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Weaponized Anonymity: The Continuing Marginalization of Communities of Color through Racially-Biased Anonymous Processes in U.S. Society

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I. INTRODUCTION

Solving America’s race problems first requires seeing them, to “really *see* them,”¹ especially as racial bias shifts from overt to opaque forms in the modern era.² Anonymity is one opaque form where anonymous processes are effectively weaponized, intentionally or implicitly, against

¹ RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 163 (2000).

² *See generally*, EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 105 (5th ed. 2018).

communities of color. Anonymity enables hidden spaces that harbor racial bias. In anonymous venues, bias thrives and harms people of color.³

Anonymity can be a shield⁴ or sword.⁵ This article focuses on anonymity as a sword thrust against communities of color. An example is the anonymous caller who lodged a building complaint against an elderly Puerto Rican widow in the Bronx.⁶ She and her husband in the 1960s converted their basement into an apartment, but their contractor failed to file documents with the Department of Buildings. For fifty years, she rented out what she thought was a legal unit until an anonymous complaint. The basement apartment is structurally safe and habitable, but there are no permits on file showing that the contractor installed the stove and bathroom fixtures in compliance with 1960s code. The widow lacks the funds to retain an architect, contractor, and lawyer to remedy the violations. The government issues failure-to-correct violations every sixty days, violations that she cannot pay. A lien will be placed on her house, and she could ultimately lose her home and end up homeless. Several properties on her block have been redeveloped recently and sell for over a million dollars each, and long-time residents believe that these recent neighborhood changes account for long-time homeowners being displaced.⁷

The building complaint example above involves weaponized anonymity in the residential arena, but anonymity is weaponized across other societal arenas. The rest of the Article below explicates non-exhaustive examples of biased anonymity in myriad arenas, along with arena-specific remedies. Part II addresses racial bias in the 911 emergency system within the criminal justice arena. Part III discusses racial bias in non-emergency nuisance complaints within the residential arena. Part IV elucidates racial bias in reporting immigration violations within the immigration arena. Part V illuminates racial bias in child welfare services within the family and parenting arena. Part VI examines racial bias in customer feedback within the workplace arena. Part VII explores racial bias in student evaluations within the education arena. Part VIII reveals racial bias in algorithms within

³ See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 65–66 (2009) (discussing how online anonymous mobs target people of color, religious minorities, and other traditionally subordinated groups).

⁴ An example is the *Nat'l Ass'n* Court holding that the constitutional right to associate prohibited Alabama from requiring the NAACP to disclose the names of its rank-and-file members in part because the NAACP showed that prior disclosures of NAACP members exposed them to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

⁵ Melody Patry, *Online Anonymity Isn't Driving Abuse of Black Sports Stars. Systemic Racism Is*, TIME (July 21, 2021, 2:25 PM), <https://time.com/6082318/social-media-abuse-online-anonymity/>.

⁶ *Equitable Enforcement: Balancing Risk, Resources, and Policy Goals*, CITIZENS HOUS. & PLAN. COUNCIL N.Y. C. 2 (Feb. 2021), https://chpcny.org/wp-content/uploads/2021/02/EE-Issue-Brief_08-1.pdf.

⁷ See *id.*

the technology arena. Part IX synthesizes the prior parts to distill efforts that can mitigate anonymity-enabled harms to communities of color.

II. WEAPONIZING ANONYMITY IN THE CRIMINAL JUSTICE SECTOR

A. Racially-Biased Anonymous Emergency 911 Reports

An estimated 240 million calls are made to 911 annually in the United States,⁸ but the anonymous 911 system contains a dark side wherein those who believe they are hidden are emboldened to act destructively.⁹ Thus, anonymous callers weaponize the 911 system by engaging in “racialized police communications”¹⁰ to harm people of color.¹¹ A Grand Rapids Police Department sergeant stated, “[t]here’s no question, unfortunately, that people will [call the police using 911 to] use us as an implement for their own prejudice or bias.”¹² A former police chief stated that bias-motivated 911 calls are “real” and “common.”¹³

Anonymous 911 calls can constitute another means of controlling marginalized communities.¹⁴ In 2018, Black candidate Shelia Stubbs was canvassing Wisconsin voters while her elderly mother and young daughter were in the car when a caller anonymously reported¹⁵ them for “waiting for drugs at the local drug house” and wanted “them moved along.”¹⁶ Candidate

⁸ 9-1-1 Statistics, NAT’L EMERGENCY NO. ASS’N, <https://www.nena.org/page/911Statistics> (last visited May 3, 2022).

⁹ Citron, *supra* note 3, at 124.

¹⁰ Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 342 (2019).

¹¹ Francesca Laguardia, *Weaponizing 911: #LivingWhileBlack, 911, and Swatting*, 57 NO. 5 CRIM. L. BULL. (Fall 2021).

¹² Nate Belt, *Grand Rapids Police fighting false, racially biased 911 calls*, 13 ON YOUR SIDE NEWS, (May 26, 2020, 10:59 PM), <https://www.wzzm13.com/article/news/local/grand-rapids-central/grpd-fighting-false-racially-biased-911-calls/69-b38ca70d-cbf0-418a-8d20-354c43b2eeec8>.

¹³ Cedric L. Alexander, *Racially Biased 911 Calls are a Huge Problem. This Isn’t a Solution*, CNN (June 5, 2019, 5:47 AM), <https://www.cnn.com/2019/06/05/opinions/racially-biased-911-calls-living-while-black-alexander/index.html>.

¹⁴ See Chanelle N. Jones, Comment, *#LivingWhileBlack: Racially Motivated 911 Calls as a Form of Private Racial Profiling*, 92 TEMP. L. REV. ONLINE 55, 55 (2020).

¹⁵ Candidate Stubbs later received from a local news station an anonymous letter purportedly written by the anonymous caller asserting that he only called the non-emergency number and called the police on the car, not on candidate Stubbs. Dan Plutchak, *Person who Called Police on Dane County Candidate: ‘So, so very sorry,’ WKOW* (Sept. 24, 2018), https://www.wkow.com/news/person-who-called-police-on-dane-county-candidate-so-so-very-sorry/article_ce0354f9-5ed2-5b05-b44c-c2f65b1bbb5c.html.

¹⁶ Jessie Opoien, *Constituent Called 911, Suspecting Drug Deal, on Dane County Supervisor Shelia Stubbs While she Canvassed for Assembly Seat*, THE CAP TIMES (Sept. 19, 2018), https://captimes.com/news/local/govt-and-politics/election-matters/constituent-called-911-suspecting-drug-deal-on-dane-county-supervisor-shelia-stubbs-while-she-canvassed/article_85c7f295-f818-546f-97b6-2bf8a8fc3e27.html.

Stubbs was eventually elected to the Wisconsin State Assembly, but the experience of being anonymously targeted left her and her family scarred.¹⁷

Further, researchers examining unfounded 911 calls found that “the proportion of suspicious 911 calls and unfounded suspicious calls increase as more Non-Black residents move into a neighborhood.”¹⁸ Such is the prevalence of suspicious or aggrieved individuals calling 911 on Black victims that it has been termed “existing while Black” or “Living While Black.”¹⁹ Other terms include “racial hoaxes” and “‘frivolous race-based police calls’ (FRBPCs).”²⁰ Unsurprisingly, a Department of Justice publication characterizes the abuse and misuse of 911 as an “urgent problem.”²¹

B. Remedying Racially-Biased Anonymous Emergency 911 Reports

Removing anonymity from 911 calls may reduce racial bias because the ability to locate and punish 911 abusers can help deter their bad acts.²² Although the Supreme Court in *Navarette* viewed anonymous 911 calls as reliable,²³ this view is incorrect.²⁴ Anonymous callers are unreliable because they lack accountability and “can lie with impunity.”²⁵ Known sources are more reliable than anonymous sources because a known source can be (1) assessed for “credibility and reputation for honesty” and (2) held “accountable for false reporting,” explained the Second Circuit in a pre-*Navarette* case.²⁶ A post-*Navarette* Massachusetts court correctly decided to “decline to endorse the Supreme Court’s reliance on the use of the 911 system as an independent indicium of reliability for an anonymous tip.”²⁷ Similarly, in another post-*Navarette* case, the *K.H.* court in Florida stated that anonymous 911 calls are “inherently unreliable.”²⁸ The *K.H.* case dealt with an anonymous call alleging trespass at a gas station by two Hispanic females who were panhandling.²⁹ The *K.H.* Court reasoned that an unreliable anonymous call combined with only the defendant’s mere presence at the

¹⁷ Melissa Gomez, *Black Candidate Wants to Know Who Called 911 as She Talked to Voters*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/politics/shelia-stubbs-wisconsin-police.html>.

