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The Racial Hoax as Crime: The Law as Affirmation

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The Racial Hoax as Crime: The Law as Affirmation

KATHERYN K. RUSSELL*

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INTRODUCTION

In recent years, the issue of racism in the criminal justice system has reemerged. The result has been a panoply of attacks and counterattacks about the effectiveness of the justice system. The critique of the criminal justice system has centered primarily upon the application of existing law¹ and the system's treatment of minorities in general² and Blacks in particular.³ The fractured debate often pits ideology and methodology against one another: some argue that the formal stages of the criminal justice system reflect little or no bias,⁴ while others argue that informal stages are significant as well, and must be evaluated for a determination of bias.⁵ Within this controversy one fact remains constant: the deep divide between Blacks and Whites regarding the presence and persistence of racism in the criminal justice system.

Study after study has shown that Blacks and Whites hold contrary views on the fairness of the criminal justice system's operation.⁶ Blacks tend to be more cautious in their praise and frequently view the system as unfair and racially biased.⁷ By contrast, Whites have a favorable impression of the justice system.⁸ Two common expressions exemplify these opposing viewpoints: "the system works" (Whites) and "justice means 'just us'" (Blacks). The point is not that Whites are completely satisfied with the justice system, but rather that, relative to Blacks, they have faith in the system. A substantial portion of the American public is indeed dissatisfied. This dissatisfaction is reflected in calls for

1. *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994). The court of appeals held that federal sentencing guidelines which provide a harsher penalty for crack cocaine possession than for the same amount of powder cocaine are without legal justification and are the result of "unconscious racism." *Id.* at 791-93.

2. *See, e.g.*, RONALD B. FLOWERS, *MINORITIES AND CRIMINALITY* (1990).

3. *See generally* DANIEL GEORGES-ABEYIE ET AL., *THE CRIMINAL JUSTICE SYSTEM AND BLACKS* (1987).

4. *See* STEPHEN P. KLEIN ET AL., *RACIAL EQUITY IN SENTENCING* 11 (1988) (finding that in California the race of the defendant is not related to the sentence imposed); William Wilbanks, *The Myth of a Racist Criminal Justice System*, in *RACISM, EMPIRICISM AND CRIMINAL JUSTICE* 5 (Brian D. MacLean & Dragan Milovanovic eds., 1990) (concluding there is no systemic bias against Blacks in the criminal justice system). Wilbanks finds that there is a "canceling-out effect." While some decisionmakers favor Whites, "there appears to be an equal tendency for other individual decisionmakers to favor blacks over whites." *Id.* at 6 (emphasis in original). This research is in contrast to earlier findings that race does have an impact on sentence. JOAN PETERSILIA, *RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* (1983).

5. *See* GEORGES-ABEYIE ET AL., *supra* note 3, at 11, 12 (arguing that the focus upon formal stages of the justice system obscures "petit apartheid" which is the "most significant contemporary form of racism . . . e.g., the everyday insults, rough or brutal treatment, and unnecessary stops, questions, and searches of blacks; the lack of civility faced by black suspects/arrestees").

6. *See, e.g.*, Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (citing NATIONAL CENTER FOR STATE COURTS, *THE PUBLIC IMAGE OF COURTS* (1977)).

7. *See, e.g.*, Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCHOL. Q. 67, 72-73 (1991) (finding that the differing views of the justice system are in part rooted in levels of trust in law enforcement). Racially divided public opinion in the O.J. Simpson case attests to this. In July, 1995, a USA Today/CNN/Gallup poll reported that 87% of the Black respondents believe Simpson was a victim of a racist criminal justice system. Only six percent of the Whites polled held the same opinion. Richard Price, *Racial Split Widens*, USA TODAY, July 25, 1995, at 3A. A number of Blacks within the legal system also negatively perceive the criminal justice system, including judges, *see generally* LINN WASHINGTON, *BLACK JUDGES ON JUSTICE* (1994), and students, *see, e.g.*, Melissa H. Barlow & David E. Barlow, *Confronting Ideologies of Race and Crime in the Classroom: The Power of History*, 6 J. CRIM. JUST. EDUC. 105, 110-11 (1995).

Blacks are more likely to be distrustful of the criminal justice system, yet they hold punitive attitudes on crime comparable to those of Whites. This is in part explained by greater fear of criminal victimization. Steven F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict*, 38 SOC. PROBS. 287, 288 (1991).

8. *See, e.g.*, GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1993*, at 231 (1994) (reporting that 74% of Whites polled rated local police to be "excellent" or "good," while only 48% of Blacks share this belief).

criminal sanctions which are more swift (reduce criminal appeals process), more certain (truth-in-sentencing legislation) and more severe (three-strikes legislation).⁹

A variety of rationales have been offered to explain the gap in Black racial "connectedness" to the criminal justice system. Foremost is the differential group experience Blacks and Whites have with the justice system's operation. For example, Blacks are more likely to be victims of police harassment/brutality or know someone who has been a victim.¹⁰ Further, they are more likely to perceive that the criminal justice system treats members of their group unfairly because of their race.¹¹ It is maintained herein that the disconnect Blacks experience is as much a reflection of affirmative acts of racial discrimination within the criminal justice system as it is a reflection of the need for more affirmative race-based sanctions within the justice system.¹² The latter is the focus of this Article.

Specifically, this Article argues for the increased use of the law as racial affirmation. This use of the law would recognize and punish ongoing racial discrimination, with the goal of bringing balance to the use of the term "race" as it relates to crime. As it now stands, the phrase "race and crime" is almost always a negative referent for "Blacks and crime." This Article focuses on one way in which law can be created and used as a means of racial affirmation, and the Article questions whether it should be a crime falsely to accuse someone Black of a crime *knowing* that the offender is not Black.¹³ In doing so, it examines some of the reasons for America's existing racial polarization, reflected in large part by the divide on the issue of racial discrimination and disparity in the criminal justice system. The Article concludes that those who play on the negative racial caricature of Blacks should face an enhanced penalty—over and above that for misleading or providing false information to the police.

There is a manifest need to focus more upon how the law, existing and potential, can at a minimum reduce and at a maximum halt the perpetuation of the *criminalblackman* myth. This Article, consisting of four Parts, addresses this need. Part I provides an examination of seven recent, well-known racial hoaxes¹⁴ and provides a sociological analysis of the phenomena of racism and the racial hoax, and how these phenomena affect Black and White individuals and groups. Part II outlines a paradigm for analyzing

9. See, e.g., NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 37-64 (Ed Gillespie & Bob Schellhas eds., 1995); Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at A16.

10. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 189 (1992); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1494-98 (1988); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991). See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94-112 (1990), for a discussion of the effect of experience on the perceived legitimacy of justice operations.

11. See Davis, *supra* note 6, at 68-71. Some have argued for the construction of a variable which would examine race-specific "group experiences." See, e.g., Kathryn K. Russell, *The Racial Inequality Hypothesis*, 18 L. & HUM. BEHAV. 305 (1994). The racial divide between Blacks and Whites with regard to the O.J. Simpson case supports the "group experience" concept. See Richard C. Dieter, *Secondary Smoke Surrounds Capital Punishment Debate*, CRIM. JUST. ETHICS, Winter-Spring 1994, at 2; Kenneth B. Noble, *The Simpson Defense: Source of Black Pride*, N.Y. TIMES, Mar. 6, 1995, at A10.

12. Examples of the former include police brutality and judicial bias. Examples of the latter include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1993) (prohibiting discrimination on the basis of race and sex, among other things); Hate Crimes Statistics Act, 28 U.S.C. § 534 (1990) (authorizing the Attorney General to gather hate crime data); 42 U.S.C. § 1983 (1988) (prohibiting racial discrimination by one acting under the color of law).

13. New Jersey has proposed legislation which would subject racial hoaxes to criminal sanction. N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database. For further discussion, see *infra* part IV.C.

14. A racial hoax occurs when (1) someone fabricates a crime then blames it on, for example, a Black person; or (2) an actual crime has been committed and someone falsely blames, for example, a Black person. The Miriam Kashani "rape" case and Susan Smith "kidnapping" case, respectively, are examples.

whether the racial hoax should be made criminal. Part III examines the relationship between perceptions of injustice, the absence of affirmative race law, and violence. Additionally, Part III considers the economics of the racial hoax. Finally, Part IV reviews the law of hate crimes and assesses whether a racial hoax law would logically fit within its parameters. Part IV also outlines the requisite components of such a law.

I. THE PHENOMENON OF THE RACIAL HOAX

A. Cases in Point

In January, 1996, Robert Harris claimed that he and his fiancée, Teresa McLeod, had been shot and robbed on a quiet Baltimore, Maryland street. Harris said the assailant was an armed Black man wearing a camouflage jacket and black and white pants. Harris was shot once and McLeod was shot several times. McLeod died at the scene. Within two days of the murder, Harris confessed to his involvement: He had hired a hit man to rob and kill his fiancée. The alleged motive was Harris' mistaken belief that he was the beneficiary of McLeod's \$250,000 life insurance policy.¹⁵

On October 25, 1994, Susan Smith, a White South Carolina mother, told police that she had been carjacked by a young Black male. According to Smith, the man drove off with her two young sons, Michael, age three, and Alex, age fourteen months. In the following week, Smith publicly pled for their lives, telling them "your Momma loves you. . . . Be strong."¹⁶ The case attracted international attention and garnered the services of both federal and state law enforcement officials. Nine days after her initial 911 call, Smith confessed to the killings.¹⁷

In April, 1992, Jesse Anderson, a White man, told the police that while leaving a suburban Milwaukee restaurant he and his wife were attacked by two Black men. According to Anderson, the men stabbed him and his wife. His wife was stabbed multiple times in the face, head, and upper body. She died following the attack. After a five-day search for the fictional Black criminals, Anderson was arrested and charged with his wife's murder. Two factors led the police to focus their investigation on Anderson: lab results from blood samples, and information that Anderson had called his wife's insurance company one month prior to her murder to determine whether her \$250,000 policy was in effect. Anderson was subsequently convicted of first degree intentional homicide.¹⁸

15. Amy Argetsinger, *Insurance May Be Motive in Fiancée's Slaying*, WASH. POST, Feb. 1, 1996, at D1; *Police Say Md. Man Had Fiancée Killed, Blamed Black Robber*, WASH. POST, Jan. 30, 1996, at B6.

16. Richard Grant, *Mother of All Crimes*, INDEPENDENT (London), Feb. 25, 1995, at 16.

17. Smith was charged with two counts of capital murder. Notably, she was not charged with filing a false police report. See Henry Eichel, *Mother May Face Death Penalty: Confessed to Drowning Sons*, RECORD (Bergen, N.J.), Jan. 16, 1995, at A1. In August, 1995, Smith was sentenced to life in prison. Under South Carolina law, Smith will serve a minimum of 30 years in prison. S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1993). It is a misdemeanor, under South Carolina law, to give false information to a law enforcement official. Upon conviction, one may be fined \$200 or imprisoned for up to 30 days. *Id.* § 16-17-725.

18. See, e.g., Rogers Worthington, *Once a Victim, Now a Suspect Husband Held as Cops Question Account of Wife's Slaying*, CHI. TRIB., Apr. 28, 1992, at 1; *Milwaukee Media Criticized on Murders* (National Public Radio broadcast, Apr. 30, 1992), available in LEXIS, News Library, Script File. In an odd twist, Anderson was murdered in prison along with serial murderer Jeffrey Dahmer. Don Terry, *Suspect in Dahmer Killing Said, 'I'm the Chosen One'*, N.Y. TIMES, Nov. 30, 1994, at A18. It has been speculated that Anderson was targeted along with Dahmer because of the racial upheaval his hoax caused. See, e.g., Rupert Cornwell, *Race Theory Emerges in Dahmer Jail Murder*, INDEPENDENT (London), Nov. 30, 1994, at 31.

