

---

Volume 9

Issue 2 2005: *Symposium - Disentangling Fact  
From Fiction: The Realities of Unequal Health  
Care Treatment*

Article 2

---

October 2015

## Considering Tortious Racism

Camille A. Nelson

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

---

### Recommended Citation

Camille A. Nelson, *Considering Tortious Racism*, 9 DePaul J. Health Care L. 905 (2005)

Available at: <https://via.library.depaul.edu/jhcl/vol9/iss2/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

## CONSIDERING TORTIOUS RACISM

Camille A. Nelson \*

*My own view is that we did brilliantly up until about the [19]60s and then we lost it. I think the pain of racism really hasn't been fully articulated yet. We talk about various changes and all of that, but we've underestimated the psychological damage American slavery and its legacy has wrought upon the lives of Blacks in general.<sup>1</sup>*

### INTRODUCTION

The recent concurrence of Justice Ginsburg in *Grutter v. Bollinger*,<sup>2</sup> and her dissent in *Gratz v. Bollinger*,<sup>3</sup> cogently explore what W.E. DuBois termed problems of the "color line".<sup>4</sup> The ongoing consequences of racism<sup>5</sup> in America reveal a complicated racial caste

---

\* Associate Professor, Saint Louis University School of Law; LL.B. University of Ottawa, Canada, LL.M Columbia Law School. I wish to thank Dean Jeffrey Lewis and the faculty of Saint Louis University School of Law for their support. As my thoughts developed I was particularly grateful to the organizers and participants of the Congress of Law and Mental Health, Montreal 2001, and to the scholars and activists who attended the Midwestern People of Color Legal Scholarship Conference 2002 hosted by DePaul College of Law and Loyola College of Law for providing valuable feedback. Thanks also to the Law, Cultures, and the Philosophy of 'Science', Mid-Atlantic People of Color Conference, held at Washington and Lee University, School of Law, University of Cincinnati, School of Law and Rutgers School of Law - Camden for allowing me to present this paper as a work in progress. Also, a special thanks to my research assistants, Ms. Robyn Hill, Mr. Piran Farhadieh and Mr. Eric Tuncil for their diligence and hard work.

<sup>1</sup> Interview by George Yancy with Laurence Thomas, in *AFRICAN-AMERICAN PHILOSOPHERS: SEVENTEEN CONVERSATIONS* 298 (George Yancy ed., 1998) (cited in JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM* 42 (2003)).

<sup>2</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>3</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>4</sup> See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* 13 (Dover Publications 1994).

<sup>5</sup> See David Williams et al., *Racial Differences in Physical and Mental Health*, 2 AM. J. HEALTH PSYCH. 335, 336 (1997) ("racism includes an ideology of superiority that categorizes and ranks various groups, negative attitudes and beliefs about outgroups and differential treatment of outgroups by individuals and societal institutions."). See generally JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES AND FUTURE REPARATIONS* (2000) (exploring many manifestations of racism including systemic

system, the medico-legal consequences of which merit exploration.<sup>6</sup> Following in the footsteps of other great jurists, Justice Ginsburg situates the challenges facing persons of color in the context of American history and connects the racialized dots to recognize the ongoing effects of racism.<sup>7</sup> Together with the majority opinion in *Grutter*,<sup>8</sup> Justice Ginsburg acknowledges that race still matters in America. Segregation persists, both educational and residential. Further, indicia of socio-economic status (SES), together with employment and health status, reveal continuing disparities along racial lines.<sup>9</sup> The reality of disparate physical and mental health care, which

---

racism, the legacy of slavery, racist ideology, racial imagery and racism in everyday practices).

<sup>6</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM 1960S TO THE 1980S* 12 (1986) (cited in Williams, *supra* note 5, at 336). Anthropologists and health researchers emphasize that “race is a gross indicator of distinctive social and individual histories and not a measure of biological distinctiveness. Races are socially constructed categories that have emerged in the context of social and economic oppression and have been used to perpetuate economic, cultural, ideological, political and legal systems of inequity.” Williams, *supra* note 5, at 336. Race is a concept “generated across a range of discourses and used to distinguish and classify human beings.” Camille A. Nelson, *(En)Raged or (En)Gages: The Implications of Racial Context to the Canadian Provocation Defense*, 35 U. RICH. L. REV. 1007, 1010 n.23 (2002) (citing CAROLINE KNOWLES, *RACE DISCOURSE AND LABOURISM* (1992)). The concept of race generally has “some phenotypical component such as skin color upon which social, cultural and psychological differences are constructed.

<sup>7</sup>See *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting) (“This insistence on “consistency” would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. ... But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”).

<sup>8</sup>See *Grutter*, 539 U.S. at 333 (O’Connor, J., majority) (“[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”).

