, *supra* note 16, at 309.

95. *Id.* at 324.

96. *Id.*

97. ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP’T JUST., SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1, 4 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/J5CE-4WCX>]; see SEO, *supra* note 58, at 6 (“No form of direct government control comes close to these [traffic] stops in sheer numbers, frequency, [or] proportion of the population affected” (first alteration in original).

98. DAVIS ET AL., *supra* note 97, at 4.

99. *Id.*

100. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCIS. U.S. 16793, 16794

than men of being killed by police.¹⁰¹ However, Black women are in the group of women that is most at risk of a deadly police encounter.¹⁰² Black men are at even greater risk. On average, one in every one thousand Black males is at risk of being killed by the police.¹⁰³ This is double the risk of death at the hands of police faced by all non-Black males together (Asian, Latino, Native American and white) and nearly triple the risk faced solely by white males.¹⁰⁴

The higher rate of Black civilian-police contact through traffic stops, coupled with Black people's greater risk of being victims of police-involved killings, makes the "open road" a fraught space for Black motorists. For instance, in 2015, the Washington Post reported that "more than 100 people [had been] shot and killed by police after a traffic stop [that] year."¹⁰⁵ One survey concluded that "27 percent of police killings of unarmed [people in 2015] began with a traffic stop."¹⁰⁶ Of the approximately 100 people killed by police after a traffic stop in 2015, one in three of those killed was Black, "making the roadside interaction one of the most common precursors to a fatal police shooting of a black person in 2015."¹⁰⁷ Thus, there is great risk that the minor traffic violations of "Driving While Black" can quickly escalate to what Professor Jelani Jefferson Exum calls "the death penalty on the streets"—the phenomenon by which police mete out the punishment of death on the street, without due process and in violation of the Eighth Amendment, for offenses that are not eligible for the death penalty,¹⁰⁸ like traffic violations.

None of the incidents that we examined in *#LivingWhileBlack* resulted in police-involved killings.¹⁰⁹ However, as we noted throughout our article, the

fig.1 (2019), <https://www.pnas.org/content/pnas/116/34/16793.full.pdf> [<https://perma.cc/Z9YB-VSHZ>].

101. *Id.* at 16795.

102. *Id.* ("Among women and girls, black women's and American Indian/Alaska Native women's [lifetime] risk [of being killed by the police] is highest.").

103. *Id.* at 16794.

104. *Id.* at 16794–95. Ninety-six per 100,000 Black men and boys are likely to be killed by police compared with between 36 and 81 per 100,000 American Indian and Alaska Native males, 53 per 100,000 Latino males, between 9 and 23 per 100,000 Asian and Pacific Islander males, and 39 per 100,000 white males. *Id.*

105. Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html [<https://perma.cc/5F6G-P95F>].

106. SEO, *supra* note 58, at 5.

107. Lowery, *supra* note 105.

108. See Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 U. MO. L. REV. 987, 988 (2015) ("When police force is likened to punishment, the use of fatal force by police officers can be considered the administration of the death penalty on the streets, absent the procedural protections and focus on human dignity given in the criminal justice system through the Eighth Amendment.").

109. See generally Henderson & Jefferson-Jones, *supra* note 4 (examining incidents involving police calls about supposed trespassing violations). The article did not consider the case of Elijah

white 911 callers in the 2018 and 2019 #LivingWhileBlack incidents each employed the threat of violence through the use of police force in an effort to exclude Black people from the spaces that they were lawfully occupying.¹¹⁰ Given the high risk that Black people, particularly Black men, face of being killed by the police, the actions of these white protagonists should be seen as more than merely racist, but actually violent and life-threatening.

C. SPATIAL CONNECTIONS: “DRIVING WHILE BLACK” AND
“LIVING WHILE BLACK”

In #LivingWhileBlack incidents, the threat of adverse criminal justice consequences, up to and including death, is ever-present.¹¹¹ As previously demonstrated, “Driving While Black” encompasses similar deadly risks. Although, at first blush, the world of memes and posts generated by #LivingWhileBlack incidents and their related 911 calls appear dissimilar to the universe of “Driving While Black” pretextual stops, they share a common thread regarding the persistent attempts at the spatial exclusion of Black Americans from spaces that have been racialized as white. Pretextual stops—whether in the context of purported drug law enforcement or in any other purported law enforcement context—impose a geography of racial exclusion.