In 1990, a female student at George Washington University in Washington, D.C. falsely stated that a White woman had been raped at knife point by two young Black men with "particularly bad body odor."¹⁹ The story exploded across campus and was a call to action for school officials, campus activists, and the school's rape crisis center. The day following the school newspaper's publication of her account, the press was informed that the story was a fabrication. Miriam Kashani, the student who was the newspaper's main source for the "rape" story, held a press conference and stated that she "had hoped the story, as reported, would highlight the problems of safety for women . . . [and] never meant to hurt anyone or racially offend anyone."²⁰ One has to wonder why, given Kashani's stated goals, her perpetrators were depicted as Black. Kashani's tale served to reinforce the myth of interracial (Black-on-White) rape—in fact, three-quarters of all rapes are *intra*racial (e.g., White-on-White or Black-on-Black).²¹

The Charles Stuart case involved a White man who claimed that a Black man had shot him and his pregnant wife. His wife and unborn child died after the attack. Mission Hill, a largely Black neighborhood in Boston, was combed in search of the killers.²² Charles Stuart picked a Black man named Willie Bennett in a line-up as the person who "most resembled" the attacker.²³ Based upon inconsistencies in his story and information obtained from his brother, Matthew Stuart, the police focused their investigation upon Charles Stuart.²⁴ Shortly thereafter, Charles Stuart committed suicide.²⁵

There are several common features in the Smith, Anderson, and Stuart cases. First, with each of these, the heinousness of the actual offense—a husband killing his wife, a mother killing her two children—quickly eclipsed the racial hoax.²⁶ Also, in each of these cases, there were calls for an apology to the Black community²⁷—clearly indicating that some "communal" or group injury had occurred. While Susan Smith's brother offered an apology to the Black community,²⁸ Ray Flynn, the Mayor of Boston, refused to apologize.²⁹ Beyond the similarity in community response, the White-on-Black hoaxes feature White women front and center. In fact, the Smith, Anderson, and Stuart cases involved White *mothers*—the symbol of American virtue—as victims of Black male deviance.

Only one of the four racial hoaxes discussed above, the Kashani case, involved rape. Historically, rape was the most common criminal hoax played on Black men. The case of the Scottsboro Boys is perhaps the best known example of the use of Black men as

19. Felicity Barringer, *False Rape Report Upsetting Campus*, N.Y. TIMES, Dec. 12, 1990, at A21.

20. Jonetta R. Barras, *Blacks See Racism in Rape Hoax at GWU*, WASH. TIMES, Dec. 12, 1990, at B4.

21. *Id.*; see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1992, at 61 (1994).

22. JOE R. FEAGIN & HERNÁN VERA, WHITE RACISM 64 (1995).

23. Michael Grunwald, *For Boston, Harsh Reminder; Five Years Ago, Stuart's Racist Hoax Was Hatched—and Believed*, BOSTON GLOBE, Nov. 4, 1994, at 17.

24. Stuart had talked to his brother about killing Carol Stuart for her insurance money and asked him to dispose of her purse after the shooting incident. FEAGIN & VERA, *supra* note 22, at 64.

25. *Id.* at 63-67.

26. Commenting on how the racial angle is often overlooked, Pulitzer-Prize-winning journalist William Raspberry notes, "[H]ere is a woman [Susan Smith] suspected of killing her own children, and we want to chastise her for racial insensitivity?" William Raspberry, *Automatically Suspect*, WASH. POST, Nov. 5, 1994, at A19. One commentator, referring to the media's treatment of the Stuart case stated, "[The press is] covering everything in detail except the most important story—the color story." Christopher Edley, Jr., *Racist Media, Politicians Sustained Boston Hoax*, MANHATTAN LAW., Mar. 1990, at 18.

27. See Edley, Jr., *supra* note 26, at 18.

28. Michele Parente, *Black Community Is Given an Apology: Drowned Boys' Uncle Speaks for the Family*, NEWSDAY, Nov. 9, 1994, at A66.

29. Edley, *supra* note 26, at 18.

scapegoats for crime. In 1931, Victoria Price and Ruby Bates, two young White women, alleged that they had been assaulted and raped by nine "Negro boys."³⁰ After swift pretrial procedures, eight of the Black boys were sentenced to death. The ninth case resulted in a hung jury. During the trial and in press reports, Bates and Price were portrayed as symbols of Southern White womanhood. Eventually, Bates recanted her story; Bates' admission, however, did not result in freedom for the eight young Black men.³¹ The hoax was successful, making this case perhaps the most notorious racial hoax case in our history.

Instances of other White-on-Black hoaxes abound.³² It is impossible, though, to know how many times racial hoaxes have been used to cover criminal tracks. There are no state or national statistics on the incidence and prevalence of racial hoaxes.

The case involving Tawana Brawley provides an interesting counterpoint to the above hoaxes. In November, 1987, Brawley, a fifteen-year-old Black girl from Wappingers Falls, New York, told police she had been abducted and raped by six White men. Brawley said that the men were police officers. She said she was smeared with feces, placed in a plastic bag, and left in a gutter. The story drew widespread attention. After convening for seven months, the grand jury declined to issue any indictments. Although Brawley stands by her original account, the incident has been widely discounted as a hoax.³³

In a second Black-on-White hoax, in 1990, Sabrina Collins, a Black student at Emory University, said that she had received hate mail and death threats and that racial epithets had been scrawled on her dormitory wall.³⁴ According to Collins, the attack so traumatized her that she fell mute.³⁵ Separate investigations by the District Attorney and the County Solicitor concluded that the incident was a hoax.³⁶

Attempts to catalogue the Brawley and Collins cases along with the hoaxes discussed earlier miss the point. Such a comparison ignores the vast power differential between the hoax perpetrators in these two groups.³⁷ It is noteworthy that both of the Black-on-White racial hoaxes were framed as "hate crimes" by the perpetrators.³⁸ Collins and Brawley stated that they had been attacked *because* they were Black. By contrast, the White-on-Black racial hoaxes were framed as random acts of Black violence. It is as if neither

30. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 5-6 (1969). The Scottsboro injustices were addressed in *Powell v. Alabama*, 287 U.S. 45 (1932), which fleshed out the parameters of the Sixth Amendment right to a fair trial.

31. See generally CARTER, *supra* note 30.

32. In January, 1995, a White man in the Trenton, New Jersey area told authorities that he saw a Black man abducting a White girl whose mouth had been bound with duct tape. Five hours later it was determined that the story was a hoax. Steve Adubato, *Toughen Penalties for False Accusation Based Upon Race*, RECORD (Bergen, N.J.), Jan. 24, 1995, at B7. A Camden, New Jersey case in 1990 involved prosecutor Sam Asbell, who claimed that he had been chased by two Black gunmen as part of an assassination plot. He later admitted to making the story up and pled guilty to filing a false police report. *Id.* In 1989, Tanya Dacri, a White Philadelphia mother of an infant boy, said that while in a shopping mall parking lot, her child was abducted by two Black men. She subsequently pled guilty to murdering and dismembering her son. She was found guilty of first degree murder. Don Williamson, *We Have to Stop Creating Bogeymen*, SEATTLE TIMES, Jan. 9, 1990, at A6.

33. See ROBERT D. MCFADDEN ET AL., *OUTRAGE: THE STORY BEHIND THE TAWANA BRAWLEY HOAX* (1990).

34. Peter Applebome, *Woman's Claim of Racial Crime Is Called a Hoax*, N.Y. TIMES, June 1, 1990, at A14.

35. *Id.*

36. *Id.*

37. Andrew Kopkind observed that while the Stuart hoax triggered police invasions of Black communities, illegal searches and seizures, and racial slurs by law enforcement officials against Blacks, there was "[n]o comparable repression of the white community in New York State follow[ing] Brawley's charge." Andrew Kopkind, *The Stuart Case: Race, Class, and Murder in Boston*, 250 NATION 149, 149, 153 (1990).

38. "Hate crimes" have been defined as "crime[s] in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." H.R. 4797, 102d Cong., 2d Sess. (1992).

Brawley nor Collins could envision a random White-on-Black crime.³⁹ This is a significant observation because it reflects the public's prevailing view of crime—that Blacks run amok committing depraved, unprovoked acts of violence against Whites, while only those Whites who are known racists—Ku Klux Klan types—commit crimes against Blacks. Further, in neither case was there a call for an apology to the “White community.” This underscores the absence of an aggrieved community—a clear distinction between Black-on-White and White-on-Black hoaxes. Using these distinctions as a starting point, the next Section considers the sociological ramifications of the racial hoax.

B. The Sociology of the Racial Hoax

Assessing the impact and weight of the racial hoax requires a look at the “body” of crime, in terms of both race and gender. By all indicators, the young Black man is the symbol of American criminality.⁴⁰ The Black male has always been perceived as a physical threat; however, until recently, that threat was portrayed in sexual terms. Historically, he was viewed as a threat to the purity of the White female.⁴¹ In the past twenty years, the image of the Black male as rapist has evolved into the image of the Black male as the symbolic pillager of all that is good and pure. The *criminalblackman* stereotype persists, even though it is contradicted by official data.⁴² The common perception of the Black male influences how the racial hoax affects Blacks and Whites, as individuals and as group members.

On an individual level, the impact of the hoax is race-specific. Not only does the hoax perpetuate the existing lore regarding the Black male as criminal, it also helps to create it. We may assume that for many young children of all races, the Charles Stuart story was their first experience with “race and crime.” For them, hearing about the horrible Black man who shot an innocent White man and killed his pregnant wife and unborn baby made

39. White-on-Black homicide is less prevalent than Black-on-White homicide. For 1993, White-on-Black murders make up 5% of the total murders with Black victims, while Black-on-White murders make up 15% of all murders with White victims. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE U.S. 1993, at 17 (1994). In general, there is more Black-on-White crime than White-on-Black crime because “there are more whites for blacks to interact with, and therefore potentially more black[on-]white crime compared to white[on-]black-crime.” CORAMAE RICHEY MANN, UNEQUAL JUSTICE 33 (1993).

40. See, e.g., *Jandrucko v. Colorcraft/Fuqua Corp.*, No. 163-20-6245 (Fla. Dept. of Labor and Employment Sec. Apr. 26, 1990). *Jandrucko* involved an elderly White woman who told authorities she was mugged by a Black man and said the incident left her afraid of all Blacks. She sought and was granted workers' compensation. Jandrucko admitted that she did not see the face of her attacker. She only saw his dark-colored arms. This means the offender could have been a Black person, a dark-skinned Latino, or a tanned White person. The Florida Senate has since passed legislation precluding workers' compensation awards for phobias based upon race. Karen Branch, *Bill Bans Fear of Co-Workers as a Workers' Comp Claim*, MIAMI HERALD, Mar. 3, 1993, at B8; see also Walter L. Updegrave, *Crime: Who's Safe, Who's Not*, MONEY, June 1994, at 114, 119-21. For a provocative discussion of “negrophobia” and the criminal law, see Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994). While the focus of this negative stereotype falls squarely on the head of the Black male, its impact upon the Black female should not be overlooked. As the mother and mate of the Black male, she is intrinsically linked to and implicated by this stereotype.

41. See, e.g., DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW §§ 2.1-2.3 (1980); GUNNAR MYRDAL, AN AMERICAN DILEMMA 60 (1964) (discussing the “white man's . . . order of discriminations”) (emphasis omitted). This threat was codified into law. Historically, the rape of a White woman by a Black man (slave, free, or otherwise) was punishable by death. See, e.g., A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 263 (1978).