¹⁸ Uttara Ananthakrishnan et al., “*I feel Threatened*”: *Measuring Racial Distrust in America from 911 Calls 2* (Feb. 5, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4014937.

¹⁹ SHAWN E. FIELDS, NEIGHBORHOOD WATCH: POLICING WHITE SPACES IN AMERICA 2 (2022).

²⁰ Yazmine C’Bona Levonna Nichols, Note, *Race Has Everything to Do with It: A Remedy for Frivolous Race-Based Police Calls*, 47 FORDHAM URB. L.J. 153, 155 (2019).

²¹ Rana Sampson, *Misuse and Abuse of 911*, U.S. DEP’T JUSTICE 1 (Aug. 2004), https://popcenter.asu.edu/sites/default/files/misuse_abuse_of_911.pdf.

²² Citron, *supra* note 3, at 124.

²³ *Navarette v. California*, 572 U.S. 393, 400 (2014).

²⁴ FIELDS, *supra* note 19, at 64–65.

²⁵ *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring).

²⁶ *United States v. Freeman*, 735 F.3d 92, 97 (2d Cir. 2013).

²⁷ *Commonwealth v. Depiero*, 42 N.E.3d 1123, 1126 (Mass. 2016).

²⁸ *K.H. v. State*, 265 So. 3d 684, 688 (Fla. Dist. Ct. App. 2019).

²⁹ *Id.* at 686.

gas station failed to constitute reasonable suspicion to stop the defendant for trespass.³⁰ Courts act properly when they recognize the perils of anonymous tips.³¹

Likewise, local government should recognize the perils of anonymous 911 calls and require callers to provide their name and contact information.³² Admittedly, laws already exist that penalize false 911 reporting.³³ For example, South Carolina law makes it a misdemeanor “for a person anonymously or otherwise to . . . contact the emergency 911 number and intentionally make a false report.”³⁴ Iowa makes it a misdemeanor for a person to report false information to law enforcement knowing that the information is false.³⁵ But the further step of removing anonymity in 911 calls is needed to better protect communities of color.³⁶ For instance, the Somerset County Prosecutor’s Office states, “You will need to give your name, where you are and the type of assistance you will need (police, ambulance, fire, etc.).”³⁷

Providing name and other information is not a radical departure from what already occurs when landline users call in to “enhanced” 911 (i.e., E911) systems that automatically display their billing name, address, and telephone number to the dispatcher.³⁸ For example, the City of Xenia, Ohio, uses an enhanced 911 system that automatically displays the landline caller’s information; then the dispatcher requests the same information from the caller to confirm the displayed information is correct.³⁹ Those calling from a wireless phone that displays less contact information to the dispatcher are instructed to give the dispatcher their name and verify their phone number.⁴⁰

If the caller fails to provide a name and contact information, the dispatcher should inform the caller that the call will be documented, but that

³⁰ *Id.* at 688.

³¹ *Miles v. United States*, 181 A.3d 633, 638 (D.C. Cir. 2018).

³² See Laguardia, *supra* note 11 (advocating for increased responses to this threat of required reporting of information for anonymous 911 calls).

³³ 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, 149 (2021).

³⁴ S.C. CODE ANN. § 23-47-80(4) (2019).

³⁵ IOWA CODE ANN. § 718.6(1) (West 1978).

³⁶ See Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 1001 (2019) (proposing model legislation stating that any dispatcher who reasonably believes a caller is abusing the 911 system will log the call in the statewide 911 abuse database and “shall record all reasonably pertinent information, including the identity and phone number of the Caller”).

³⁷ Somerset Cnty. Prosecutor’s Off., *Personal Safety Guide* (2010), <https://www.co.somerset.nj.us/home/showpublisheddocument/30412/636682158391870000>.

³⁸ *911 Communications*, CITY TURLOCK, <https://www.cityofturlock.org/policedepartment/aboutus/911communications.asp> (last visited June 3, 2022).

³⁹ *When to Call 911*, EXPLORE XENIA, <https://www.ci.xenia.oh.us/268/When-to-Call-911> (last visited June 3, 2022).

⁴⁰ *Id.*

officers will not be dispatched.⁴¹ This is the proper response to unreliable anonymous calls potentially motivated by racial bias.⁴² Officers should not respond based on calls that lack a legitimate basis for law enforcement involvement.⁴³ This requires training dispatchers to not reflexively send officers to respond to questionable calls that lack sufficient information.⁴⁴ Ultimately, the criminal justice system including the 911 system should curtail oft-abused anonymous reporting against people of color because being of a particular race is neither a criminal act nor indicative of criminal activity.⁴⁵ As stated by New Jersey's governor, those who weaponize 911 through biased reporting against people of color engage in an "abhorrent form of discrimination" and "should be held accountable to the fullest extent of the law."⁴⁶

III. WEAPONIZING ANONYMITY IN THE RESIDENTIAL SECTOR OF SOCIETY

A. Racially-Biased Anonymous Non-Emergency Nuisance Complaints

Anonymity enables residents to unleash their racial bias.⁴⁷ In one Brooklyn neighborhood, anonymous flyers with the heading "CHINESE ARE DESTROYING [sic] BAY RIDGE" were posted on lampposts.⁴⁸ The racist flyer stated the Chinese were engaging in illegal home conversions that were "ruining housing stock of Bay Ridge resulting in a flight of middle class homeowners," opening up "massage parlors (prostitution)" and "dirty Chinese restaurants," creating "[t]rashed up streets," and "scavenging [sic]."⁴⁹ The flyer also furthered Covid fears by stating, "Corona Virus spread by Chinese immigration."⁵⁰

⁴¹ See Carl Takei, *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, AM. C.L. UNION (June 18, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated>.

⁴² See *id.*

⁴³ *Id.*; Jones, *supra* note 14 at 87–88.

⁴⁴ Takei, *supra* note 41.

⁴⁵ As stated by the *Romero* court, "[a] person of a particular race standing in a parking lot where a crime occurred is not enough to create reasonable suspicion." *Romero v. Story*, 672 F.3d 880, 888 (10th Cir. 2012).

⁴⁶ Evan Simko-Bednarski, *A False 911 Call in New Jersey Could Lead to More Jail Time if There's Bias*, CNN (Sept. 2, 2020), <https://www.cnn.com/2020/09/02/us/new-jersey-racial-bias-911-trnd/index.html>.

⁴⁷ See David Cruz, *Racist Anti-Chinese Flyers in Bay Ridge are Countered with Messages of Inclusivity*, GOTHAMIST (June 7, 2020), <https://gothamist.com/news/racist-anti-chinese-flyers-bay-ridge-are-countered-messages-inclusivity>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Yet local jurisdictions often address problems by relying on anonymous complaints⁵¹ to react to caller-identified issues.⁵² But this anonymous complaint-driven system is problematic for marginalized communities.⁵³ First, the complaint-driven system is one that “privileges those who are comfortable making complaints and navigating the system.”⁵⁴ A study of 311 complaints referred to the New York Police Department found a “significantly higher” increase in the number of “quality of life” complaints in “those lower-income, majority person-of-color tracts with large influxes of white residents than those without large influxes of white residents.”⁵⁵ In effect, residents in neighborhoods with White influxes make more quality-of-life complaints that are referred to the police.⁵⁶ In a study of gentrifying West Harlem, new White residents said they called 311 because they were not comfortable directly approaching long-time residents.⁵⁷

Second, the complaint-driven system disadvantages those who are unknowledgeable of or unable to complain such as renters fearful of retribution from their landlords.⁵⁸ In another example, in Queens in New York City, a caller weaponized the 311 complaint system against the undocumented community when the caller complained that construction at a shelter was carried on without permits and by undocumented workers.⁵⁹ Additionally, residents of color living in heavily-policed communities feel unsafe in their encounters with police and are thus less likely to call for assistance.⁶⁰

Third, the complaint-driven system concentrates government resources in areas that may not require it.⁶¹ A caller may complain simply

⁵¹ “Anonymous complaint” means a complaint lacking information such as name and address to identify the source. TEX. OCC. CODE ANN. § 154.0535(a)(1) (West 2011).

⁵² CITIES FOR RESPONSIBLE INV. & STRATEGIC ENF’T POWER & PROXIMITY CODE ENF’T: A TOOL FOR EQUITABLE NEIGHBORHOODS 4 (June 2019), https://hesterstreet.org/wp-content/uploads/2019/07/CR_-Phase-I-_Equitable-Code-Enforcement-report_FINAL-JUNE-2019.pdf.