<sup>9</sup>See *Gratz*, 539 U.S. at 299 (Ginsburg, J., dissenting).

In the wake “of a system of racial caste only recently ended,” large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate

contributes to disparate physical and mental health, is intricately connected to SES and race.<sup>10</sup> By highlighting several areas disproportionately affected by racialization, Justice Ginsburg recognizes the continuity of negative societal consequences derived from conscious or unconscious racial bias.

This article will focus upon the mental health consequences of the American racial caste system and consider how tort law might address these disparities to achieve racial recompense. The disparities created by societal constructions of race<sup>11</sup> will be conceptualized from an impact-driven perspective. This perspective acknowledges that the consequences of racial disparities, which are closely tied to disparities in socio-economic status,<sup>12</sup> are often abusive to those so victimized. Recognition of the resultant negative mental health sequelae, which flows from racial victimization, demands exploration of the remedial compensation the law might provide to those abused by systemic and individualized racism. In this way, the consequences of racial discrimination are recognized as analogous to the consequences flowing from other abusive contexts.

---

markets and consumer transactions. Bias both conscious and unconscious reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice. *Id.*

<sup>10</sup> See DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION 3-31 (1999).

<sup>11</sup> This view does not deny that there may be biological aspects to race. See *supra* n.6. However, science has established that genetic and biological factors are not the sole nor the central defining characteristics of race and are, accordingly, unlikely to be the primary sources of racial differences in health. See generally Norman B. Anderson et al., *Autonomic Reactivity and hypertension in blacks: A review and proposed model*, 1 ETHNICITY & DISEASE 154 (1991); Maya McNeilly et al., *The Perceived Racism Scale: A Multidimensional Assessment Of The Experience Of White Racism Among African Americans*, 6 ETHNICITY & DISEASE 154 (1996) (cited in Williams, *supra* note 5, at 336).

<sup>12</sup> SHARMILA LAWRENCE ET AL., NATIONAL CENTER FOR CHILDREN IN POVERTY, DEPRESSION, SUBSTANCE ABUSE, AND DOMESTIC VIOLENCE 10, available at <http://www.nccp.org/media/dsd04-text.pdf> (last visited Sept. 28, 2004); National Center for Children in Poverty, Disasters and Domestic Violence, [www.ncptsd.org/facts/disasters/fs\\_domestic.html](http://www.ncptsd.org/facts/disasters/fs_domestic.html) (last visited Sept. 28, 2004); JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE, available at [www.ssw.umich.edu/trapped/pubs\\_trapped.pdf](http://www.ssw.umich.edu/trapped/pubs_trapped.pdf) (last visited Sept. 28, 2004). See Lori Heise et al., Center for Health and Gender Equity, *Ending Violence Against Women* (Population Reports, Series L, No. 11, 1999), available at [http://www.jhuccp.org/pr/111/111chap5\\_3.shtml](http://www.jhuccp.org/pr/111/111chap5_3.shtml) (last visited Jan. 10, 2006).

Within the American system of racial apartheid,<sup>13</sup> a norm of disparate impact is created at the intersection of race and class. The exploration of issues related to the physical and psychological impact, versus intentionality, of racialized abuses is mandated if one takes seriously the goal of racial recompense and the (re)creation of equality maximizing non-constitutional law doctrine.<sup>14</sup> Focus upon *intent* in the absence of *impact* marginalizes a central component of any analysis of racism. As the legal tests<sup>15</sup> have proven to be significant hurdles for the racially marginalized to overcome, constitutional protections are not always accessible.<sup>16</sup> Similarly, the great promise of civil rights laws has been elusive.<sup>17</sup> Although originally created to address racial disparities and racial abuses, civil rights doctrine has not proven to be the golden vehicle for remedying racial wrongs. Moreover, the language of civil rights has been co-opted and is often used by those who are antagonistic to its founding principles and origins.<sup>18</sup> Furthermore,

---

<sup>13</sup> See generally PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM : THE DARK FIGURE OF RACISM (Dragan Milovanovic & Kathryn K. Russell eds., 2001).

<sup>14</sup> Although racial differences are generally reduced with improved SES, they frequently persist even after adjustment for income, class, and education. Moreover, for some of the indicators of SES, racial differences increase and are worsened as SES improves. Therefore, exclusive emphasis on differences in SES as solely responsible for racial differences in health is inadequate and unfounded. See Williams, *supra* note 5, at 337; Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963).

<sup>15</sup> U.S. CONST. amend IV (describing the discriminatory effect needed to determine whether or not segregation was intended by certain municipalities).

<sup>16</sup> See Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (discussing the doctrine of discriminatory purpose which was established in the 1976 decision of *Washington v. Davis*, 426 U.S. 229 (1976)). This well establishing line of reasoning provides that Title VI does not of its own force proscribe unintentional racial discrimination, no matter its impact.