42. Official data for the last 10 years show that Whites consistently comprise between two-thirds and three-quarters of all arrests in any given year. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE U.S. 1984-1993 (1994). See generally Kathryn K. Russell, *White Crime* (1994) (unpublished manuscript on file with author) (arguing that the discipline of criminology is overly focused upon Black crime and does not offer comparable attention to White crime).

the *criminalblackman* imprint indelible—the myth was created.⁴³ The stamp of this image upon a new generation occurs every time a hoax is perpetrated. The hoax and its fallout place both shame and blame upon Blacks. Particularly disturbing is the fact that even after the hoax is uncovered, Blacks are still perceived as being at fault.⁴⁴

For Blacks as a group, racial hoaxes underscore unfairness and the racism of Whites. For instance, many Blacks were initially skeptical of Susan Smith's story and troubled that so many Whites believed it so quickly.⁴⁵ For Whites as a group, the hoax supports the prevailing myth that Blacks pose the greatest crime threat to Whites. For both groups the racial hoax fosters an "us-versus-them" sentiment. Blacks and Whites divide further by race as the hoax takes its expected course. Law enforcement is called into action to protect an innocent White person from further harm and to apprehend a widely perceived threat—a menacing Black man. The incident arouses sympathy and leads to calls for swift, harsh, and certain punishment. The collective racial consciousness of each group gains more strength and permanence with each hoax.

Among the most damaging effects the hoax has upon Blacks is that it enhances the appeal of conspiracy theories. Studies show that Blacks are more likely to believe race-related government conspiracy theories.⁴⁶ Black susceptibility to such theories is borne of government-sanctioned atrocities, such as chattel slavery and the Tuskegee syphilis experiment.⁴⁷ Whites are less suspicious of government operations. These differing perceptions create great tension between Blacks and Whites. Blacks are increasingly perceived as paranoid, and this further marginalizes them from the mainstream.

43. Speculating about the impact of the Susan Smith hoax, one commentator asks, "What message is being sent to our young Black boys trying to find their place in a world that limits their importance to about 100 entertainers and 200 athletes?" Kevin Ross, *The Bogeyman Still Haunts Many White Minds*, EMERGE, Feb. 1995, at 84. Another notes, "Some blacks wonder how they can raise a younger generation of African-Americans with enough self-esteem and lack of bitterness in the face of lingering racism." Deepti Hajela, *Blacks Wonder Why Hoax So Easily Believed; Crime Revives Questions of Prejudice*, SUN-SENTINEL (Fort Lauderdale), Nov. 5, 1994, at 16A; see also ROBYN HOLMES, HOW YOUNG CHILDREN PERCEIVE RACE (1995); Davis, *supra* note 6, at 1562 (stating that children assimilate negative racial stereotypes before they reach the age of judgment).

44. See, e.g., Kopkind, *supra* note 37, at 154.

45. Hajela, *supra* note 43, at 16A.

46. See, e.g., Lydia Saad & Leslie McAneny, *Black Americans See Little Justice for Themselves*, GALLUP POLL MONTHLY, Mar. 1995, at 32. There was a large gap between Black and White attitudes on O.J. Simpson's guilt. At one time, 75% of White but only 25% of Black respondents believed the murder charges were at least probably true. Price, *supra* note 7, at 3A. In 1995, there was discussion in the Black community that the criminal allegations made against three major Black entertainment figures, Mike Tyson, Michael Jackson, and O.J. Simpson, were part of a plot to destroy successful Black men. *Conversation with Mike Tyson* (Black Entertainment Television broadcast, Aug. 16, 1995). See generally PATRICIA A. TURNER, I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN AMERICAN CULTURE (1993) (discussing prevalence of conspiracy theories in the Black community).

47. See, e.g., JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1993).

II. RACISM⁴⁸ AS CRIME

A. Views of Commentators

Why should the racial hoax be punished? Consideration of this question requires an examination and analysis of racist acts and their impact upon Blacks in particular and society as a whole.⁴⁹ This discussion relies upon three articles to provide a context for assessing whether the racial hoax should be criminalized. The first is an article by Professor Patricia Williams on "spirit-murder."⁵⁰ In the article, Williams argues that although racism is difficult to see in its more subtle forms, it should nevertheless be made criminal. The second article, by Professor Peggy Davis, examines how the everyday slights that Blacks experience shape their perceptions of justice.⁵¹ Finally, Professor Wendy Brown-Scott's analysis of the impact of "state lawlessness" upon Blacks provides a framework for considering the racial hoax a crime.⁵² Together, these three articles provide a paradigm for analyzing the sociology of racism—of which the racial hoax is a part—and a structure for discussing whether the racial hoax should be made criminal.

According to Williams, racism is "an offense so deeply painful and assaultive as to constitute something [called] 'spirit-murder.'"⁵³ For Blacks, spirit-murder is constant. There is a daily onslaught of Black crime stories played out in the media, which unfailingly portray Blacks as ignorant and criminal. Williams examines the ways in which incidents with obvious racial aspects are neutralized as private, nonracial incidents. She details several high profile criminal cases (e.g., Howard Beach, Bernhard Goetz) involving assaults by Whites upon Blacks.⁵⁴ In each instance, the public and political response was to both excuse the offenders' behavior *and* to deny there was a larger racial context in which to consider the incident.⁵⁵ Williams refers to this as "privatization"—segregating individual incidents, thereby making it impossible to group cases together and discuss their broader implications; the result is "socialized blindness."⁵⁶ Williams is concerned less with fault than with the grave harm of inaction:

We need to elevate . . . spirit-murder to the conceptual, if not punitive level of a capital moral offense. We need to see it as a cultural cancer; we need to open our eyes to the spiritual genocide it is wreaking on blacks, whites, and the abandoned and abused of all

48. The use of the term "racialism" may be preferable to the use of the term "racism." By eliminating the hysteria associated with racism, perhaps a more objective sociological and legal assessment can be made of acts which cause race-based harm. See Stephen Carter, *When Victims Happen to Be Black*, 97 *YALE L.J.* 420, 443 (1988); Davis, *supra* note 6, at 1570. For purposes of this paper, the Author uses "racist" to connote conduct which causes race-based harm, without reference to the actor's intent.

49. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in *WORDS THAT WOUND* 89, 90-96 (Mari Matsuda et al. eds., 1993), for an excellent discussion of the impact of racist speech upon Blacks and Whites.

50. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 *U. MIAMI L. REV.* 127 (1987).

51. See generally Davis, *supra* note 6.

52. Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 *HARV. L. REV.* 1209 (1994).

53. Williams, *supra* note 50, at 129.

54. *Id.* at 136-39, 144-48, 152-54.

55. *Id.*

56. *Id.* at 152.

racism and ages. We need to eradicate its numbing pathology before it wipes out what precious little humanity we have left.⁵⁷

Whereas Williams provides a macrolevel analysis of individual incidents of racism, Davis concentrates upon one-on-one Black/White encounters as the unit of analysis. Davis refers to these encounters as “microaggressions.” Microaggressions are defined as “subtle, stunning, often automatic, and non-verbal exchanges which are “put downs” of blacks by [Whites].”⁵⁸ Davis asserts that microaggressions are a fact of life for Blacks.⁵⁹ Subjection to microaggressions erodes self-confidence, as Blacks internalize negative images. The criminal justice system, in particular, is fraught with microaggressions. The experience that Blacks have within the system, as victims, offenders, or as jurors, often reinforces any negative perceptions they may have had prior to their experience.⁶⁰ The negative stereotypes of Blacks that Whites learn at an early age causes the onslaught of microaggressions. These images are developed, reinforced, assimilated, and over time accepted as “truth rather than opinion.”⁶¹

Microaggressions—individually directed, incessant, and cumulative assaults—do not operate in a vacuum. In addition to one-on-one aggressions, Blacks are confronted with assaults upon their group. Group assaults are termed “macroaggressions.” Macroaggressions are attacks, insults, and/or pejorative statements made against Blacks by Whites. Unlike microaggressions, however, they are neither directed at nor designed to offend a specific Black person. Further, they are primarily characterized by the effect they have of rendering Blacks invisible and portraying them in a stereotypically negative light. Finally, macroaggressions are played out through the press at the national level, and as a result become part of our collective racial consciousness.⁶²

For a one-month period during February, 1995, newspaper articles were culled for examples of macroaggressions.⁶³ During this period, several macroaggressions garnered national attention: (1) Ann Arbor, Michigan police officials required 100 Black men to submit to DNA testing to “clear” themselves of rape and murder charges;⁶⁴ (2) Merchants in a Georgia town posted a criminal “offenders” sheet, which only listed the names of

57. *Id.* at 155 (citation omitted). This phenomenon was also evident in the O.J. Simpson case after the “Mark Fuhrman tapes” were made public in August, 1995. On tape, Fuhrman, now a retired L.A.P.D. detective, discussed beating and framing citizens, bragged of lies he told the police department, used slurs to describe minorities and women, and boasted about his membership in a police group named “Men Against Women.” See, e.g., David Margolick, *What the Tapes in the Simpson Case Say*, N.Y. TIMES, Aug. 23, 1995, at A14. The reaction to the tapes was mixed. Some commentators believed Fuhrman was puffing, others suggested he was an aberrant rogue cop, and still others argued that his racism bore no relevance to Simpson’s guilt or innocence. For many Blacks, however, the Fuhrman tapes validated their longstanding complaints of police brutality. William Claiborne and Kathryn Wexler, *Tapes Hit Home for L.A. Blacks*, WASH. POST, Aug. 31, 1995, at A1.

58. Davis, *supra* note 6, at 1565 (quoting Chester M. Pierce et al., *An Experiment in Racism: TV Commercials, in TELEVISION AND EDUCATION* 62, 66 (Chester M. Pierce ed., 1978)).

59. *Id.* at 1569. See generally PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM (1991).

60. Davis, *supra* note 6, at 1570.

61. *Id.* at 1562.

62. Davis notes that macroaggressions could be characterized as microaggressions vis-a-vis each individual who heard them. E-mail message from Professor Peggy S. Davis to Professor Kathryn K. Russell (Apr. 14, 1995) (on file with *Indiana Law Journal*).

63. *The New York Times* and *The Washington Post* were the primary sources for the one-month search.

64. *World News Saturday: Bitter Dispute over DNA Testing of Blacks in Ann Arbor* (ABC television broadcast, Feb. 4, 1995). There were earlier regional reports of this case. See, e.g., Maryanne George, *Women Living in Fear*, CHI. TRIB., Dec. 27, 1994, at 7.

Black patrons;⁶⁵ (3) Rutgers University President Francis Lawrence made derogatory comments about Blacks;⁶⁶ and (4) In St. Louis, Missouri, more than fifty Blacks were sprayed with Kool-Aid from a fire extinguisher on Martin Luther King, Jr.'s birthday in 1991 and 1992.⁶⁷ The month-long search yielded a total of nine macroaggressions.⁶⁸

Like Williams and Davis, Brown-Scott considers the way that racism harms Blacks. Unlike Williams and Davis, however, Brown-Scott examines the state's role in promoting racism. Her analysis seeks the source of the harm inflicted by individual and group racism. Specifically, Brown-Scott identifies state lawlessness as the cause. State lawlessness includes both the abuse of legal power and the withholding of laws to protect Blacks.⁶⁹ As examples of state lawlessness, Brown-Scott cites slavery and the "contemporary second-class citizenship experienced by many African Americans."⁷⁰ The allocation of state resources having a disproportionately negative impact on Blacks and the levels of economic and psychological subordination reflect this second-class citizenship. According to Brown-Scott, instances of state lawlessness are typically invisible and are therefore difficult legally to redress.⁷¹

Brown-Scott focuses primarily upon the macrostructural harm resulting from state lawlessness. In particular, she notes the growth of racial enclaves which could spiral into an "apartheid state"⁷² as well as the continued and justified mistrust Blacks have of the

65. See Ronald Smothers, *Pilloried on a List That's Guilt by Name*, N.Y. TIMES, Feb. 5, 1995, at 18. Smothers describes how Union Point, Georgia merchants, with the support of their mayor, imposed a ban upon 21 Blacks. The ban, implemented in December, 1994, prohibited those listed from entering the town's commercial establishments and threatened criminal trespass charges for violations. The list was devised as an anticrime measure. Though suspected of criminal activity, none of the 21 had ever been convicted of any crime. In late February, 1995, the merchants lifted the ban. The U.S. District Court Judge who negotiated the settlement stated, "[The store owners'] efforts to prevent crime were not motivated by any racial motivation." *Georgia Shops Lift Ban on 21 Blacks*, WASH. POST, Feb. 23, 1995, at A5.