⁵³ *Id.*; CITY’S RELIANCE ON COMPLAINTS FOR PROPERTY MAINTENANCE ENFORCEMENT DISPROPORTIONATELY AFFECTS DIVERSE AND GENTRIFYING NEIGHBORHOODS, PORTLAND CITY AUDITOR (Nov. 3, 2021), <https://www.portland.gov/sites/default/files/2021/report-and-responses.pdf>.

⁵⁴ CITIES FOR RESPONSIBLE INV. & STRATEGIC ENF’T, *supra* note 52, at 4.

⁵⁵ Harold Stolper, *New Neighbors and the Over-Policing of Communities of Color: An Analysis of NYPD-Referred 311 Complaints in New York City*, CMTY. SERV. SOC’Y (Jan. 6, 2019) <https://www.cssny.org/news/entry/New-Neighbors>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Cities for Responsible Inv. & Strategic Enf’t, *supra* note 52, at 4.

⁵⁹ CITIZENS HOUS. & PLAN. COUNCIL N.Y.C., *supra* note 6, at 3.

⁶⁰ Stolper, *supra* note 55.

⁶¹ CITIES FOR RESPONSIBLE INV. AND STRATEGIC ENF’T, *supra* note 52, at 4.

because the complainant⁶² does not like or feel comfortable with the new neighbors.⁶³

Finally, a complaint system weaponized by the dominant culture “sets up an adversarial relationship between government and the communities they serve” including communities of color.⁶⁴ For example, long-time Harlem resident Ramon Hernandez had for decades enjoyed sitting in a fold-up chair on his Harlem block every summer or playing an evening dominoes game with neighbors as music played from a nearby parked car.⁶⁵ This was a tradition in the historically Latinx neighborhood.⁶⁶ But conditions changed with the arrival of an increased police presence due to officers responding to complaint calls.⁶⁷ This coincided with gentrification and more white people moving into the neighborhood.⁶⁸

Business owners of color, like residents of color, also endure biased 311 reporting.⁶⁹ One Black restaurant owner selling snowballs (similar to snow cones) in Baltimore was subjected to racist comments and unfounded 311 complaints.⁷⁰ One white neighbor asked the Black owner whether she had properly researched the neighborhood before opening and stated her type of business was “unwanted” in that neighborhood.⁷¹ Another Black restaurant owner providing food, liquor, and live music in Baltimore was subjected to constant harassment including unfounded 311 complaints and weekly anonymous letters demeaning restaurant patrons as “Black racists” who were “loud, obnoxious, mean, nasty and ignorant.”⁷²

B. Remediating Racially-Biased Anonymous Nuisance Complaints

A solution is to restrict anonymity in 311 complaints.⁷³ Florida prohibits code enforcement officers from investigating alleged code

⁶² Such a caller might be called a “vexatious complainant,” one who “contentiously raises a complaint, without grounds, in order to cause annoyance or disruption.” *Policy and Procedure for Persistent and Vexatious Complainants* 2, CROYDON (Apr. 4, 2011), <https://www.croydon.gov.uk/sites/default/files/articles/downloads/vexatious-persistent-complaints-policy-procedure.pdf>.

⁶³ CITIES FOR RESPONSIBLE INV. AND STRATEGIC ENF'T, *supra* note 52, at 4.

⁶⁴ *Id.*

⁶⁵ Lam Thuy Vo, *They Played Dominoes Outside Their Apartment for Decades. Then the White People Moved in and Police Started Showing Up*, BUZZFEED NEWS (June 29, 2018), <https://www.buzzfeednews.com/article/lamvo/gentrification-complaints-311-new-york>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ John-John Williams IV & Stephanie García, “Overenforcement”: *Black Baltimore Restaurant Owners Say They’re Harassed and Subject to Spurious 311 Complaints*, BALT. SUN (Mar. 9, 2022), <https://www.baltimoresun.com/food-drink/bs-fe-restaurants-aggression-20220309-pxxloamyq5akfatagrometvmx4-story.html>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See FLA. STAT. ANN. § 162.21(3)(b) (West 2021).

violations based on anonymous calls.⁷⁴ Instead, a caller must provide name and address information before an investigation may occur.⁷⁵ The exception is if there is reason to believe the alleged violation presents an “imminent threat to public health, safety, or welfare or imminent destruction of habitat or sensitive resources.”⁷⁶ Also, the City of Riverside states that “some departments will not accept anonymous requests” for those using the city’s online 311 complaint form, which requires the complainant’s full name, phone number, and email.⁷⁷

Disallowing anonymous 311 complaints will likely not undermine the 311 system.⁷⁸ As one city spokesperson stated regarding the city moving to non-anonymous 311 complaints, “[s]ome changes will be necessary, but we don’t expect it to significantly affect our operating procedures for initiating and investigating code complaints or ways the public can report non-emergency code issues.”⁷⁹ The spokesperson further noted, “311 has also been notified and they agree it will not negatively impact their function either.”⁸⁰

At most, implementing a non-anonymous 311 system will require only minor adjustments such as providing notice to 311 users.⁸¹ The City of Cape Coral provides the following notice to a person submitting an online 311 report: “For Code Enforcement complaints, you must provide your name and address pursuant to Florida [law] . . . unless the complaint is an emergency that immediately threatens public health, safety, or welfare, or imminent destruction of habitat or sensitive resources.”⁸²

A potential downside to moving to a non-anonymous 311 system is the cost of the move, but any expense would be a mere “minor cost.”⁸³ Another potential downside is fewer 311 calls, but officials could track the number of calls before and after the move to determine if there are actually fewer calls afterward.⁸⁴ Even if that turned out to be true, it could be due to the new non-anonymous system weeding out frivolous and unfounded 311 complaints.⁸⁵

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Request Non-Emergency City Services Online*, CITY RIVERSIDE, <https://crmweb.riversideca.gov/> (last visited May 25, 2022).

⁷⁸ *See Anonymous Code Complaints Curtailed*, CAPE CORAL BREEZE (July 22, 2021), <https://www.capecoralbreeze.com/news/local-news/2021/07/22/anonymous-code-complaints-curtailed/>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

⁸³ CAPE CORAL BREEZE, *supra* note 78.

⁸⁴ *Id.*

⁸⁵ *See* Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/> (stating that “people will engage in worse behavior if they believe their actions are anonymous and not likely to be made public”).

Alternatively, if anonymous complaints are permitted, then more protections should be conferred on potential victims of 311 abuse.⁸⁶ For example, a New York City bill would protect victims of repeat anonymous 311 calls by categorizing as “harassed” any property receiving three or more baseless 311 calls within six months.⁸⁷ Further, for any non-emergency anonymous complaint against a “harassed” property, the 311 customer service center will merely document the call instead of referring the call to an enforcement agency.⁸⁸

IV. WEAPONIZING ANONYMITY IN THE IMMIGRATION SECTOR

A. Racially-Biased Anonymous Reporting Against Immigrants

Individuals or law enforcement agencies may provide anonymous tips involving suspected immigration violations to Immigration and Customs Enforcement (ICE) through its online Tip Form or toll-free Tip Line.⁸⁹ But this anonymous tip system further marginalizes disadvantaged communities⁹⁰ because anonymous reporters can exploit the anonymous reporting system in various ways.⁹¹ First, human traffickers, employers, or landlords can subjugate their undocumented immigrant victims and prevent them from seeking help by threatening to anonymously report them to government officials to have them deported.⁹² Second, if immigrant victims do seek help or are perceived as troublesome, their oppressors can use anonymous reporting to retaliate.⁹³ A trafficker could anonymously report an undocumented immigrant victim who seeks to escape;⁹⁴ an employer could anonymously report an undocumented worker who demands fair compensation or the right to unionize;⁹⁵ a landlord could anonymously report undocumented tenants who fail to vacate the apartment quickly

⁸⁶ See A Local Law to Amend the Administrative Code of the City of New York, in Relation to Procedures to Be Adopted by the 311 Call Center for Responding to Certain Repeat Anonymous Complaints Against the Same Property, N.Y.C. Council B. Int. No. 221 (2022), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5570436&GUID=78E8B67E-E28E-426F-A03D-6002806A21C1>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ICE Tip Form, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/webform/ice-tip-form> (last visited May 4, 2022).

⁹⁰ Letter from Elizabeth Taufa, Pol’y Att’y & Strategist, to Scott Elmore, PRA Clearance Officer, ICE 3 (Dec. 21, 2021) (on file with ILRC), https://www.ilrc.org/sites/default/files/resources/ilrc_ice_tip_form_comment_-_final_-_12.21.21.pdf.

⁹¹ *Id.* at 2–3.

⁹² *Id.* at 2.