Both “Living While Black” and “Driving While Black” are, at their base, about who belongs and who is out of place. As previously noted, norms of place and belonging are often enforced through the use of police force. Individual police officers use race in the context of place and space “as a marker of where people ‘belong,’ and racial incongruity as a marker of suspicion.”¹¹²

McClain. Another resident of Aurora, Colorado called 911 to report that McClain was waving his arms and “looked sketchy.” Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Aug. 16, 2020), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/LC8D-6FEC>]. McClain, a musician, is believed to have been listening to music and dancing at the time he was observed. During his subsequent encounter with police, officers restrained McClain and injected him with a sedative, causing his death. *Id.*

110. See generally Henderson & Jefferson-Jones, *supra* note 4 (discussing distortion of property law along racial lines).

111. For instance, in one of the most publicized #LivingWhileBlack incidents of 2018, Jennifer Schulte, aka “Barbeque Becky,” called 911 on a group of Black men who were barbecuing in Oakland, California’s Lake Merritt Park. Tom Cleary, *Jennifer Schulte, ‘BBQ Becky’: 5 Fast Facts You Need to Know*, HEAVY (June 23, 2018, 5:54 PM), <https://heavy.com/news/2018/05/jennifer-schulte-bbq-becky> [<https://perma.cc/4J4Y-2KKC>]. She specifically told the men, “ya’ll [sic] going to jail,” thus vocalizing her intent to not just request police intervention to possibly remove the men from the park, but her expectation of punitive consequences. *Id.* Given the high rate of escalation in Black civilian-police encounters, the incident could have easily resulted in the deaths of the Black victims of this unjustified 911 call.

112. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457-477-78 (2000).

Scholars have noted that, “not just people,” but places can be racially profiled.¹¹³ This analysis resonates with scholarship recognizing the racialization of space. Thus, places and spaces can be assigned racial characteristics and those perceived characteristics can impact how police perform their jobs within those places and spaces. In short, geographical “context itself can be racially profiled.”¹¹⁴ For this reason, comparing police activity within the same geographical area may not always be helpful in discovering patterns of racial profiling.¹¹⁵ Rather, it is necessary to compare police activity—such as pretextual traffic stops—across racially-identified geographical areas.¹¹⁶

The intersection of the racialization of space and the geographical nature of “Driving While Black” is not merely anecdotal. Researchers have quantified “Driving While Black.” For instance, one study found what they called “the race and place effect” whereby Black motorists faced both disproportionate surveillance and stopping by police when in predominately white neighborhoods.¹¹⁷ In particular, they found that in the predominantly white neighborhoods, police conducted license plate queries on Black motorists over 300 percent more often than on the general driving population (whites and other races combined), and that Black motorists in these neighborhoods were three times more likely to be stopped than they were when near the border between the Black and white neighborhood.¹¹⁸ Moreover, they found that, in instances where a predominately Black neighborhood shared a border with a predominately white neighborhood, a Black motorist’s likelihood of being surveilled or stopped increased exponentially the farther the Black motorist ventured from that border (i.e., deeper into the white neighborhood).¹¹⁹

As Professor Bennet Capers notes, there is a “link between policing, race, and place” and a “significant role that criminal law and procedure have played, and continue to play, in maintaining racialized spaces.”¹²⁰ Police officers rely on ideas of “racial incongruity.”¹²¹ If, after all, various places and

113. Lance Hannon & Aaron Siegel, *Racially Profiling People and Places*, 18 CONTEXTS 66, 66 (2019).

114. *Id.*

115. *Id.*

116. *Id.*

117. Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUST. Q. 399, 399, 401 (2002); see also Leo Carroll & M. Liliana Gonzalez, *Out of Place: Racial Stereotypes and the Ecology of Frisks and Searches Following Traffic Stops*, 51 J. RSCH. CRIME & DELINQ. 559, 575 (2014) (finding that Black drivers were four times more likely to be frisked in white towns than in the more racially heterogeneous city that those towns bordered).

118. Meehan & Ponder, *supra* note 117, at 417.

119. *Id.* at 401.

120. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 44 (2009).