66. On November 11, 1994, Rutgers President Francis Lawrence made the following statement: "The average SAT for African Americans is 750. . . . Do we set standards in the future so that we don't admit anybody with the national test? Or do we deal with a disadvantaged population that doesn't have that genetic hereditary background to have a higher average?" *Rutgers Game Halted by Protesting Students*, WASH. POST, Feb. 8, 1995, at A3.

67. *Around the Nation*, WASH. POST, Feb. 11, 1995, at A2 (stating that David Walden and Shawn Daniels of Missouri pled guilty to federal civil rights violations for these offenses—driving around St. Louis on the 1991 and 1992 Martin Luther King holidays "spraying more than 50 blacks with water and koolaid from a fire extinguisher").

68. In addition to the four instances cited above, see, e.g., *Campus Protest Against Slurs*, N.Y. TIMES, Feb. 16, 1995, at A22 (reporting racist hate mail left in the mail boxes of University of California, Boalt Hall minority law students—"Rejoice you crybaby niggers. It's affirmative action month. . . . When I see you in class it bugs the hell out of me because you're taking the seat of someone qualified"); *Confederate Flag Stays*, WASH. POST, Feb. 19, 1995, at A12 (reporting that the South Carolina Attorney General, reversing previous opinion, determined that the confederate flag should be allowed to fly despite longstanding protests against it as an inappropriate reminder of slavery); *News in Brief*, WASH. POST, Feb. 17, 1995, at A2 (reporting that the Mississippi state senate in 1995, 100 years after federal adoption, ratified the Thirteenth Amendment to the U.S. Constitution which outlaws slavery); *TV Column*, WASH. POST, Feb. 1, 1995, at D10 (reporting White Detroit weather reporter fired after likening a Black man to a gorilla); *2 Charged in Anne Arundel Church Break-In*, WASH. POST, Feb. 23, 1995, at Md. 3 (reporting that two youths were charged with burglary for breaking into a church and spraying the letters "KKK" on a carpet with a fire extinguisher).

Other instances of macroaggressions have occurred since February, 1995. Three are particularly noteworthy: the incident involving five White Greenwich, Connecticut high school students who placed a coded message in their yearbook that spelled out "Kill All Niggers," Jacques Steinberg, *Racist Message Reveals Rift*, N.Y. TIMES, June 21, 1995, at B4; the videotaped Whites-only picnic attended by Alcohol, Tobacco, and Firearms agents that featured racist slogans and a sign that read, "Nigger CheckPoint," Tim Weiner, *F.B.I. Says at Least 7 Agents Attended Gathering Displaying Racist Paraphernalia*, N.Y. TIMES, July 19, 1995, at A12; and the computer game "Freedom!" in which the players take on the role of Black slaves. Players begin the game as illiterate slaves, referred to as "boy." The game, sold by the Minnesota Educational Computing Corporation, was one of the computer games available for students to play in the Tempe, Arizona Elementary School District. *School's Computer Game on Slavery Prompts Suit*, N.Y. TIMES, Aug. 28, 1995, at A10.

69. Brown-Scott, *supra* note 52, at 1209.

70. *Id.*

71. *Id.* at 1213.

72. *Id.* at 1209.

state.⁷³ Although she does not detail the impact of state lawlessness upon individual Blacks, she would likely agree with Professor Mari Matsuda that

[t]he aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, when racist attacks are officially dismissed as pranks, *the victim becomes a stateless person.*⁷⁴

The paradigm created by Williams, Davis, and Brown-Scott has three major premises. The first is the invisibility of the harm to Blacks caused by White racism. This is coupled with the invisibility of the harm to Whites caused by White racism. The harm to Blacks is exacerbated by the fact that the harm is largely unacknowledged. The second component is that the unfair treatment Blacks have received, which is the source of their perceptions of injustice, prevents them from full individual and group participation in mainstream American life.⁷⁵ The third part concerns the subsequent impact of reduced Black participation and what it bodes for the future of race relations and justice. The result could be alienation, criminal offending, or greater tension between the races. At the core, Williams, Davis, and Brown-Scott make it clear that the legal system does not adequately respond to spirit-murder, microaggressions, and state lawlessness. As a result, these social phenomena cause continuous and cumulative harm.

B. The Paradigm and the Racial Hoax

The paradigm which emerges from the three articles permits an argument to be made that the racial hoax should be a crime. Specifically, Williams argues that spirit-murder is the outcome of a system of “formalized distortions of thought [which] . . . produces social structures centered around fear and hate.”⁷⁶ In both its individual and group dimensions, the racial hoax typifies spirit-murder. Davis notes that the law has to include the voices of those who face discrimination. Without such voices the law will never be perceived as legitimate: “So long as legal decisionmaking excludes black voices, and hierarchical judgments predicated upon race are allowed insidiously to infect decisions of fact and *formulations of law*, minorities will perceive, with cause, that the courts are fully capable—and regularly guilty—of bias.”⁷⁷ What is needed, then, are laws which do not, by their definition or application, reflect bias. A racial hoax law meets this test. Such a law would be a liberating “formulation of law,” which would affirm the reality of racial discrimination. Likewise, Brown-Scott describes state lawlessness as omissions made by the state which are “invisible to society because they fall outside the scope of conventional civil rights claims or because they are not easily verifiable independent of the testimonies of the victims.”⁷⁸ Brown-Scott concludes that in a society concerned with racial equality, Whiteness must be “deprived” and Whites “must bear a greater burden

73. *Id.* at 1212.

74. Mari Matsuda, *Public Response to Racist Speech*, in *WORDS THAT WOUND*, *supra* note 49, at 25 (discussing the impact of race-based hate speech upon its victims) (emphasis added).

75. Noted historian John Henrik Clarke states (referring to the Bernhard Goetz case): “The lack of citizenship for black America has reached a point where we can’t lie about it anymore . . . We cannot tell the world anymore about our great democracy and melting pot theory when there is an African nation existing within the United States that is still lacking full citizenship.” Susan Taylor Martin, *A Case of Hate: Attack on N.Y. Girl, and Reaction to It, Stirs Racial Tensions*, *ST. PETERSBURG TIMES*, Mar. 20, 1988, at 1A.

76. Williams, *supra* note 50, at 151.

77. Davis, *supra* note 6, at 1577 (emphasis added).

78. Brown-Scott, *supra* note 52, at 1213-14.

of correcting the wages of privilege."⁷⁹ A racial hoax law would benefit both Blacks and Whites. As Whites would become more understanding and cognizant of the existing discrimination against Blacks, the groundwork would be laid for smoother interracial relations.

We miss the point if we examine each racial hoax case separately. We cannot conclude that what Susan Smith did was an isolated event *and* what Jesse Anderson did was an isolated event *and* what Charles Stuart did was an isolated event. Nor can we simply dismiss Smith, Anderson, and Stuart as "crazy."⁸⁰ These cases beg for holistic analysis. Nonrecognition of the racial hoax by the criminal law exemplifies the very "privatization" that Williams decries. The following section considers the paucity of affirmative race law and how it affects crime.

III. THE LAW AS AFFIRMATION AND ITS RELATIONSHIP TO CRIMINAL OFFENDING

A. Affirmative Race Law

The goal of a color-blind society is not the same thing as the attainment of a color-blind society. As the Williams, Davis, and Brown-Scott articles establish, Blacks face social discrimination. This discrimination has an impact on how Blacks are treated, how Blacks perceive Whites, how Blacks perceive themselves, how Whites perceive Blacks, and how Whites perceive themselves. Racial inequality, both actual and perceptual, is a social fact.⁸¹ Failure to acknowledge inequality not only ensures that it will continue, but also further exacerbates the pain experienced by its victims.

The legal system needs more laws which acknowledge American racial history and operate as a bulwark against existing racial subordination and discrimination.⁸² This kind of law can be characterized as the *law as affirmation*.⁸³ Developing law as affirmation is necessary to build Black trust in police, courts, and corrections. The distrust Blacks currently have of the criminal justice system has several ramifications. One concern is

79. *Id.* at 1224. For an interesting discussion of White privilege, see Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in RACE, CLASS, AND GENDER 76-87 (Margaret L. Anderson & Patricia H. Collins eds., 1995); see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1994).

80. Referring to the Tanya Dacri racial hoax, one commentator states, "[P]eople excused [her] story, because she was crazy. She may have been crazy, but she understood the state of U.S. race relations. She understood that a White woman raising the specter of crazed, violent Black men would strike a responsive chord in the press and with the general public." Williamson, *supra* note 32, at A6.

81. Emile Durkheim defined a social fact as one which is external to the individual and is coercive in nature. EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 50-59 (1982).

82. See *supra* note 12 and accompanying text. Courts have been loathe to accord legal relevance to past racial discrimination. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that statistical proof of racial discrimination in capital sentencing is insufficient to establish a violation of the Equal Protection Clause); *Cato v. United States*, No. 94-17102 (9th Cir. Dec. 4, 1995) (holding that African-Americans not entitled to reparations under the U.S. Constitution). Further, there has been a shift from race-conscious remedies to race-neutral ones. See Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231 (1993), for a detailed discussion of color-conscious versus color-blind approaches to criminal law.

83. This must be part of a larger effort to present an accurate picture of race and crime. See, e.g., Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (providing an in-depth analysis of the costs of "White crime"—compared with the costs of "Black crime"—as well as White crime's causes and its relationship to white collar crime); see also Russell, *supra* note 42. In addition to the enactment of new laws, affirmative race law encompasses the vigorous enforcement of existing laws which promote racial justice. For instance, sanctioning law enforcement officials who have violated the rights of Black citizens would constitute affirmative race law.

strained police-community relations in Black neighborhoods. Under these conditions, Blacks are less likely to assist police in crimesolving, which is particularly troubling considering that Blacks are disproportionately likely to be crime victims.⁸⁴

A law proscribing racial hoaxes would exemplify the law as affirmation. Specifically, it would serve as a symbol of intolerance for the fiscal harm (wasted law enforcement resources) and the psychic harm (reinforcing criminal stereotypes)⁸⁵ of such actions.⁸⁶ Some might question the legitimacy of affirmative race law. For instance, an opponent might argue that Blacks, who offend at a disproportionately high rate, are responsible for the existing criminal stereotype. According to this argument, perception *is* reality. While Blacks are overrepresented in arrest data given their percentage in the total U.S. population, they do not comprise the majority of those arrested in any given year.⁸⁷

A component of this argument is that Blacks' lack of faith in the criminal justice system is the result of their overinvolvement in criminal activity. Criminologist James Q. Wilson offers perhaps the most concise articulation of this view. He opines that there is a positive, causal relationship between Black crime and White racism.⁸⁸ If Blacks would cease to offend disproportionately, Wilson contends White racism would simply wither away. Beyond being both ahistorical and counterintuitive, this argument lacks any empirical grounding.⁸⁹ Further, such reasoning excuses prejudice and racial discrimination against all Blacks because of the criminal actions of a relative few.⁹⁰ The *criminalblackman* stereotype, which labels all Black males as criminal, is proof. This *criminalblackman* depiction permeates public and social institutions. Unfortunately, Blacks, no matter what their level of social status, can rise no higher than the prevailing deviant image.⁹¹ Finally, the criminal stereotype has been used to justify more punitive sanctions that will disproportionately affect Blacks, as the federal sentencing guidelines illustrate. For instance, the guidelines mandate harsher penalties for possessing crack cocaine than for possessing powder cocaine.⁹²

In sum, the *criminalblackman* stereotype makes manifest the need for affirmative race law. As this section has argued, the failure to develop a greater body of affirmative race law has a number of costs, including psychological, sociological, and economic harm.