⁹³ *Id.* at 3.

⁹⁴ See *id.*

⁹⁵ Roshani M. Gunewardene, *Criminalization of Employer Fraud Against Alien Employees? A National Priority*, 25 NEW ENG. L. REV. 795, 797 (1991).

enough.⁹⁶ In such instances, government officials become tools of those using anonymous reporting to exploit undocumented immigrants.⁹⁷

B. Remediating Racially-Biased Anonymous Reports Against Immigrants

States should proscribe threats to report a person's immigration status.⁹⁸ New York law deems it coercion for a person to "[r]eport [a victim's] immigration status or suspected immigration status" to force the victim to comply with the perpetrator's demands.⁹⁹ Colorado law deems it criminal extortion if a person "threatens to report to law enforcement officials" the immigration status of the victim.¹⁰⁰ Virginia law deems it extortion if a person "threatens to report [the victim] as being illegally present in the United States."¹⁰¹ California law deems it extortion to threaten to "report [the victim's] immigration status or suspected immigration status."¹⁰² Maryland law declares it unlawful for a person to extort a victim through threatened or actual reporting to law enforcement officials "about [the victim's] undocumented or illegal immigration status."¹⁰³

The laws above help protect vulnerable undocumented immigrants.¹⁰⁴ By contrast, Arizona law prohibits employers from knowingly employing unauthorized immigrants and permits anonymous complaints of such violations.¹⁰⁵ Arizona law then seeks to ameliorate anonymous reporting abuse by directing officials to not investigate complaints that are "based solely on race, color or national origin."¹⁰⁶ But this provision fails to protect immigrants because, first, allowing reporting to be anonymous eliminates all accountability and prevents determination of whether a complaint is based on race, color, or national origin.¹⁰⁷ Second, Arizona's provision is inherently contradictory because although it purports to proscribe racially-biased complaints, it is fundamentally racially biased

⁹⁶ See Massarah Mikati, *In New York It's Now Illegal to Threaten to Report Someone to ICE*, TIMES UNION (Oct. 14, 2021, 11:41 AM), <https://www.timesunion.com/news/article/In-New-York-it-s-now-illegal-to-threaten-to-16530713.php?IPID=Times-Union-HP-CP-Spotlight>.

⁹⁷ See Taufa, *supra* note 90.

⁹⁸ See, e.g., N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

⁹⁹ *Id.*

¹⁰⁰ COLO. REV. STAT. ANN. § 18-3-207(1.5) (West 2018).

¹⁰¹ VA. CODE ANN. § 18.2-59 (2010).

¹⁰² CAL. PENAL CODE § 519(5) (2015).

¹⁰³ MD. CODE ANN., CRIM. LAW § 3-701(b)(4) (West 2020).

¹⁰⁴ See, e.g., N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

¹⁰⁵ ARIZ. REV. STAT. ANN. § 23-212(A)-(B) (West 2021). Indeed, one corporate counsel for a large corporation advises employers to establish an anonymous workplace hotline to report potential immigration violations. Tyler D. Bolden, *Business Interruption & Employer Liability in the Age of Ice Raids*, 5 S.C. J. INT'L L. & BUS. 113, 135 (2009).

¹⁰⁶ ARIZ. REV. STAT. ANN. § 23-212(B) (2021).

¹⁰⁷ Patrick S. Cunningham, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411, 420 n.65 (2010).

because the statute is crafted to control a community defined by race, color, and national origin, specifically male, working-age Latinos.¹⁰⁸

Thus, states should follow the example of New York and other states discussed above to better protect immigrants against abusive reporting.¹⁰⁹ As stated by a New York State senator, the law must protect vulnerable immigrants from extortion, especially when an undocumented immigrant fleeing danger in the home country faces a potential death sentence if reported to immigration officials and deported.¹¹⁰

V. WEAPONIZING ANONYMITY IN THE FAMILY AND PARENTING SECTOR OF SOCIETY

A. Racially-Biased Anonymous Reporting in Child Welfare Services

Racial disparities exist at nearly every major decision-making stage in the child welfare system¹¹¹ including the initial reporting stage.¹¹² Many report anonymously to the child welfare system.¹¹³ For example, of the 150,000 calls annually to New York State's hotline, over 10,000 are anonymous,¹¹⁴ and only 3.5% of these anonymous reports are deemed credible.¹¹⁵ The problems with anonymous reporting in the child welfare system include it being unregulated, susceptible to abuse, and lacking effective penalties for false reporting.¹¹⁶ Nonetheless, the numerous anonymous reports, many motivated by spite and malice, launch numerous investigations, many targeting families of color.¹¹⁷

¹⁰⁸ Abigail E. Langer, Note, "Men Made It, but They Can't Control It": Immigration Policy During the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision in *Chamber of Commerce v. Whiting*, 43 CONN. L. REV. 1645, 1665 (2011).

¹⁰⁹ See, e.g., N.Y. PENAL LAW § 135.60(10) (McKinney 2021).

¹¹⁰ See Nick Reisman, *New Law Criminalizes Threats to Undocumented Immigrants*, SPECTRUM NEWS (Oct. 11, 2021, 5:10 AM), <https://nystateofpolitics.com/state-of-politics/new-york/ny-state-of-politics/2021/10/11/new-law-criminalizes-threats-to-undocumented-immigrants?s=03>.

¹¹¹ CHILD'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., BULL. FOR PROFS., *Child Welfare Practice to Address Racial Disproportionality and Disparity* (Apr. 2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

¹¹² An example of racial disparities in other stages is seen in the foster-home-placement stage where 2017 data for Washington state showed that "African American children were 2.2 times and Native American children were 2.9 times more likely to be placed in out-of-home care [e.g., foster homes] compared to white children." *Child Welfare Data at a Glance*, PARTNERS FOR OUR CHILD., <https://partnersforourchildren.org/data/quickfacts> (last visited May 9, 2022).

¹¹³ See Madelyn Freundlich, *Commentary: Anonymous Child Abuse Allegations Do More Harm Than Good*, TIMES UNION (May 1, 2022), <https://www.timesunion.com/opinion/article/Commentary-Anonymous-child-abuse-allegations-do-17140519.php>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 52 (2014).

¹¹⁷ Freundlich, *supra* note 113.

Throughout its history, the child welfare system has oppressed First Nations, immigrants, and communities of color.¹¹⁸ It is a system typically most visible in poor and nonwhite communities.¹¹⁹ For the Black community, the child welfare system is a government-run program that “disrupts, restructures, and polices Black families.”¹²⁰ It disrupted and policed the family of Malcolm X.¹²¹ After White people murdered his father when Malcolm X was a child, state welfare workers began to intrude on his family’s life.¹²² They asked his mother “a thousand questions” while looking around the house and seeing him, his siblings, and their mother not as people, but as “just *things*.”¹²³ His mother, Louise Little, “hated” the state welfare people and wanted them out of her house, but they “kept after” her and her family.¹²⁴ They called her crazy for refusing donated pork even though she explained eating pork went against her religion.¹²⁵ The welfare people eventually broke apart his family, but Malcolm X believed that despite his family’s impoverished situation, “we could have made it, we could have stayed together” if the state welfare workers had stopped hounding his family.¹²⁶

The child welfare system continues to disrupt and police marginalized communities.¹²⁷ This family policing system targets Black and Brown families, especially low-income families living in impoverished communities neglected by society.¹²⁸ It subjects families of color to disparate treatment;¹²⁹ for example, Black youth are overrepresented in the child welfare system.¹³⁰ Fifty-six of every one thousand black children are reported to child services, twice the rate of white children.¹³¹ In New York

¹¹⁸ DON LASH, *WHEN THE WELFARE PEOPLE COME: RACE AND CLASS IN THE US CHILD PROTECTION SYSTEM 10–11* (2017).

¹¹⁹ *Id.* at 6.

¹²⁰ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* viii (2002).

¹²¹ MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X AS TOLD TO ALEX HALEY* 12 (Ballantine Books ed., 2015).

¹²² *Id.* at 2, 12.

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 17.

¹²⁵ *Id.* at 18.

¹²⁶ Malcolm X, *supra* note 121.

¹²⁷ See Halimah Washington et al., *An Unavoidable System: The Harms of Family Policing and Parents’ Vision for Investing in Community Care*, RISE, TAKEROOT JUST. 5 (Fall 2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf>.

¹²⁸ *Id.*

¹²⁹ Cecka, *supra* note 116, at 59.