<sup>17</sup> See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books 1992); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE AND UNEQUAL* (Ballantine Books 1992); JOE R. FEAGIN, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (Beacon Press 1994); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995) (discussing the failure of civil rights pleadings to adequately portray, through language, the reality of the abuses sought to be remedied); Emily Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003).

<sup>18</sup> See American Civil Rights Institute, <http://www.acri.org>; Center for Equal Opportunity, <http://www.ceousa.org>.

criminal law sanctions for hate crimes and hate speech are often unwieldy and present their own challenges for effective utilization.<sup>19</sup> Therefore, it behooves those interested in achieving compensation for racial abuses to consider all of the legal and non-legal options available. This includes revisiting traditional, even archaic, legal principles with equality-seeking norms in mind. Such a revolutionary exploration of traditional doctrine entails working within the legal system, utilizing every available doctrine for equality-seeking ends, while simultaneously agitating for structural changes that make utilization of such exclusive doctrine ultimately unnecessary.

With these normative goals in mind, this article will focus on the potential of some tort law doctrines to be used as vehicles for analysis of the impact of racial abuse. The intentional tort law doctrines of assault, battery and infliction of nervous shock will be considered together with the negligence law proximate cause doctrines of the Thin-Skull plaintiff and Eggshell personality as capable of providing legal remedies for mental and physical harms caused by racial abuse. Revisiting these foundational tort doctrines conceptually opens space for their consideration as legal theories capable of racial contextualization. The later two substantive law doctrines are interesting precisely because they allow for tort recovery when the plaintiff is not "ordinary" in the common legal sense of the word. This baseline consideration of "normalcy" will be explored from a racialized perspective with reference to what shall be referred to as "critical psychology" and "critical sociology."<sup>20</sup> Importantly, critical psychology and critical sociology address the socio-political constructs that impact mental, physical and spiritual health, thereby disparately

---

<sup>19</sup> Legislation imposes significant limitations on full recovery, be that free speech concerns, stringent intent requirements and disparate enforcement. *See generally* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?* (1997); JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* (2002); JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998); Valeria W. Weaver, *The Failure of Civil Rights 1875-1883 and Its Repercussions*, 54 J. NEGRO HIST. 368, 373-75 (1969); Risa L. Goluboff, *The Thirteenth Amendment And The Lost Origins Of Civil Rights*, 50 DUKE L.J. 1609.

<sup>20</sup> This critical interdisciplinary approach recognizes critical psychology and sociology as those sub-categories of their disciplines that respond to the traditionally assumed universality of experience by recognizing the subjectivity of experience, especially as the psyche is impacted by societal factors including race, gender, sexual orientation, class, culture, religion and the intersection of these realities.

affecting those operating at the margins of society.<sup>21</sup>

Part I of this article will explore a cogent example of racialized abuse. Specifically, the cross-burning cases which were consolidated in *Virginia v. Black*,<sup>22</sup> a case decided by the United States Supreme Court in the spring of 2003 will be considered in light of the critical psychology and sociology. This case is interesting for a number of reasons, not the least of which is the ignored mental and physical effects of such racialized abuse on those so victimized. Part II uses the facts from a St. Louis racial incident as a hypothetical framework for exploration of tort law doctrine capable of achieving recompense for racial abuse. In the likely event that the tortfeasor attempts to articulate lack of intention in committing such racial abuse, the negligence law proximate cause liability enhancers of the thin-skull plaintiff and the egg-shell doctrine will be examined in Part III. This part will view the recent articulation and settlement of an eggshell claim at the University of Virginia, School of Law. The final part will analyze the potential advantages and disadvantages of such racial contextualization as political paradox. Critical psychology and sociology will be explored throughout the article in order to assess how best to engage and inform tort law with the normative goal of equality enhancement.

## **PART I: CROSS BURNING AS RACIALIZED ABUSE**

*'a page of history is worth a volume of logic'*<sup>23</sup>

### **A. Virginia v. Black Through The Racially Distorted Lens Of American History**

The cases of *O'Mara v. Commonwealth of Virginia* and *Elliott v. Commonwealth of Virginia*<sup>24</sup> involve the non-consensual attempted burning of a cross in the backyard of the home of James S. Jubilee, an African-American man. The companion case of *Black v.*

---

<sup>21</sup> See, e.g., Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77 (2003).

<sup>22</sup> *Virginia*, 538 U.S. at 343.

<sup>23</sup> *Id.* at 388 (Thomas, J., dissenting).

<sup>24</sup> *Id.* at 343.

*Commonwealth of Virginia* involves a Ku Klux Klan (KKK) rally on private property with the permission of the owner, where a cross was burned as part of the ceremony. Although the cross burned in *Black* was within view of a public highway, (and thus might have affected passersby) *O'Mara* will be focused upon in light of the method of intimidation chosen by O'Mara and Elliott to harass their Black neighbor.