84. In 1992, Black households had the highest rate of victimization—199 per 1000 households. This contrasts with 147 per 1000 households for Whites. BUREAU OF JUSTICE STATISTICS, *supra* note 21, at 20. The level of victimization for young Black males is particularly stark. They “experience[] violent crime at a rate significantly higher than the rates for other age or racial groups. . . . Males age 16 to 19 were particularly at risk; their violent victimization rate was almost double the rate for white males” LISA D. BASTIAN & BRUCE M. TAYLOR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *YOUNG BLACK MALE VICTIMS* (1994).

85. See, e.g., Jan Glidewell, *Racial Hoax Shows Our Inner Bias*, ST. PETERSBURG TIMES, Nov. 20, 1994, at 1 (stating that “even [Union, South Carolina police chief] Wells’ masterful handling of the situation could not help but leave black people everywhere angry and hurt”).

86. See, e.g., Les Payne, *A Rape Hoax Stirs up Hate*, NEWSDAY, Dec. 16, 1990, at 6 (concluding that “crying wolf . . . should be severely punished”).

87. Figures for 1993 show that Whites comprised 67% of total arrests. FEDERAL BUREAU OF INVESTIGATION, *supra* note 38, at 235.

88. James Q. Wilson, *To Prevent Riots, Reduce Black Crime*, WALL ST. J., May 6, 1992, at A16; see also BYRON ROTH, *PRESCRIPTION FOR FAILURE* (1994).

89. For a thoughtful discussion of the relationship between White racism and Black crime, see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 245-48 (1988).

90. See, e.g., ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 93-95 (1993).

91. *Id.*

92. *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.), *rev’d*, 34 F.3d 709 (8th Cir. 1994) (holding that federal sentencing guidelines which provide a harsher penalty for crack cocaine possession than for the same amount of powder cocaine are without legal justification, and noting that the law has grossly disproportionate impact upon minorities).

The next section shows that there is an additional harm in rejecting affirmative race law: its impact upon criminal offending.

*B. Absence of Affirmative Race Law and
Criminal Offending*

Equally important in assessing the legitimacy of affirmative race law is determining what impact the disconnection between Blacks and the criminal justice system has upon law-abiding behavior. It is argued herein that the failure to acknowledge this dissonance combined with the absence of affirmative race law may promote a range of antisocial reactions, from alienation to criminal violence. Defiance theory has been offered to explain when the perception of unfair legal sanctions may increase criminal offending.⁹³ Defiance theory is based upon Professor John Braithwaite's theory of shaming,⁹⁴ which posits that how society responds to criminal behavior either increases or decreases the probability of criminal offending. Society may either respond by "reintegrative shaming," which expresses community disapproval followed by community reacceptance,⁹⁵ or with "stigmatization," which places blame upon the offender.⁹⁶

Defiance theory predicts that a person's perception that he has been punished unfairly, or that members of his group have been punished unfairly, increases the probability that he will engage in criminal behavior. The perception of unfair treatment may come from formal contacts with the criminal justice system (*e.g.*, court proceedings) or informal contacts (*e.g.*, vehicle stops, street stops). With regard to Blacks, inequity and perceived bias in the justice system at the very least create a psychic and emotional environment in which criminal behavior can be committed and rationalized.⁹⁷

For young Black men, criminal justice shaming is stigmatizing rather than reintegrative. They are labelled deviant *before* any formal contact with the justice system. In a discussion on police disrespect in citizen-police encounters, Professor Lawrence Sherman notes that "young males, especially the poor and minorities, are much more exposed than lower crime groups to police disrespect and brutality, both vicariously and in person, *prior* to their peak years of first arrest and initial involvements in crime."⁹⁸ Given the *criminalblackman* label, police interactions with Black men are likely to reinforce existing stereotypes. Police come away from encounters with Black men believing that Black men are hostile and disrespectful; Black men come away from encounters with police believing that the police are hostile and disrespectful. This cycle

93. Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445 (1993).

94. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

95. *Id.* at 100-01.

96. *Id.* at 101.

97. See, *e.g.*, Thomas J. Bernard, *Angry Aggression Among the "Truly Disadvantaged"*, 28 CRIMINOLOGY 73, 80 (1990) ("Racial and ethnic discrimination involves intentionally harming, threatening, or insulting people and intentionally blocking their goal-directed activities[.]" (citations omitted)); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957) (stating that techniques include "denial of injury" and "condemnation of the condemners").

98. Sherman, *supra* note 93, at 464.

creates further outcast status for Black men and increases the probability of an antisocial response.⁹⁹

Sociology Professor Anthony Lemelle, in a thorough discussion of the “forced criminality” of Black males, provides support.¹⁰⁰ He states, “Black males are primarily concerned with avoiding shame and guilt in situations with the police. . . . To avoid embarrassment, shame, and guilt—in short, emasculation—the males seek to neutralize the militarylike systems that occupy their communities.”¹⁰¹ It is shame and emasculation that many Blacks experience in their encounters with agents of the criminal justice system, leading to stigmatization, not reintegration. Lemelle continues, “[T]he police techniques of interrogation often implicate them in the assumption that Black males are *guilty until they are proven innocent*.”¹⁰² Lemelle concludes that the end result is the rejection of the legitimacy of the criminal justice system. “[B]lack males form a position of opposition that results directly from their social experiences, which undermine the normal methods of institutional control.”¹⁰³ The tension Lemelle describes pits Blacks directly against the criminal justice system. The standoff leaves Blacks on one side believing that they have been prejudged, unable to get equitable treatment, and therefore, justified in rejecting the law’s legitimacy. On the other side is the criminal justice system, with preconceptions that Blacks are defiant and deviant based solely upon the criminal actions of a few.¹⁰⁴ There can be no victors, Pyhrric or otherwise, in a match where battle lines are constantly redrawn with ever-growing distance between Blacks and Whites.

99. This process essentially turns labelling theory on its head. Labelling theory predicts that once an individual has had a formal contact with the criminal justice system and is thereby labelled deviant, he is likely to act in conformity with the label. Therefore, labelling theorists argue, the deviant label should be avoided. Today, because Black males are presumed deviant, they are treated as deviant and may subsequently act in ways which conform to the label. *See, e.g.*, GEORGE B. VOLD & THOMAS J. BERNARD, *THEORETICAL CRIMINOLOGY* 252-57 (3d ed. 1986).

100. ANTHONY J. LEMELLE, JR., *BLACK MALE DEVIANCE* (1995).

101. *Id.* at 40.

102. *Id.* at 41 (emphasis added).

103. *Id.* at 42.

104. English researcher John Pitts refers to this practice as the difference between “epic” versus “lyric” criminology. Epic criminology, which describes much of U.S. criminology, focuses upon cultural characteristics, such as childrearing patterns, to explain crime. Conversely, lyric criminology emphasizes the characteristics of criminals (*e.g.*, socioeconomic status, education level) to explain crime. John Pitts, *Theoretotyping: Anti-racism, Criminology, and Black Young People*, in *RACISM AND CRIMINOLOGY* 108 (Dee Cook & Barbara Hudson eds., 1993).

Defiance theory, coupled with Lemelle's discussion of "forced criminality," provides support for the argument that there is an additional link in the shaming-defiance causal chain.¹⁰⁵ It is posited that for Blacks the perceived existence of unfair sanctions, combined with the absence or lack of adequate sanctions for race-based harms, cause a diminished faith in the justice system, which in turn sets the stage for criminal offending. At least for now, two of these variables—the presence and absence of race-based legal sanctions—are linked. This causal process is illustrated below:

presence of unfair legal sanctions on the basis of race + absence of/inadequate legal sanctions for race-based harms → lack of faith in the system → dissonance → violence

This model, which unites defiance theory and affirmative race law, does not purport to explain all criminal offending. If the proffered relationships are accurate, then the development of more laws which acknowledge the continuing inequality between Blacks and Whites is necessary to show that the legal system can work for everyone. More importantly, such laws may lead to a decrease in criminal activity. Indeed, the existing shame-stigmatization cycle demonstrates the need for affirmative race law, such as a racial hoax sanction.

An example provided by Professor Williams illuminates the nexus between racism and crime. Williams, a Black woman, begins her spirit-murder article by recounting a racial incident in which she was denied entrance to a clothing store by a White clerk.¹⁰⁶ Williams details her rage,¹⁰⁷ which she was ultimately able to channel into a public complaint.¹⁰⁸ Referring to her store encounter, Williams confides, "My rage was admittedly diffuse, even self-destructive, but it was *symmetrical*."¹⁰⁹ Williams, a well-known and well-respected law professor, had a legal, productive medium through which to express her anger. The majority of young Black men, embarrassed and angered by the sting of racism, have no such outlet. Thus, Williams argues that there is a causal relationship between racism and crime.

Several recent incidents provide examples of how spirit-murder, micro/macroaggressions, and state lawlessness can escalate into violence. In January, 1995, four Black teens in Kentucky were accused of killing a White man, purportedly because he hung a Confederate flag in the back of his truck.¹¹⁰ In February, 1995, a White rookie police officer shot and killed an unarmed Black youth in a Paterson, New Jersey drug

105. For a supporting political theory, see Thomas Simon, *A Theory of Social Injustice*, in *THE RADICAL PHILOSOPHY OF LAW* 54-72 (David S. Caudill & Steven J. Gold eds., 1995). Simon sketches the outline of a theory of social injustice. His theory seeks to "catalogu[e] and compar[e] the various forms of injustice." *Id.* at 56. Simon notes that it is critical to the success of such a theory "for people to first get straight on what is wrong," *Id.* at 57. Once harm is acknowledged, compensation and restitution can be made available. Simon also discusses the various reactions to powerlessness, including rage, which can take the form of harming an innocent victim. Simon's central theoretical focus is upon the entrenched powerlessness of certain groups (e.g., minorities). He concludes that "[w]hen group powerlessness cuts across generations, when it becomes a . . . defining feature of the group, it should receive top priority on the democratic agenda." *Id.* at 71.

106. Williams, *supra* note 50, at 127-29.

107. "I was enraged. At that moment I literally wanted to break all of the windows in the store and take lots of sweaters . . ." *Id.* at 128.

108. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 46 (1991) (recounting how she typed up a detailed account of the incident, made it into a poster, and attached it to the United Colors of Benneton store window).

109. *Id.* (emphasis added).