¹³⁰ Yolanda Anyon, *Reducing Racial Disparities & Disproportionalities in the Child Welfare System: Policy Perspectives about How to Serve the Best Interests of African American Youth*, 33 CHILD. & YOUTH SERVS. REV. 242, 242 (2011), https://www.academia.edu/16482453/Reducing_Racial_Disparities_and_Disproportionalities_in_the_Child_Welfare_System_Policy_Perspectives_about_How_to_Serve_the_Best_Interests_of_African_American_Youth.

¹³¹ Cecka, *supra* note 116, at 59–60.

City, “[o]ver 40% of Black children” risk being subjected to a child maltreatment investigation by age 18.¹³²

This policing system allows for anonymous reports where contact with the child welfare system can be triggered by vengeful neighbors or racially-biased individuals.¹³³ Further, this system effectively deputizes citizens to be “mandatory reporters”¹³⁴ despite strong evidence showing mandatory reporters such as teachers and doctors are influenced by race regarding what they label and report as child abuse.¹³⁵ One study involving a hospital to investigate potential racial differences in the medical evaluation and reporting of children hospitalized for fractures concluded that children of color were “more likely to be evaluated and reported for suspected child abuse,” indicating that “racial differences do exist in the evaluation and reporting of pediatric fractures for child abuse.”¹³⁶

Despite well-intentioned individual child service workers, the child welfare system oppresses communities of color.¹³⁷ As shared by one parent of color after her family was ensnared and traumatized by New York City’s Administration for Children’s Services (ACS): “Was it harmful? Most certainly. Because now my family is traumatized. We will never be the same.”¹³⁸ One African American woman also ensnared by ACS, echoing Malcolm X’s critique of child welfare services, regarded ACS as a system that perpetuated slavery and observed that for women of color, “it’s us against them.”¹³⁹

B. Remedying Racially-Biased Anonymous Reporting in Child Welfare Services

One step in ameliorating biased reporting is requiring reporters to provide their name and contact information.¹⁴⁰ Instead, many states allow for anonymous reporting to child welfare services.¹⁴¹ These states, though, should follow the lead of states requiring name and contact information.¹⁴²

¹³² Washington et al., *supra* note 127.

¹³³ See LASH, *supra* note 118, at 6.

¹³⁴ Elizabeth J. Stevens, Comment, *Deputy-Doctors: The Medical Treatment Exception After Davis v. Washington*, 43 CAL. W. L. REV. 451, 479 (2007).

¹³⁵ ROBERTS, *supra* note 120, at 49.

¹³⁶ Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1603 (Oct. 2, 2002), <https://jamanetwork.com/journals/jama/fullarticle/195342>.

¹³⁷ LASH, *supra* note 118, at 11–12.

¹³⁸ Washington et al., *supra* note 127, at 13.

¹³⁹ *Id.* at 12.

¹⁴⁰ See Alexa Irene Pearson, *Eulogies, Effigies, & (and) Erroneous Interpretations: Comparing Missouri’s Child Protection System to Federal Law*, 69 MO. L. REV. 589, 605 n.75 (2004). This article’s limited scope focuses on remedying the problem of anonymous reporting by abolishing anonymity, but others have proposed the more comprehensive remedy of abolishing the current child welfare system. ROBERTS, *supra* note 120, at ix–x; *All children deserve to be with their families*, UPEND MOVEMENT, <https://upendmovement.org/> (last visited June 28, 2022).

¹⁴¹ Stevens, *supra* note 134, at 477.

¹⁴² See Pearson, *supra* note 140, at 605 n. 75.

For example, Pennsylvania requires a reporter, after making an immediate oral report, to later make a written report that “shall” include the reporter’s name, telephone number, and e-mail address.¹⁴³ Similarly, North Carolina states that the reporter “shall” provide the reporter’s name, address, and telephone number.¹⁴⁴

A state may attempt to compromise by proscribing anonymity for mandated reporters and permitting it for non-mandatory reporters.¹⁴⁵ For instance, Florida requires mandated reporters to provide their names to the central abuse hotline worker whereas non-mandated reporters may report anonymously.¹⁴⁶ But the better practice is to require all reporters including non-mandated reporters to provide their names to enhance accountability.¹⁴⁷

A further beneficial step is requiring child service workers receiving reports to screen for biased reports.¹⁴⁸ For example, a New York bill states that a caller will be asked for “name and contact information”¹⁴⁹ and that no investigation commences unless the information is provided,¹⁵⁰ and the bill then goes further to require child service workers receiving calls to “utiliz[e] protocols that would reduce implicit bias from the decision-making process.”¹⁵¹

Finally, those making false reports should be penalized.¹⁵² For example, Oklahoma law states that a person making a false report regarding alleged child maltreatment may be criminally investigated and is guilty of a misdemeanor if convicted.¹⁵³

VI. WEAPONIZING ANONYMITY IN THE WORKPLACE SECTOR OF SOCIETY

A. *Racially-Biased Anonymous Customer Feedback*

Employers use customer feedback to make decisions in a variety of workplace situations including hiring, promotions, discipline, termination, pay rates, bonuses, and job duties.¹⁵⁴ But customer feedback is problematic because it is often brief, narrow in scope, based on limited interactions, and provided by customers not trained on how to properly evaluate

¹⁴³ 23 PA. STAT. & CONS. STAT. § 6313(b)(8) (West 2014).

¹⁴⁴ N.C. GEN. STAT. § 110–105.4(a) (2016).

¹⁴⁵ See FLA. STAT. ANN. § 39.201(1)(b)1–2 (LexisNexis 2022).

¹⁴⁶ *Id.*

¹⁴⁷ See Pearson, *supra* note 140, at 605 n.75.

¹⁴⁸ See, e.g., S. Res. 7879A, 244th Gen. Assemb., Reg. Sess. (N.Y. 2021).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See, e.g., OKLA. ADMIN. CODE § 340:2-3-33(i)(1) (2015).

¹⁵³ *Id.*

¹⁵⁴ Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2177 (2018).

employees.¹⁵⁵ Added to these problems is the anonymity that encourages non-accountable customers to provide discriminatory feedback.¹⁵⁶ Thus, a customer's anonymous rating of an employee of color could be biased by the customer's racial stereotypes.¹⁵⁷

One study of gender and racial biases in customer satisfaction ratings found that customers were less satisfied with the services provided by nonwhite employees versus white employees, even when controlling for objective indicators of performance.¹⁵⁸ This study consisted of three sub-studies. The first sub-study examined patient satisfaction ratings of primary care physicians working at a large health maintenance organization (HMO).¹⁵⁹ The second sub-study involved student participants providing customer evaluations after watching videos of a customer-employee interaction in a university bookstore.¹⁶⁰ The third sub-study examined satisfaction surveys from customers of a large national country club organization.¹⁶¹ The study found evidence of racial bias regardless of whether the nonwhite employees were predominantly Asian (HMO sub-study), Black (bookstore sub-study), or Latinx (country club organization sub-study).¹⁶² Thus, customer feedback is unreliable because it consists of subjective judgments easily skewed by various biases including racial bias.¹⁶³

B. Remedying Racially-Biased Anonymous Customer Feedback

One solution is restricting anonymous feedback in assessing employee performance because anonymous customers “have no need to feel accountable for their evaluations.”¹⁶⁴ Eliminating anonymity will make customers more accountable and incentivize them to do the hard work of overcoming their bias.¹⁶⁵ Ending anonymity can be simply achieved by employers requiring customers to provide their contact information on the feedback form.¹⁶⁶ Additionally, employers could solicit customer feedback

¹⁵⁵ Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1212–13 (2017).

¹⁵⁶ *Id.*

¹⁵⁷ Flake, *supra* note 154, at 2182.

¹⁵⁸ David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 256 (2010).

¹⁵⁹ *Id.* at 243.

¹⁶⁰ *Id.* at 249.

¹⁶¹ *Id.* at 253.

¹⁶² *Id.* at 256.

¹⁶³ Flake, *supra* note 154, at 2182.

¹⁶⁴ Lu-in Wang, *When the Customer Is King: Employment Discrimination As Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 282 (2016).

¹⁶⁵ *Id.*; Hekman, *supra* note 158, at 240, 257.