121. See *id.* at 65–66 (“Who is scrutinized, who is stopped, who is questioned, and who is frisked is too often based on ‘racial incongruity’—the presence of a minority in a predominantly

spaces are the domains of certain racial groups, then it is reasonable for police officers to stop and question Black people who are in places and spaces that have been racialized as white.¹²² Thus, police are empowered both to exact a “racial tax”¹²³ from Black people who “cross[] [racialized] geographic borders and [to] demonstrate[] the existence of state action in the service of segregation.”¹²⁴ As Professor Capers notes, “methods of policing help shape race and space.”¹²⁵ This is no less true with regard to policing through the use of pretextual traffic stops, which have proven to be tools used to maintain racialized spaces.¹²⁶

D. REMOVING RACIALIZED ROADBLOCKS FROM THE “OPEN ROAD”

Limiting civilian-police contact on the “open road” is the most effective way to end “Driving While Black” incidents and to ensure Black motorists the same access to the American ideal of freedom that whites enjoy. Doing away with pretextual traffic stops would greatly reduce civilian-police contact.

Despite the Supreme Court’s ruling in *Whren*, some state courts and legislatures, noting the racially discriminatory nature of these stops, have recently moved to ban them. For instance, in 2019, the Oregon Supreme Court held that, under its state constitution, it is impermissible for a police officer to use a stop made for a minor traffic offense as justification for investigating other potential crimes.¹²⁷ The court ruled that “an officer is limited to investigatory inquiries that are reasonably related to the purpose of the traffic stop or that have an independent constitutional justification.”¹²⁸

In late 2020, lawmakers in Virginia banned police from stopping motorists for minor traffic infractions.¹²⁹ Rather, police may not initiate

non-minority neighborhood, or the presence of a non-minority in a predominantly minority neighborhood.”).

122. See *id.* at 46 (“As a result of th[e] practice” of assessing where reasonable suspicion exists, “law-abiding minorities entering predominately white neighborhoods are frequently stopped and questioned as to the reason for their presence in the neighborhood.”).

123. RANDALL KENNEDY, RACE, CRIME AND THE LAW 158–59 (1998).

124. Capers, *supra* note 120, at 46.

125. *Id.* at 62.

126. *Id.* Professor Capers heavily centers his arguments regarding race, place and policing on the policing practice of stopping and frisking suspects in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968). *Id.* at 62–69. However, these same arguments regarding the intersection of the racialization of space and criminal law and procedure can be applied in the context of the pretextual traffic stops sanctioned under *Whren v. United States*, 517 U.S. 806 (1996). *Id.* at 64–65 (“The collateral consequences of *Terry* and its progeny [which includes *Whren*] is that they permit the disproportionate targeting of minorities in cars.”).

127. *State v. Arreola-Botello*, 451 P.3d 939, 948–50 (Or. 2019) (en banc).

128. *Id.* at 949.

129. Act of Nov. 9, 2020, ch. 45, 2020 Va. Acts, <https://lis.virginia.gov/cgi-bin/legp604.exe?202+ful+CHAP0045> [<https://perma.cc/BW4C-HC4X>].

contact, but may instead issue a citation to be mailed to the motorist.¹³⁰ Legislators in Texas have indicated that they will seek a similar ban.¹³¹

Police officers may argue that bans and limitations on pretextual traffic stops will take from them an effective investigatory tool. However, given the evidence of racially discriminatory abuse of traffic stops and given the dignitary harms that Black motorists face as a result of the use of pretextual stops, justice dictates that courts and legislatures ban these practices.

IV. CONCLUSION

“Driving While Black” poses an existential threat to Black people. In the quest to assert their freedom of mobility, Black people have always had to run a gauntlet, facing potential emotional and physical injury, loss of freedom, and even death. Like so many spaces in America, the “open road” has been historically and repeatedly claimed by whiteness and, therefore, is a space in which unfettered participation by Black people has been curtailed. The problem of “Driving While Black” implicates the state-sanctioned racialization of space and the ensuing racial territoriality endemic to “Living While Black” in the particular space of the “open road”—a space that comprises both physical and metaphysical freedom. Thus, it is apparent that, “Driving While Black” incidents, just like “Living While Black incidents,” must be combatted in order to dismantle the racialization of space and the racial territoriality that it engenders—both of which are components of what can be termed “spatial structural racism.” Tearing down this structure is not just a matter of convenience. Obstacles of this nature bar Black people’s access to both the fullness of citizenship, and the full enjoyment of the freedom to which they are entitled.

130. *Id.*

131. Jolie McCullough & Cassandra Pollock, *The Texas Lawmakers Who Led the Sandra Bland Act are Pushing to Reinstate the Police Reforms Stripped from their Original Bill*, TEX. TRIB. (June 9, 2020, 12:00 PM), <https://www.texastribune.org/2020/06/09/texas-sandra-bland-act-police> [<https://perma.cc/78C7-R8Y6>].