110. Carol Castenada, *In Kentucky, Confederate Flag is Fatal*, *USA TODAY*, Jan. 30, 1995, at 4A. Two men have been convicted of murder and sentenced to life in prison. *2 Convicted in Killing over Confederate Flag*, *N.Y. TIMES*, Jan. 13, 1996, at 7.

bust. In response to the New Jersey shooting, one young Black man stated, "The youth of Paterson, we don't want to be violent, but we want justice served[,] . . . if justice is not served, then there will be *repercussions*."¹¹¹ This statement is consistent with Brown-Scott's observation that the uprisings in poor communities are examples of the potential of repressive state action to cause unrest.¹¹² The young Black man in Paterson felt that the state had acted beyond its legal authority and that he had no legal way to voice his discontent *and be heard*. The attempted murder of Stacey Koon, one of the police officers convicted of violating Rodney King's civil rights, is an example of these "repercussions." On the eve of Koon's release from a halfway house, a lone Black gunman went searching for him. Randall Tolbert, the gunman, took three hostages when he was unable to find Koon. He killed one hostage and then was killed by police. According to Tolbert's brother, Randall "wanted to protest that Stacey Koon was [housed in a Black community]" and felt that Koon "should still be in prison." His brother also observed, "It was like they were trying to slap us in the face by putting him here."¹¹³

Within a one-year period (September, 1994 to September, 1995), police departments in three major cities—New York, Los Angeles, and Philadelphia—faced allegations of department-wide, long-standing police corruption.¹¹⁴ Each set of allegations resulted in internal investigations and commission reports. Common to each scandal was that the primary targets of the police lawlessness were minority communities. In Philadelphia, for instance, five police officers pleaded guilty to making false arrests, planting drugs, filing false police reports, and robbing victims during a three-year period.¹¹⁵ Cases involving some 1400 officers were reviewed.¹¹⁶ Such official brutality and harassment serve to create further disillusionment within minority communities. For some, particularly Black men who are the primary targets of police brutality, disillusionment may become anger, then rage. The concern is whether this rage will cause retaliation, either in the form of intraracial¹¹⁷ or interracial violence. The latter could take the form of Blacks committing crimes in White communities and the targeting of White law enforcement officials.¹¹⁸ The criminal actions of police officers and the potential response of minority communities attest to the need for affirmative race law.

As the above instructs, we cannot afford to overlook the link between racism and crime. Poll data show that the void between Black and White views on the legitimacy of

111. Neil MacFarquhar, *Angry Calm at the Services for Teen-Ager Slain by Police*, N.Y. TIMES, Feb. 27, 1995, at B5 (emphasis added).

112. Brown-Scott, *supra* note 52, at 1216-17.

113. Tom Goman & Bettina Boxall, *Family Tells of Slain Gunman's Anger at Koon*, L.A. TIMES, Nov. 25, 1995, at A1.

114. *See, e.g.*, INDEPENDENT COMM'N ON THE LOS ANGELES POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1995) (commission report stemming from the March, 1991 beating of Rodney King); Joe Domanick, *Fuhrman Is Not an Exception*, WASH. POST, Sept. 1, 1995, at A25.

115. *See, e.g.*, Debbie Goldberg, *Police Scandal Creates Storm in Philadelphia*, WASH. POST, Aug. 17, 1995, at A3; Don Terry, *Philadelphia Shaken by Criminal Police Officers*, N.Y. TIMES, Aug. 28, 1995, at A1.

116. Goldberg, *supra* note 115, at A3.

117. *See, e.g.*, James Bennet, *A Woman's Plunge to Death Transfixes Detroit*, N.Y. TIMES, Aug. 23, 1995, at A1. Bennett writes about a Black woman who was involved in two minor traffic accidents. The car she hit was driven by a Black man who gave chase. She was forced to stop and was dragged out of her car by the driver and his two passengers. Her clothes were ripped off and she was beaten. To avoid further assault, the woman jumped off a bridge to her death.

118. Some counties have experienced an increase of assaults against police officers. *See, e.g.*, Jon Jeter, *Officer's Slaying Not Tied to a Fight*, P. G. Police Say, WASH. POST, May 4, 1995, at C1.

the justice system continues to widen.¹¹⁹ There is every indication that this trend will continue, but the need for racial restoration is not apparent to all. People continue to call for the eradication of "race-conscious" remedies that benefit minorities.¹²⁰ In particular, affirmative action programs have been under attack¹²¹ and heightened barriers have been erected to reduce the number of persons who have access to the American mainstream.¹²² Concurrently, there has been the steady barrage of legislation, which is increasingly retributive and will have a disproportionate impact upon Blacks because they are disproportionately involved in the criminal justice system.¹²³ In fact, the recent trend more closely resembles retrenchment than reform. In perhaps the most glaring example, the House of Representatives, in a debate about adopting a "good faith" exception for warrantless federal searches, voted down an amendment that was a verbatim recital of the Fourth Amendment.¹²⁴

C. Economics of the Racial Hoax

Beyond causing sociological injury, the racial hoax also exacts a financial toll. Consequently, economic factors are relevant to an analysis of whether racial hoaxes should be criminalized. Untold resources have been wasted on efforts to locate a fictional *criminalblackman*. In Trenton, New Jersey, which has seen its share of racial hoaxes,¹²⁵ a city official commented, "This kind of accusation [racial hoax] . . . affects us all. It terrorizes a community and discriminates against a race of people. And it is the kind of

119. The Gallup Poll data for 1993 reported that in response to the question, "Do you think that the American justice system is biased against Black people or not?" Thirty-three percent of Whites responded yes while more than twice as many Blacks (68%) did so. Gallup Poll data for the last decade show a burgeoning gulf between how Blacks and Whites view the police. Respondents were asked, "How would you rate the honesty and ethical standards of [the police]?" In 1985, 48% of the Whites stated "very high/high," while only 35% of Blacks said "very high/high." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 159 (Timothy J. Flanagan & Edmund F. McGarrell eds., 1986). By 1993, the gap between Whites and Blacks had doubled: 53% of Whites said "very high/high" and 28% of Blacks said "very high/high." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 165 (Kathleen Maguire & Ann L. Pastore eds., 1994).

The jubilant reaction to the *Simpson* verdict, by some sectors of the Black community, makes manifest how little faith many Blacks have in the criminal justice system. Professor Paul Butler offers "racially based jury nullification" as one way to empower Black jurors and bridge the racial gap in perception of fairness in the justice system. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

120. See, e.g., *U-Md. Combines Black Scholarships with 2nd Program*, WASH. POST, Feb. 6, 1995, at B3 (highlighting actions taken since a federal appeals court in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1995), held that the University of Maryland's Benjamin Banneker scholarship program for incoming Black freshman violated the Equal Protection Clause).

121. See, e.g., B. Drummond Ayres, Jr., *Conservatives Forge New Strategy to Challenge Affirmative Action*, N.Y. TIMES, Feb. 16, 1995, at A1 (referring to the California ballot initiative against state affirmative action programs). Such political maneuvers are examples of what Professor Derrick Bell calls "the principle of involuntary sacrifice." He uses this term to describe how subordinated racial groups are used as political tools to benefit those racial groups in power. The sacrifice takes place so that "identifiably different groups of Whites" can establish or reestablish a relationship. BELL, *supra* note 41, § 1.9, at 29-30. Specifically, in the affirmative action debate, Blacks are being used by politicians to show that they support color-blind laws at the expense of Black progress. It looks as though this is also being done at the expense of White women—the primary benefactors of affirmative action. *Id.*

122. See, e.g., Dan Stein & Herman Schwartz, *Entitlements for Undocumented Aliens*, A.B.A. J., Feb. 1995, at 42 (discussing California's Proposition 187).

123. See, e.g., MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1-2 (1995).

124. Katharine Q. Seelye, *House Backs Bill to Require Restitution from Criminals*, N.Y. TIMES, Feb. 8, 1995, at 16A ("[T]he Republicans defeated a Democratic amendment that simply reiterated the words of the Fourth Amendment to the Constitution. The vote was 303 to 121.").

125. See Adubato, *supra* note 32.

crime that costs taxpayers thousands of dollars to launch massive, futile investigations."¹²⁶

Indeed, a consideration of the economic consequences of the Susan Smith, Jesse Anderson, and Charles Stuart investigations underscores this point.¹²⁷ These cases involved countless days of manhunts, police investigations, and court proceedings. In the Smith case, several agencies were involved in the nine-day search. A precise accounting of the costs is not available, but is estimated in the thousands of dollars.¹²⁸ The F.B.I. and the South Carolina State Law Enforcement Division provided both manpower (*e.g.*, air and ground searches) and technical services (*e.g.*, computer equipment).¹²⁹ The Union County Sheriff's Office and City of Union employees also provided assistance.¹³⁰ Beyond their cost to taxpayers, hoaxes frequently spawn their own cottage industry—for example, civil suits, countersuits, tax investigations, book deals, and paraphernalia. National data collection on the economic impact of racial hoaxes at state and federal levels would buttress the argument for criminalizing the hoax.

IV. A LEGAL RESPONSE: THE LAW AND THE LOGISTICS

A. False Reporting Statutes

Most jurisdictions have statutes that penalize the filing of a false police report.¹³¹ However, these laws are rarely applied to punish a racial hoax perpetrator. None of the racial hoax offenders in the cases discussed above were charged with filing a false police report. At a minimum, it would be expected that in those cases where the hoax was a total fabrication, for example, the Kashani rape case,¹³² false reporting charges would be filed. Notably, of the six cases discussed earlier, only Brawley faced civil sanctions through the legal system.¹³³ The failure to impose any legal sanctions for these hoaxes suggests that the existing penalties are ineffective; the fact that most false report violations constitute misdemeanors may explain their ineffectiveness. On the one hand, adding a false report charge to a case like Susan Smith's might look like overzealous prosecution. Conversely, pursuing such a charge against Miriam Kashani might look like a waste of the prosecutor's time, energy, and resources. The fact that existing false report laws were not applied in *any* of the highly publicized racial hoax cases underscores the need for putting more teeth into the law. The following Sections examine the law on hate crimes and assess the components of a racial hoax law.

126. Douglas H. Palmer, Mayor of Trenton, N.J., Press Release, Jan. 12, 1995.

127. The police handling of the Harris case, *supra* note 15, stands in marked contrast. In the Harris case, the police "didn't go on a witch hunt for an African American male." *Police Say Md. Man Had Fiancee Killed, Blamed Black Robber*, *supra* note 15, at B6.

128. Telephone Interview with Hugh Munn, South Carolina State Law Enforcement Division (Aug. 15, 1995); see also Jo-Ann Clegg, *Susan Smith Should Pay Dearly: Unfit Parents Should Take Heed*, NORFOLK VIRGINIAN-PILOT, Nov. 11, 1994, at 7 ("For more than a week she lied to the authorities, thus triggering an investigation that cost tax payers millions of dollars and had thousands of people searching . . .").

129. Telephone Interview with Hugh Munn, *supra* note 128.

130. Telephone Interview with Linda Jenkins, Deputy Clerk Advisor, Union, S.C. Sheriff's Office (Aug. 15, 1995).

131. See, *e.g.*, CAL. PENAL CODE § 148.5 (West Supp. 1995); MD. ANN. CODE art. 27, § 150 (1994); MASS. ANN. LAWS ch. 269, § 13A (Law. Co-op. 1992).

132. See *supra* notes 19-21 and accompanying text.

133. The assistant county prosecutor filed a \$30 million defamation suit against Tawana Brawley and her advisors. The prosecutor won a default judgment. See *Brawley Case Ruling Favors Ex-Prosecutor*, N.Y. TIMES, May 10, 1991, at B3. Further, steps were taken to sanction her attorneys for obstruction of justice. See, *e.g.*, John Bonomi, *About Justice: Odd Bedfellows Before the Bar*, NEWSDAY, July 10, 1990, at 48.

B. The Law on Hate Crimes

Hate crime¹³⁴ statutes are typically divided into two types.¹³⁵ First, there are those which treat hate crimes as independent criminal offenses. These are referred to as “pure bias” statutes. The Minnesota statute at issue in *R.A.V. v. St. Paul*¹³⁶ is an example of this type.¹³⁷ The *R.A.V.* Court held that the state’s bias crime law had content-based provisions, which rendered it facially invalid, in violation of the First Amendment.¹³⁸

A second type of hate crime statute is one that provides for the “penalty enhancement” of bias-motivated crimes. Under this type of statute, one who commits a criminal offense as a result of bias (e.g., against race, sex, religion, sexual orientation) faces additional penalties. A number of states have adopted the model bias crime provision drafted by the Anti-Defamation League.¹³⁹ The federal government has also enacted penalty enhancement legislation.¹⁴⁰

Penalty enhancement statutes have been upheld by the U.S. Supreme Court. In *Wisconsin v. Mitchell*,¹⁴¹ a Black defendant challenged the state’s penalty enhancement statute. Mitchell, who had been convicted of beating a White boy, faced an increased penalty because his crime was motivated by bias. Under state law, he faced an additional five years for his bias crime.¹⁴² Finding the provision content-neutral, the Court noted that “bias-inspired conduct” is an appropriate arena for penalty enhancement, because it is “thought to inflict greater individual and societal harm.”¹⁴³ Further, the Court observed, such conduct is likely to provoke “retaliatory crimes, inflict distinct emotional harm on their victims, and incite community unrest.”¹⁴⁴ A racial hoax law could be framed as either a pure bias crime or as a penalty enhancement. Given that the Supreme Court has

134. Professor Frederick Lawrence prefers the term “bias crime” rather than “hate crime,” to describe more accurately the perpetrators’ actions. Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 673-74 n.1 (1993).