¹⁶⁶ Flake, *supra* note 155, at 1220.

through face-to-face interactions and focus groups rather than through anonymous forms.¹⁶⁷

Employers who continue to rely on anonymous feedback could be sued by their employees for customer feedback discrimination.¹⁶⁸ In such cases, courts should determine employer liability under a “negligence” standard.¹⁶⁹ A court would ask only two questions: (1) whether the employer knew, or should it have reasonably known, that the customer feedback was biased, and if so, (2) whether the employer responded reasonably through proper preventive or corrective measures.¹⁷⁰ But the better option for the employer is to pre-empt the potential employee lawsuit by discontinuing anonymous evaluations, and in doing so, eliminate rather than perpetuate racial inequities.¹⁷¹

VII. WEAPONIZING ANONYMITY IN THE EDUCATION SECTOR OF SOCIETY

A. Racially-Biased Anonymous Student Evaluations

Student evaluations are biased.¹⁷² Student evaluations favor male white faculty and disfavor perceived “outsiders” including faculty of color, faculty viewed as having an accent, faculty regarded as immigrants, and female faculty.¹⁷³ Student evaluations are affected by chocolates provided during evaluations, an entertaining teaching style, the perceived physical attractiveness of the teacher, the teacher’s clothing, the timing of the class, class size, and more.¹⁷⁴ In short, they measure everything except effective teaching.¹⁷⁵ Moreover, student evaluations not only fail to measure teaching effectiveness,¹⁷⁶ they in fact promote poor teaching and grade inflation.¹⁷⁷ These problems including the problems of race and gender biases in student evaluations harm faculty of color.¹⁷⁸

¹⁶⁷ *Id.*

¹⁶⁸ See Flake, *supra* note 154, at 2172.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Hekman, *supra* note 158, at 259.

¹⁷² Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 15 (2015); Wolfgang Stroebe, *Student Evaluations of Teaching Encourages Poor Teaching and Contributes to Grade Inflation: A Theoretical and Empirical Analysis*, 42 BASIC & APPLIED SOC. PSYCH. 276, 283 (2020).

¹⁷³ Deo, *supra* note 172.

¹⁷⁴ *Id.* at 15–17.

¹⁷⁵ *Id.* at 16.

¹⁷⁶ Stroebe, *supra* note 172.

¹⁷⁷ *Id.*

¹⁷⁸ See Deo, *supra* note 172, at 41.

Student evaluations are especially dangerous for professors of color and female professors because students' racial biases and stereotypes¹⁷⁹ in student evaluations affect hiring, promotion, tenure, and termination decisions.¹⁸⁰ A study involving undergraduates and graduate student evaluations in a public university found that "[w]hite teachers tend to get rated higher than minority teachers."¹⁸¹ One Black female law professor who experienced racially-biased evaluations described bias that included student evaluations criticizing her hair, clothing, accent, and her "very existence."¹⁸² Many students added notes to their evaluations of this professor of color expressing racial or sexist stereotypes or both.¹⁸³ Some personally blamed this professor for ruining their chances of grading onto law review although her class was merely one of their multiple classes.¹⁸⁴

Similarly, an instructor of color from Shanghai, China, who began her Ph.D. studies and teaching as a teaching assistant at a U.S. university regularly received biased negative remarks on her student evaluations criticizing her English language abilities despite receiving the maximum score on a test measuring her proficiency in spoken English.¹⁸⁵ The student evaluations complained that she was difficult to understand and did not speak English well enough to teach.¹⁸⁶ But as stated by Professor Rubin, a professor of education and speech communication who administered the English proficiency test to the instructor, the instructor's native Chinese language background did "not interfere with her [English language] intelligibility."¹⁸⁷ Further, Professor Rubin regarded the instructor's English vocabulary in both speaking and listening as "sophisticated and probably more fluent than my own."¹⁸⁸ The problem is one of student preconceptions rather than instructor English proficiency because research reveals that students who expect a nonnative instructor to be a poor instructor and unintelligible speaker will experience comprehension difficulties despite hearing standard English spoken by a nonnative speaker during a well-formed lecture.¹⁸⁹

¹⁷⁹ SYLVIA R. LAZOS, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of "Doing" Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 173 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

¹⁸⁰ Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1041 (2018).

¹⁸¹ Alan Socha, *A Hierarchical Approach to Students' Assessments of Instruction*, 38 ASSESSMENT & EVALUATION HIGHER EDUC. 94, 107 (2013).

¹⁸² Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 167 (1999).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ John Gravois, *Teach Impediment*, CHRON. HIGHER EDUC. (Apr. 8, 2005).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

Further, student evaluations go beyond being biased to being potentially useless.¹⁹⁰ A 2021 meta-study of over ninety articles on student evaluations stated, “[t]eaching evaluations are only weakly correlated or entirely uncorrelated with teaching effectiveness.”¹⁹¹ The study noted the lack of research on faculty of color because of their severe underrepresentation in academia, but the available research indicates that professors of color are evaluated worse than White professors, “especially Black and Asian professors, with Black men faring particularly poorly.”¹⁹² Also, “[f]aculty with accents and Asian last names receive lower ratings.”¹⁹³ Further, professors of color may be punished more for intersectional stereotype nonconformity such that “Latina women are perceived less warmly than Anglo women with similarly strict teaching style . . . and women of color are evaluated more harshly than white men”¹⁹⁴

In addition to individual bias within student evaluations, teachers of color also face institutionalized bias as educational institutions continue to use biased evaluations.¹⁹⁵ One study of undergraduate student evaluations at a college of education found race was a factor in student ratings of teaching effectiveness.¹⁹⁶ The evaluations included *multidimensional* items (measuring a single aspect of teaching such as organization or preparation) and *global* items (measuring “general impressions such as overall value of the course and overall teaching ability”).¹⁹⁷ The study found that of the three faculty groups (Black, White, and other), Black faculty were rated by students the lowest both on a majority of the multidimensional parts and also lowest on the global parts.¹⁹⁸ The lower global ratings were especially problematic because the college of education used the global parts to make personnel decisions involving promotion, tenure, pay increases, and awards.¹⁹⁹

The use of student evaluations in hiring, salary increases, and promotions furthers inequalities and is potentially illegal.²⁰⁰ In one arbitration case involving a Canadian university, the arbitrator ruled that student evaluations may not be used to “measure teaching effectiveness for promotion or tenure.”²⁰¹ Educational institutions use student evaluations

¹⁹⁰ Deo, *supra* note 172, at 41.

¹⁹¹ Rebecca J. Kreitzer & Jennie Sweet-Cushman, *Evaluating Student Evaluations of Teaching: A Review of Measurement and Equity Bias in SETs and Recommendations for Ethical Reform*, J. ACAD. ETHICS 2, 3 (2021).

¹⁹² *Id.* at 5.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Smith, *supra* note 182, at 86.

¹⁹⁶ Bettye P. Smith & Billy Hawkins, *Examining Student Evaluations of Black College Faculty: Does Race Matter?*, 80 J. NEGRO EDUC. 149, 159 (2011).

¹⁹⁷ *Id.* at 153.

¹⁹⁸ *Id.* at 159.

¹⁹⁹ *Id.*

²⁰⁰ Stroebe, *supra* note 172.

²⁰¹ *Ryerson U. v. Ryerson Fac. Ass’n*, 2018 CanLII 58446 (ON LA).

because they are easy to administer, make it easy to compare professors, appear objective, and seem scientifically sound.²⁰² But as stated by the arbitrator, student evaluations are “imperfect at best and downright biased and unreliable at worst.”²⁰³

Student evaluations that are widely and uncritically used to determine pay and promotion opportunities will harm faculty of color and lead to non-white faculty receiving more benefits and moving further up the organizational ladder.²⁰⁴ As one professor of color stated regarding bias and anonymity in educational institutions, “[p]eople would like to be able to control how black people are perceived, but they want to do so costlessly. Don’t worry, be happy, they say to black people in the academy.”²⁰⁵

B. Remediating Racially-Biased Anonymous Student Evaluations

One solution is making student evaluations anonymous to professors, but not to the administration.²⁰⁶ This allows the administration to determine who misuses student evaluations to harass and intimidate, and further, could protect the university against future hostile work environment claims.²⁰⁷

A more comprehensive remedy is to replace student evaluations with a more effective evaluation process.²⁰⁸ An alternative proffered by a physics professor and Nobel laureate is termed the Teaching Practices Inventory that encourages teachers to adopt effective research-based teaching practices.²⁰⁹ A sample excerpt of the inventory of teaching practices for STEM (science, technology, engineering, and mathematics) courses is below:²¹⁰

²⁰² *Id.* at 4.

²⁰³ *Id.*

²⁰⁴ See Hekman, *supra* note 158, at 257.

²⁰⁵ Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 222 (1993) (discussing an anonymous law student writing to a local campus publication a letter containing racist commentary about Prof. Culp, a professor of color).

²⁰⁶ LawProfBlawg, *Weaponizing Student Evaluations (Part III)*, ABOVE L. (Oct. 9, 2018), <https://abovethelaw.com/2018/10/weaponizing-student-evaluations-part-iii/>.

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Carl Wieman, *A Better Way to Evaluate Undergraduate Teaching*, 47 CHANGE: MAG. HIGHER LEARNING 6, 10 (2015).