135. *Id.* at 682.

136. 505 U.S. 377 (1992).

137. The statute provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

138. *Id.* at 396.

139. The ADL model statute provides:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates section [] of the Penal Code (insert Code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a misdemeanor/felony (the degree of criminal liability should be made at least one degree more serious than that imposed for commission of the offense).

ANTI-DEFAMATION LEAGUE, HATE CRIMES STATUTES: A STATUS REPORT (1991).

140. Hate Crimes Sentencing Enhancement Act of 1993, Pub. L. No. 103-322, 108 Stat. 2096 (1994).

141. 113 S. Ct. 2194 (1993). In October, 1989, Mitchell and some of his friends discussed a scene from the movie “Mississippi Burning.” In the scene, a White man beat a young Black boy who was praying. After their conversation, Mitchell and his friends decided to “move on some white people,” and severely beat a White boy who was passing by. *Id.* at 2196.

142. WIS. STAT. § 939.645 (1994). Notably, the five-year penalty enhancement provision exceeds the two-year maximum sentence for the crime of aggravated battery.

143. *Mitchell*, 113 S. Ct. at 2201.

144. *Id.*

upheld bias crime enhancement, this seems to be the safer constitutional route. However, a content-neutral bias statute would also likely withstand constitutional scrutiny.

C. *The Racial Hoax as Crime*

1. Constitutional Concerns

The road to making the racial hoax a crime is, constitutionally speaking, a much smoother road than the one which earlier hate crime legislation had to travel. This is primarily because the First Amendment is a nonissue in the racial hoax context.¹⁴⁵ It is a longstanding principle of constitutional law that where speech entails imminent, lawless action, it is not accorded First Amendment protection.¹⁴⁶ Thus, one does not have the right to yell “fire” in a crowded video store.¹⁴⁷

Where one uses a racial hoax to mislead law enforcement, certain, immediate responses can reasonably be expected by both law enforcement and the community. The speech element of the racial hoax triggers numerous actions, including deployment of police officers to particular neighborhoods to locate potential suspects, creation of “wanted” posters, notification of the media, announcement of all points bulletins, and meetings by the police and/or community groups to discuss strategy on how to proceed. The person uttering the words of a racial hoax has done more than simply speak. He has pointed his finger at a community of people in an attempt to thwart justice. By design, the speech of the racial hoax is lawless conduct, unprotected by the Constitution.

2. Logistics of a Racial Hoax Law

The individual, group, and societal harms caused by the racial hoax were discussed in Parts II and III. These concerns outline the parameters of a racial hoax law. Next this Article looks at one state’s proposal for criminalizing the hoax.

a. New Jersey Legislation

New Jersey is the only state which has considered legislation specifically designed to target racial hoax perpetrators. The legislation, proposed in January, 1995, was drafted in direct response to two White-on-Black racial hoaxes.¹⁴⁸ The proposed New Jersey statutory amendment to “False Reports to Law Enforcement Authorities” reads:

a. Falsely incriminating another. . . (2) A person who knowingly gives or causes to be given false information or a description of a fictitious person to any law enforcement officer with purpose to implicate another because of race, color, religion, sexual orientation or ethnicity commits a crime of the third degree.

145. Professor Lawrence refers to the free-speech-versus-bias-crime debate as a “false paradox.” He states: The apparent paradox of seeking to punish the perpetrators of racially motivated violence while being committed to protecting the bigot’s right to express racism is a false paradox. Put simply, we are making this problem harder than it needs to be. We must focus on the basic distinction between bias crimes—such as racially motivated assaults or vandalism—and racist speech.

Lawrence, *supra* note 134, at 676.

146. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

147. This is an updated version of Justice Oliver Wendell Holmes’ pronouncement that one does not have the right to “shout fire in a theatre.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

148. Adubato, *supra* note 32, at B7.

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- c. A person who violates subsection b. [fictitious reports] is guilty of a crime of the fourth degree if the person acted with purpose to implicate another because of race, color, religion, sexual orientation or ethnicity.
- d. Restitution. In addition to any other fine, fee or assessment imposed, any person convicted of an offense under this section shall be ordered to reimburse the governing body of the municipality for the costs incurred in investigating the false information or the fictitious report.¹⁴⁹

Because New Jersey is the only jurisdiction that has considered racial hoax legislation, it will serve as a referent for the following discussion on the elements of a racial hoax law. There are, broadly speaking, four perpetrator/victim racial hoax combinations:

White perpetrator/Black victim (A) (e.g., Harris, Smith, Anderson, Kashani, and Stuart)	Black perpetrator/Black victim (C)
Black perpetrator/White victim (B) (e.g., Brawley and Collins)	White perpetrator/White victim (D)

The White-on-Black and Black-on-Black hoaxes (Cells A & B) should be the emphasis of a racial hoax law.¹⁵⁰

b. The Offender

A racial hoax law should be written such that anyone, regardless of race, who perpetrates a hoax will be subject to sanction. The earlier discussion and analysis supports this approach. The nature of and damage done by the hoax is so great that nobody should be excluded from those who can be charged. Theoretically, there is harm done irrespective of whether the hoax perpetrator is White or Black. Practically, however, there is no empirical evidence of Black-on-Black hoaxes.¹⁵¹ All of the hoaxes discussed have involved "cross-racial fabrication" (Cells A & C).¹⁵²

149. N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database. False incrimination absent bias is a fourth-degree offense, N.J. STAT. ANN. § 2C:28-4(a) (West 1995), punishable by imprisonment for a maximum of eight months, *id.* § 2C:43-6(a)(4), and/or a \$7500 fine. *Id.* § 2C:43-3(b). The penalty for a third-degree offense is imprisonment for three to five years, *id.* § 2C:43-6(a)(3), and/or a fine of \$7500. *Id.* § 2C:43-3(b). Absent bias, the filing of a fictitious police report would be a disorderly persons charge, *id.* § 2C:28-4(b), which is not considered a crime in New Jersey. *Id.* § 2C:1-4(b). No official action was taken on the bill during the 1994-1995 legislative session. The bill, renumbered A5 61-1996, is now in the Assembly Judiciary Committee. Telephone Interview with Dominick DeMarco, Legislative Aide to Congresswoman and bill sponsor Shirley Turner (February 2, 1996).

150. There are a number of other possible racial combinations, such as White-on-Latino and Latino-on-Black. As argued throughout this Article, the perception and stereotype of Blacks as criminal is so deeply entrenched and widespread that special legal focus should be given to this problem. Latinos, in particular, also face negative criminal stereotyping. See, e.g., MANN, *supra* note 39, at 101-02. Although the discussion herein is confined to racial hoaxes, the New Jersey law has other categories, including ethnicity, sexual orientation, and religion. N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database.

151. In February 1996, Gerald Hill, a Black man, was charged in a 1200-count indictment with child abuse. Specifically, Hill was accused of abusing his four children, ages 5 to 12, over a five-year period. The charges allege sexual abuse, injecting the children with cocaine, and feeding them roaches and rats. Just days following the indictment, three of the children stepped forward to recant their allegations, saying that a relative had badgered them into making the allegations. If the charges are false, this case would be an example of a Black-on-Black racial hoax. *Bond in Abuse Case Stands; Judge Not Swayed by Kids' Recantation of Charges*, CHI. TRIB., Feb. 10, 1996, at 5.

152. Glidewell, *supra* note 85, at 1.

There might be a different community response and injury depending upon the race of the offender. Where a White offender points the finger at a Black person, it acts to further polarize Black and White communities. As a result, Blacks feel more vulnerable to indiscriminate police practices and Whites feel more vulnerable to crime by Blacks. Conversely, where the hoax perpetrator is Black and the victim is Black, it is probable that the hoax "crime" will not be taken as seriously. The police are not likely to treat as seriously the claim of victimization of someone Black as they would a similar claim by someone White.¹⁵³

White-on-Black hoaxes, like the Charles Stuart and Susan Smith cases, receive a great deal of media attention, as predicted by this model. It is also less probable that a Black-on-Black hoax would be uncovered because such a fabrication would appear to reflect the status quo—the erroneous belief that the majority of crime is Black-on-Black. In fact, Whites comprise the majority of those arrested in any given year.¹⁵⁴ Furthermore, more than eighty percent of all crime is intraracial; that is, with most crimes, the offender and victim are of the same race.¹⁵⁵ Given that there were no Black-on-Black hoaxes found, the argument for extending a racial hoax law to include them is theoretical only. The Black-on-Black and the White-on-Black hoax should be sanctioned because they both perpetuate the existing *criminalblackman* stereotype.

Professor Mari Matsuda, in a compelling argument for making race-based hate speech a crime, contends that only Whites can be offenders.¹⁵⁶ She states that the harm of racist speech is greatest where the speech reinforces an "historically vertical relationship."¹⁵⁷ Likewise, Professor Marc Fleischauer, in his discussion of hate crime, argues that penalty enhancement should only attach when there is a White offender.¹⁵⁸ Without this "Whites only" rule, "minorities will be subjected to enhanced penalties at a disproportionate rate compared to Whites because it is the nature of society for the majorities to prosecute minorities more frequently and with more vigor than vice versa."¹⁵⁹ The fact that *Wisconsin v. Mitchell*¹⁶⁰—the only hate crime sentencing enhancement case decided by the U.S. Supreme Court—involved a Black defendant, supports Fleischauer's observations.

While Fleischauer and Matsuda make strong arguments, the line that they draw between the race of the perpetrator and race of the victim should not be applied to the racial hoax. First, unlike the victim of racist hate speech, the victim of a racial hoax is not directly assaulted by the offender. Second, it is not just one person who is harmed by a racial hoax, but an entire community. The harm of a Black-on-Black hoax is different in degree from the harm of a White-on-Black hoax; both, though, cause harm because the racial hoax operates as a macroaggression.¹⁶¹ Given the harm done by pointing a false finger at a Black person, anyone of any race who perpetrates a criminal hoax should be

153. See, e.g., Laure Weber Brooks, *Police Discretionary Behavior*, in CRITICAL ISSUES IN POLICING 140, 154-55 (Roger G. Dunham & Geoffrey P. Alpert eds., 2d ed. 1993).

154. FEDERAL BUREAU OF INVESTIGATION, *supra* note 39, at 235.

155. BUREAU OF JUSTICE STATISTICS, *supra* note 21, at 61.

156. Matsuda, *supra* note 74, at 36.

157. *Id.*

158. Marc Fleischauer, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 703 (1990).

159. *Id.* at 706.

160. 113 S. Ct. 2194 (1993).

161. See *supra* notes 58-62 and accompanying text.

penalized. Notably, the New Jersey legislation does not make a distinction based upon race of the perpetrator.

c. Targets and Victims

With regard to who classifies as a victim for the racial hoax, two key questions arise. First, should a racial hoax law mandate an identifiable, named victim—a “Willie Bennett requirement”?¹⁶² Under existing false report statutes, it is not required that there be an identifiable victim. Therefore, no such requirement should be part of a racial hoax law. The goal of false reporting statutes is to punish intentional efforts to thwart law enforcement. Whether there is an identifiable victim or not, the racial hoax causes harm which justifies a sanction.

Professor Frederick Lawrence, discussing the breadth of harm caused by hate crimes, points out that “[t]he victim suffers for being singled out on the basis of her race, and the general community of the target racial group is harmed as well.”¹⁶³ As applied to the racial hoax, once a “victim” says “a Black guy did it,” she has hurled a racial epithet which is actionable. Given the predictable response of law enforcement to such statements, the hoax is akin to physical harassment solely on the basis of race. It is as if Susan Smith, Jesse Anderson, Miriam Kashani, and Charles Stuart called every Black man a “low life,” “hoodlum,” or “criminal” because of his race. It is Blacks as a group, and Black men in particular, who are directly harmed. The New Jersey legislation recognizes the need to penalize someone who uses a racial hoax to target a specific person because of his race (“False Incrimination”), as well as the need to penalize someone who uses the hoax to create a nonexistent villain (“Fictitious Reports”).¹⁶⁴

Assuming there is a legally cognizable victim, a second important question regarding victim status is which racial groups should receive protection under a racial hoax law. A strong argument can be made for requiring a Black victim.¹⁶⁵ Ideally, a racial hoax law would only be actionable where the finger has been pointed at someone Black. This is based upon the enduring *criminalblackman* image.¹⁶⁶ Fleischauer, in his discussion of Florida’s hate crime statute, argues that it would be constitutional to make minorities the only protected group.¹⁶⁷ Fleischauer observes that one of the express goals of hate crime legislation is to curb racism and empower minorities.¹⁶⁸ To allow a racial hoax law to encompass both White-on-Black hoaxes and Black-on-White hoaxes unfairly accords the two equal weight. As the above discussion on the sociology of the racial hoax makes clear,¹⁶⁹ beyond the individual harm a racial hoax may cause to a targeted Black person, it brings harm to Blacks as a group and creates more tension between Blacks and Whites. There is no indication that the harm of a White-on-Black hoax or Black-on-Black hoax

162. A Black man named Willie Bennett was the initial suspect in the Charles Stuart case. *See supra* notes 22-25 and accompanying text.

163. Lawrence, *supra* note 134, at 698.

164. N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database.

165. This could be reasonably expanded to include Hispanics/Latinos who also have the dubious distinction of symbolizing crime. *See, e.g.,* MANN, *supra* note 39, at 101-02.

166. *Cf.* Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence”*, 99 YALE L.J. 845, 852-53 (1990) (arguing that prosecutors are less likely to pursue hate crimes with minority victims).

167. *See* Fleischauer, *supra* note 158, at 703.

168. *Id.* at 707 n.63.

169. *See supra* part I.B.

is comparable to the harm of either a White-on-White or Black-on-White hoax. The New Jersey amendment is silent with regard to victim's race—the inference being that a victim can be of any race.

The Equal Protection Clause presents the biggest roadblock to the proposed restriction on who qualifies as a victim for the racial hoax law. Such a distinction is legally justified because the harms of the hoax (White-on-Black and Black-on-Black versus Black-on-White and White-on-White) differ. Further, Black-on-White and White-on-White hoaxes are not without legal sanction; existing false reporting statutes provide a penalty for these hoaxes. While Black-on-White hoaxes do occur (as in the Tawana Brawley case), they are so infrequent that their inclusion in racial hoax laws is unnecessary. Likewise, White-on-White hoaxes, while they do occur, do not pose the same societal problems as those where the victim is Black. Considering the U.S. Supreme Court's "color-blind" leanings,¹⁷⁰ however, the safest route would be to draft racial hoax legislation so as to protect a victim of any race.

d. Intent

A racial hoax law could be written to require that the perpetrator act either "purposefully" or "knowingly." If "knowledge" were required, the prosecution would only have to show that the hoax perpetrator was "practically certain" that law enforcement forces would respond and that some harm would occur as a result of the race labelling. A "purposeful" intent requirement, on the other hand, would require prosecutors to prove the hoax perpetrator had as his or her "conscious object" the bringing about of the particular result—triggering law enforcement and causing harm to a specific Black person or Blacks as a group.¹⁷¹

The New Jersey legislation appears to impose a general intent requirement. Under the proposal, one could be charged with false incrimination on the basis of race, where one "knowingly provides false information to a law enforcement officer with purpose to implicate another because of race."¹⁷² To avoid the problem of attempting to determine whether the hoax perpetrator intended to cause harm to Blacks as a group or to any particular Black person, specific intent should not be an element of a racial hoax offense. The very fact that a racial hoax has been employed means that existing stereotypes have been reinforced and racial dissension furthered. Therefore, society has been harmed. Professor Charles Lawrence offers support:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.¹⁷³

170. See, e.g., *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995) (mandating heightened legal proof to support a set-aside contract program by requiring the government to demonstrate a narrowly tailored, compelling state interest, based upon clear evidence of past discrimination).

171. See MODEL PENAL CODE § 2.02 (1992).

172. N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database.

173. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (citations omitted).

Furthermore, given the insidious, amoeba-like qualities of racism, a specific intent requirement (e.g., intent to harm on the basis of race of alleged suspect) would render it virtually impossible to hold someone accountable. The prosecution should not be required to establish intent to mislead law enforcement, and they should not be required to prove that the hoax perpetrator is a racist. As set forth in the New Jersey law, it is sufficient that the perpetrator has blamed someone because of his race. The reasons behind the fingerprinting should be irrelevant.

Each of the racial hoaxes discussed above involved a crime index offense.¹⁷⁴ There is no reason, however, to limit a racial hoax law to these eight offenses. For example, a racial hoax might be perpetrated for the non-index crimes of assault and fraud. The New Jersey proposal does not limit its application to specific crimes.¹⁷⁵

e. Penalties and Remedies

Perpetrating a racial hoax should subject one to a felony charge. The hoax is a serious crime and has ramifications beyond any one specific case. Further, a penalty must be imposed which would deter others from devising hoaxes. A state could decide to impose a criminal fine and/or prison term. Given that two of the five White-on-Black hoaxes were perpetrated by a person considered to be middle class (Charles Stuart and David Anderson), a fine would have had to have been substantial to deter them. Interestingly, both Anderson and Stuart created a hoax as a scheme to get money. Prison time for the hoax may be a more effective deterrent than a fine.

Beyond a prison term and/or a criminal fine, a hoax perpetrator should be required to pay restitution. The New Jersey provision requires restitution in the amount of law enforcement costs for deployed resources.¹⁷⁶ Additionally, payment of court costs and restitution to any identifiable victims should be imposed.

In addition to imposing criminal penalties and restitution, an apology requirement ought to be considered. The hoax offender should be required to apologize to the public in general, and the Black community in particular, for playing on racial stereotypes.¹⁷⁷ Also, the apology would be one step toward healing a racially divided community. Without question, with White-on-Black hoaxes the most aggrieved group will be the Black community. Following Susan Smith's confession, there were numerous calls for an apology to the Black community. One journalist commented, "This may be difficult for non-minorities to accept, but black people do feel [e]specially violated by Susan Smith's lie."¹⁷⁸ Demands were also made for an apology in the Anderson, Kashani, and

174. The following are classified as crime index offenses: murder and nonnegligent homicide, burglary, arson, forcible rape, robbery, motor vehicle theft, aggravated assault, and theft. FEDERAL BUREAU OF INVESTIGATION, *supra* note 39, at 380.

175. See N.J. Assembly Bill 2553, 206th Leg., 2d Sess. (1995), available in WESTLAW, NJ-Bills Database.

176. *Id.*

177. Professor Richard Abel has suggested that an apology is an appropriate sanction for hate speech. RICHARD ABEL, SPEECH AND RESPECT 28 (1995). For a critique of this argument, see RICHARD DELGADO & JEAN STEFANCIC, APOLOGIZE AND MOVE ON? (1995).

178. Raspberry, *supra* note 26. Following the George Washington University rape hoax, see *supra* notes 19-21, the school president, in a letter addressed to the university community, wrote, "We must understand that our black students, faculty, staff and neighbors have been given offense and reason to feel concerned and anxious. They were special victims of the hoax." Barras, *supra* note 20, at B4. Smith's brother did issue an apology. See Parente, *supra* note 28, at A66.

Stuart cases.¹⁷⁹ At the same time the Black community is injured, so is the White community. An apology, therefore, is due the entire community.¹⁸⁰

f. Reporting Requirement

In the same way that there are reporting requirements for bias crimes,¹⁸¹ there should be reporting requirements for racial hoaxes. It is impossible to estimate the annual frequency of racial hoaxes, as there exists no data bank for this information. More importantly, it is difficult to piece together this information because it is not part of the recorded case information upon closing a case file. A national database should be created which tracks information on racial hoaxes, including the race, sex, and age of the offender and victim; the underlying hoax offense; the number of days of the hoax; and an estimate of the economic cost attributable to the hoax. These data could be compiled as a part of the information collected for the Hate Crime Statistics Act.¹⁸²

CONCLUSION

As the above analysis makes clear, there is a manifest need to continue developing race-affirming legislation. The empirical literature shows that Whites and Blacks perceive two separate justice systems in operation, one which works and one which does not. The negative perception Blacks have—based in part on a long history of legalized racial subordination—should not be ignored. One way this perception gap can be addressed is by changing the reality of existing law and making the law more responsive to existing racial realities. This can be done by creating affirmative race law. Discussing the import of bias crime legislation, Professor Frederick Lawrence correctly states that it “represent[s] the highest expression of a societal commitment to racial, religious, and ethnic harmony.”¹⁸³

A racial hoax law is offered as one way to fill this legal void. With the exception of the New Jersey legislation, there has been a deafening legal silence to the ravages of the racial hoax. Williams, Davis, and Brown-Scott, in their tripartite discussions of spirit-murder, microaggression, and state lawlessness, provide a paradigm for assessing the value of a racial hoax law.

Beyond theoretical support for making the racial hoax a crime, there is criminological support as well. The *criminalblackman* stereotype, which is continually reinforced by the shame-stigmatization cycle, makes the nexus between perceptions of criminal injustice and criminal activity more than a theoretical proposition.

Further, as the legal analysis makes clear, such a law is constitutionally permissible. Not only is a racial hoax law constitutionally acceptable, it is arguably legally mandated. It provides a legal route for addressing this country's racial past, as it is played out today

179. More than one entity could be asked to apologize—for example, the media, the police, the mayor, and the defendant.

180. An educational component would also be useful for the racial hoax. Specifically, a requirement that the perpetrator take a “crash course” on crime statistics. This would include Uniform Crime Reports data on actual arrests, crime rates by race, and the prevalence of intraracial versus interracial crime. Whether this should be legally mandated remains unclear. This could be part of a criminal justice information packet provided upon conviction.

181. Hate Crime Statistics Act, 28 U.S.C. 534 (Supp. V 1993).

182. *Id.*

183. Lawrence, *supra* note 134, at 721.

in perceptions of crime. Just as important, given that hate crime statutes are similar to antidiscrimination laws,¹⁸⁴ a racial hoax law is a natural and necessary extension of legally cognizable racial harm.

In sum, a racial hoax law acknowledges American racial history, the power of negative stereotypes based upon this history, and the need for legal redress. Absent a specific legal intervention, like a racial hoax law, people will continue to use hoaxes to play the race card and avoid criminal liability. In fact, without substantive legal consequence, we are encouraging people to employ racial hoaxes. A racial hoax law would deter such incidents. Further, enactment would send a message, both real and symbolic, that we will not tolerate the wide-ranging and deleterious impact of racial hoaxes.

184. The *Mitchell* Court noted that "motive plays the same role under the Wisconsin statute as it does under the federal and state anti-discrimination laws." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2200 (1993); see also *Leading Cases*, 107 HARV. L. REV. 144, 238-39 (1993).