²⁰⁹ *Id.*

²¹⁰ Carl Wieman & Sarah Gilbert, *The Teaching Practices Inventory: A New Tool for Characterizing College and University Teaching in Mathematics and Science*, 13 LIFE SCIENCES EDUC. 552, 563 (2014).

Appendix 1. Inventory showing formatting, with scoring and footnotes to references that justify the scoring. We did not insert the references directly in the document to allow the format to be shown. The formatting improves the user-friendliness of the inventory. A clean copy of the inventory is available at www.cwsei.ubc.ca/resources/TeachingPracticesInventory.htm.

Teaching Practices Inventory

(Scoring rubric points are the numbers in bold to right of each item.)

I. Course information provided to students via hard copy or course webpage. (check all that occurred in your course)^a

- List of topics to be covered **1**
- List of topic-specific competencies (skills, expertise, ...) students should achieve (what students should be able to do) **3**
- List of competencies that are not topic related (critical thinking, problem solving, ...) **1**
- Affective goals – changing students' attitudes and beliefs (interest, motivation, relevance, beliefs about their competencies, how to master the material) **1**
- Other (please specify) **1**
If you selected other, please specify _____

II. Supporting materials provided to students (check all that occurred in your course)

- Student wikis or discussion boards with little or no contribution from you **0**
- Student wikis or discussion boards with significant contribution from you or TA^b **1**
- Solutions to homework assignments^c **1**
- Worked examples (text, podcast, or other format) **1**
- Practice or previous year's exams **1**
- Animations, video clips, or simulations related to course material **1**
- Lecture notes or course PowerPoint presentations (partial/skeletal or complete)^d **1**
- Other instructor selected notes or supporting materials, podcasts, etc. **0**
- Articles from scientific literature^e **1**
- Other (please specify) **1**
If you selected other, please specify _____

III. In-class features and activities

A. Various

Give approximate average number:

Average number of times per class: pause to ask for questions _____ (**1** if >3)

^a Promising Practice No. 1: Prepare a Set of Learning Outcomes in Froyd (2008); chap. 5 in Ambrose et al. (2010).

^b Black & William, 1998; Hattie & Timperley, 2007; Promising Practice No. 5: Providing Students Feedback through Systematic Formative Assessment in Froyd (2008); chap. 5 in Ambrose et al. (2010).

^c Atkinson et al., 2000).

^d (Kiewra, 1985).

^e (Pintrich, 2003); chap. 3 in Ambrose et al. (2010).

Points called ETP (extent of use of research-based teaching practices) points are assigned for each teaching practice that is supported by research showing it improves learning.²¹¹ For example, one point is assigned to the practice of providing students with course information such as a list of topics covered in the course; in another example, one point is assigned to the practice of providing student with supporting material such as lecture notes or PowerPoint presentations.²¹² The professor teaching the class fills out the inventory and an ETF number is generated that corresponds with that professor's extent in using effective research-based teaching practices for that class.²¹³ The benefits include allowing faculty to see the range of teaching practices in use, identify which practices increase student learning, and understand how they can improve their teaching and document that

²¹¹ Wieman, *supra* note 208, at 12.

²¹² Wieman & Gilbert, *supra* note 210.

²¹³ Wieman, *supra* note 208, at 12.

improvement.²¹⁴ With slight modifications, the STEM inventory can be tailored to law school use.²¹⁵

VIII. WEAPONIZING ANONYMITY IN THE TECHNOLOGY SECTOR OF SOCIETY

A. Racially-Biased Anonymous Algorithms

The internal opacity of an algorithm is a form of anonymity that can harm communities of color.²¹⁶ Government use of privately designed algorithmic systems is increasing with their deployment in varied settings including Medicaid and disability benefits, public teacher employment evaluations, unemployment benefits, and criminal risk assessments.²¹⁷ But these algorithmic systems may be racially biased.²¹⁸ For example, a criminal-risk-assessment algorithm might rely on factors that are proxies for race.²¹⁹ One oft-used factor is “parental criminality” (e.g., the parent’s criminal behavior),²²⁰ which can serve as a race proxy to help create a skewed “high risk” score because of the over-policing of communities of color.²²¹ Another problematic factor is “community disorganization” (e.g., deteriorated housing),²²² which can also help create a skewed “high risk” score because of the history of public and private housing discrimination.²²³

Another example of algorithm bias is found in facial recognition software.²²⁴ A press release for a paper titled *A Deep Neural Network Model to Predict Criminality Using Image Processing* stated, “[w]ith 80 percent accuracy and with no racial bias, the software can predict if someone is a criminal based solely on a picture of their face.”²²⁵ But there is “no distinctive feature of facial appearance that predestines a person to become a criminal”²²⁶ Racial biases have already been found to exist in current

²¹⁴ *Id.* at 14.

²¹⁵ *See id.* at 10.

²¹⁶ *See* Press Release, Sen. Ron Wyden, Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 to Require New Transparency and Accountability for Automated Decision Systems (Feb. 3, 2022) (on file with author).

²¹⁷ Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1948 (2019).

²¹⁸ *See id.* at 1942–43.

²¹⁹ AI NOW INST., LITIGATING ALGORITHMS: CHALLENGING GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS 13 (2018), <https://ainowinstitute.org/litigatingalgorithms.pdf>.

²²⁰ JOSEPH MURRAY ET AL., EFFECTS OF PARENTAL IMPRISONMENT ON CHILD ANTISOCIAL BEHAVIOUR AND MENTAL HEALTH: A SYSTEMATIC REVIEW, CAMPBELL SYSTEMATIC REVIEWS. 10 (2009).

²²¹ AI NOW INST., *supra* note 219.

²²² Damian J. Martinez, *Felony Disenfranchisement and Voting Participation: Considerations in Latino Ex-Prisoner Reentry*, 36 COLUM. HUM. RTS. L. REV. 217, 233 (2004).

²²³ AI NOW INST., *supra* note 219.

²²⁴ Kevin W. Bowyer et al., *The “Criminality from Face” Illusion*, ARXIV 1, 7 (2020), <https://arxiv.org/ftp/arxiv/papers/2006/2006.03895.pdf>.

²²⁵ *Id.* at 1.

²²⁶ *Id.* at 2.

facial recognition algorithms that connect surveillance photos to mugshots.²²⁷ These racial biases will be reproduced if future facial criminality algorithms merely use the same bias-infected databases.²²⁸

The racial bias problem is compounded by the opacity problem, wherein government actors are ignorant of the inner workings of these algorithmic systems and the algorithmic systems companies oppose sharing insights into the internal workings of their algorithmic technology, arguing they constitute trade secrets and confidential information.²²⁹

B. Remediating Racially-Biased Anonymous Algorithms

The digital opacity of biased anonymous algorithms can be remedied by requiring software companies to reveal the computation processes within their algorithms.²³⁰ As stated by Senator Ron Wyden, legislation is needed to “pull back the curtain on the secret algorithms that can decide whether Americans get to see a doctor, rent a house or get into a school.”²³¹ A step in the right direction is the Algorithmic Accountability Act of 2022.²³² This federal bill would require a company that developed or deployed algorithms to provide an “impact assessment” to determine the algorithms’ impact on consumers.²³³ When creating its impact assessment, the company must meaningfully consult with relevant stakeholders such as advocates for “impacted groups,” which could include communities of color.²³⁴ Also, the impact assessment must evaluate the algorithm’s present and past performance to include information on any “differential performance associated with consumers’ race, color,” or other characteristics.²³⁵ Further, the impact assessment would provide information on whether any “subpopulations” (e.g., communities of color) were used to test and evaluate the algorithm including identifying how and why they were relevant for the algorithm testing and evaluation.²³⁶

Another helpful bill is the Algorithmic Justice and Online Platform Transparency Act that also seeks to reduce algorithm anonymity.²³⁷ This Act requires online platforms such as social media sites to use plain language in disclosing to users relevant algorithm information including the “method by which the type of algorithmic process prioritizes, assigns weight to, or ranks

²²⁷ *Id.* at 7.

²²⁸ *Id.*

²²⁹ Crawford & Schultz, *supra* note 217, at 1941–42, 1944.

²³⁰ See Wyden, *supra* note 216.

²³¹ *Id.*

²³² *Id.*

²³³ Algorithmic Accountability Act of 2022, S. 3572, 117th Cong. § 2(7)(A)(i)–(ii), (12) (2022).

²³⁴ *Id.* at § 3(b)(1)(G).

²³⁵ *Id.* at § 4(a)(4)(E).

²³⁶ *Id.* at § 4(a)(4)(F).

²³⁷ Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. § 4(a)(1)(A)(iv) (2021).

different categories of personal information to withhold, amplify, recommend, or promote content”²³⁸ Representative Doris Matsui, who introduced the bill, stated it was necessary to “root out prejudiced practices wherever they occur” including prejudice hiding in anonymous algorithms.²³⁹

IX. MITIGATING ANONYMITY’S HARM TO COMMUNITIES OF COLOR

The examples above of ubiquitous societal anonymity biases align with what communities of color already know about racial bias in U.S. society.²⁴⁰ A survey of Black Americans found that a majority said racism would “get worse” and only a small percentage said it would “improve” in their lifetimes.²⁴¹ This negative assessment reflects the reality of continuing racial bias in society evidenced in anonymous means and methods that further marginalize communities of color.²⁴²

But the use of anonymity as a sword against communities of color may be countered.²⁴³ First, anonymity should not supersede every other interest.²⁴⁴ Harmful anonymity should be prohibited and subordinated to racial equality, a fundamental constitutional value.²⁴⁵ For example, Judge Barkett, dissenting in part in a case involving an anonymous jury, stated that equal protection considerations²⁴⁶ entitled defendant Ochoa to a new trial by an impartial jury.²⁴⁷ The defendant argued that the prosecution engaged in a pattern of racially-discriminatory strikes against five Hispanic venire members, and to support this argument, the defendant needed information about the racial and ethnic identity of the anonymous jurors.²⁴⁸ But the district court prevented the defendant from gaining this information by, among other actions, prohibiting the defendant from questioning the jurors directly about their ethnicity.²⁴⁹ As Judge Barkett averred, “[a]s important as juror anonymity measures may be, they cannot be permitted to defeat . . .

²³⁸ *Id.*

²³⁹ Press Release, Sen. Ed Markey, Senator Markey, Rep. Matsui Introduce Legislation to Combat Harmful Algorithms and Create New Online Transparency Regime (May 27, 2021) (on file with author).

²⁴⁰ See Silvia Foster-Frau et al., *Poll: Black Americans Fear More Racist Attacks After Buffalo Shooting*, WASH. POST (May 21, 2022, 10:00 AM), <https://www.washingtonpost.com/nation/2022/05/21/post-poll-black-americans/>.

²⁴¹ *Id.*

²⁴² See, e.g., McNamara, *supra* note 10.

²⁴³ See Wang, *supra* note 164; Hekman et al., *supra* note 158, at 240, 257.

²⁴⁴ See Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. U. L. REV. COLLOQUY 191, 206 (2011).

²⁴⁵ See *id.*

²⁴⁶ U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²⁴⁷ *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1048 (11th Cir. 2005) (Barkett, J., dissenting in part).

²⁴⁸ *Id.* at 1051–52.

²⁴⁹ *Id.* at 1055.

rights under the Equal Protection Clause.”²⁵⁰ Thus, anonymity considerations should not supersede racial equality rights that protect communities of color.²⁵¹

A different situation that also counters the primacy of anonymity is the *Davis* Court stating that the government's interest in protecting a prosecution witness by preserving the confidentiality of the witness's juvenile offender record had to yield to the defendant's constitutional right to cross-examine the juvenile prosecution witness for bias.²⁵² *Davis* involved the defendant being prosecuted for stealing a safe containing cash and checks.²⁵³ The prosecution witness was a juvenile on probation after burglarizing two cabins.²⁵⁴ The prosecution successfully moved for a protective order preventing the defense from cross-examining the prosecution witness about his juvenile record.²⁵⁵ At trial, the prosecution witness provided testimony that helped convict the defendant.²⁵⁶ The government argued it had an important interest in protecting the anonymity of juvenile offenders that outweighed any competing interest by the defense to cross-examine the prosecution witness for bias.²⁵⁷ The Court disagreed and concluded that the “right of confrontation is paramount to the State's policy of protecting a juvenile offender.”²⁵⁸

Second, prohibiting anonymity already occurs in numerous states.²⁵⁹ Texas states that a complaining party such as an insurance agent filing a complaint against a physician must include the complainant's name and address²⁶⁰ and that the Texas medical board may not accept anonymous complaints.²⁶¹ Arizona prohibits anonymous complaints against process servers and requires the complainant's name, telephone number, and address.²⁶² California prohibits state officials from relying on anonymous complaints to investigate or audit grape processors.²⁶³ Delaware prohibits the Department of Education from investigating anonymous complaints against licensed educators.²⁶⁴ Ohio prohibits the Probate Court from considering or addressing anonymous complaints against guardians for

²⁵⁰ *Id.* at 1055–56.

²⁵¹ *See id.*

²⁵² *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

²⁵³ *Id.* at 309–10.

²⁵⁴ *Id.* at 311.

²⁵⁵ *Id.* at 310–11.

²⁵⁶ *See id.* at 310.

²⁵⁷ *Davis*, 415 U.S. at 319.

²⁵⁸ *Id.*

²⁵⁹ *See, e.g.*, TEX. OCC. CODE ANN. § 154.0535(c) (West 2011).

²⁶⁰ *Id.*

²⁶¹ *Id.* at § 154.0535(b).

²⁶² ARIZ. REV. STAT. ANN. § 7-204H1(a), (c) (2021).

²⁶³ CAL. FOOD & AGRIC. CODE § 55601.5(h)(5) (West 2000).

²⁶⁴ DEL. CODE ANN. tit. 14, § 121(b)(5)g (West 2022).

minors.²⁶⁵ Utah prohibits the Standards of Professionalism and Civility Board from considering anonymous complaints about lawyers.²⁶⁶

Third, penalizing those who misuse anonymity to harass or harm others is allowed because various laws already provide this protection. Wyoming law makes it a misdemeanor for a person to (1) telephone another anonymously while using obscene, lewd or profane language intending to terrify, intimidate, threaten, harass, annoy or offend or (2) make repeated anonymous telephone calls that disturbs the peace, quiet or privacy of the person called.²⁶⁷

Fourth, curbing anonymity can occur despite free speech concerns.²⁶⁸ Prohibiting anonymous speech does not necessarily violate the First Amendment.²⁶⁹ Florida law makes it a misdemeanor for a person to make an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the person called.²⁷⁰ A Florida court held this law did not impermissibly restrict legitimate free speech rights in part because anonymity creating fear and discomfort in the person called was a factor countering any legitimate free speech communicative function in the call.²⁷¹

Similarly, Georgia's anti-Klan law makes it a misdemeanor for a person to wear a mask, hood, or device concealing the wearer's face in public with the intent to conceal the wearer's identity.²⁷² A Georgia court held the law did not infringe on protected symbolic speech because the law furthered the state's substantial interest in protecting its citizens from intimidation, violence, and threats, and in assisting law enforcement in apprehending criminals through unmasking would-be intimidators.²⁷³ Indeed, the court declared safeguarding the right of citizens to exercise their civil rights free from violence was not only a compelling interest, but the state's affirmative constitutional duty.²⁷⁴ Also, the law was not broader than necessary to further the state's compelling interest because the law restricted only unprotected expression (the communication of a threat) and regulated only the noncommunicative function of the mask (the concealment of the wearer's identity).²⁷⁵

²⁶⁵ OHIO ALLEN CNTY. COMMON PLEAS, PROB. DIV., RULE 66.03(B)(1).

²⁶⁶ UTAH RULES APP. PROC. ORD. 7.

²⁶⁷ WYO. STAT. ANN. § 6-6-103(a)-(b)(i) (West 2022).

²⁶⁸ See *State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990).

²⁶⁹ See *id.*

²⁷⁰ FLA. STAT. ANN. § 365.16(1)(b), (d) (West 2022).

²⁷¹ *State v. Elder*, 382 So. 2d 687, 691 (Fla. 1980).

²⁷² GA. CODE ANN. § 16-11-38(a)(1)-(3) (West 2021).

²⁷³ *Miller*, 398 S.E.2d at 550.

²⁷⁴ *Id.* at 551.

²⁷⁵ *Id.*

X. CONCLUSION

Anonymity enables inequality. Where anonymity resides, racial bias follows and nests within the dark corners of anonymous spaces in all sectors of society. People of color must contend with racial bias as they move through these anonymous spaces from the justice system to homes and neighborhoods to the workplace and more. Morphing from conspicuous to obscured, racial bias persists through time, and the advancement of technology from past to present has created not only modern wonders, but additional spaces in algorithms for anonymous bias to lodge. Anonymity creates veiled venues hiding inequitable means and methods. But the veil can be lifted so that we see racial bias, really *see* it, to then overcome it so that people of color can work, live, and exist equally in society.