Misters O'Mara and Elliott claim that they burned the cross on the lawn of their neighbor, Mr. Jubilee, since they were angry that he asked about their use of their back yard as a firing range. While O'Mara and Elliott claim that theirs was not a cross burning based on racism, but rather neighborly intimidation, their chosen method of intimidation is insightful and reveals the historically steeped racial hostility under which they labored. They knew their neighbor, Mr. Jubilee, was Black and they also must be deemed to know the history of their country – they certainly know of their right to bear firearms. Instead of selecting one of the many race-neutral modes of communication and intimidation,<sup>25</sup> they opted to burn a cross on the private property of their Black neighbor. In all likelihood they did this because they knew that cross burning in America has a certain historical salience especially when deployed against people of color and those deemed enemies by the KKK.<sup>26</sup> If they did not actually know this racialized history, they ought to have known - such a-historical negligent racism should not provide a shield from impact driven racial recompense.

The history of cross burning in America is largely a history of racial abuse. While certainly not the only form of racial abuse deployed against people of color,<sup>27</sup> it is one of the more frequently recognized

---

<sup>25</sup> They could, for instance, have constructed a placard advocating for gun usage, they could have left a letter for Mr. Jubilee, they could have left a NRA brochure for their neighbor, or they could simply have told him to mind his own business and that they would use their backyard as a firing range if they so desired.

<sup>26</sup> Enemies of the KKK include Blacks, Jews, Latinos, Gays, Lesbians, Transsexuals, Catholics, Muslims, and anyone who is not Christian or committed to Christian values. See Knights of the Klu Klux Klan Party, <http://www.kkk.bz> (last visited Jan. 9, 2006).

<sup>27</sup> See generally JAMES ALLEN ET AL., *WITHOUT SANCTUARY LYNCHING* (Twin Palms Publishing 2000); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA*; Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (2004); Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* (2002).



forms of terrorism by Americans against fellow Americans. Burning a cross is an intentional act meant to convey a historically informed message. Cross burnings do not happen by spontaneous combustion, but rather are premeditated events often meant to intimidate and threaten the victim(s) with violence.<sup>28</sup> The design of cross burnings is the orchestration of fear. The Supreme Court recognized that those who would burn a cross intend that the recipients of the message fear for their lives.<sup>29</sup> Few, if any, messages of intimidation are more powerful. The very aim of a cross burning is the physical and mental impact which is actually achieved. To deny the reality of these intentions is absurd and smacks of willful blindness.

As the case of Elliott and O'Mara reveal, even individuals without Klan affiliation who wish to threaten or menace a racialized person will resort to cross burning, rather than racially benign threats, due to the association between a burning cross, violence and racialized abuse. Moreover, the history of violence associated with the Klan, and other White supremacist groups, shows that the possibility of injury or death is real – the depth of this history of racialized abuse is revealed by the number of reported incidents in which the victim of a cross burning later felt the wrath of the Klan.<sup>30</sup>

Thus, our shared history of racial and ethnic hostilities transforms otherwise innocuous symbols or words into powerful forms of abuse – racialized meaning is breathed into words and symbols by virtue of historical and contemporary fact. For instance, it would be complete abstraction to claim a neutral meaning for a swastika.<sup>31</sup> Such a position would be untenable in contemporary German or American

---

<sup>28</sup> *Virginia*, 538 U.S. at 391 (Thomas, C., dissenting) ( “[B]ecause the modern Klan expanded the list of its enemies beyond blacks and "radical[s]," to include Catholics, Jews, most immigrants, and labor unions, ... a burning cross is now widely viewed as a signal of impending terror and lawlessness.”).

<sup>29</sup> *Id.*

<sup>30</sup> See generally Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002); JAMES W. CLARKE, *THE LINEAMENTS OF WRATH: RACE, VIOLENT CRIME, AND AMERICAN CULTURE* (Transaction Publishers 1998); FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* (University of Illinois Press 1993); STEWART TOLNAY, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* (University of Illinois Press 1995).

<sup>31</sup> Psychological Effects of the Holocaust, <http://www.studyworld.com/basementpapers/repce/History/80.htm> (last visited Sept. 28, 2004); Patty Alvarez, *The Nature of Hate Crimes: A Literature View*, 69 BULLETIN 26 (2001), available at [http://www.stophate.org/stophate/STHProgram/STHfiles/litreview\\_alvarez.pdf](http://www.stophate.org/stophate/STHProgram/STHfiles/litreview_alvarez.pdf) (last visited Sept. 28, 2004).

society, despite the origins of the swastika as a symbol of peace and harmony.<sup>32</sup> The depiction of a swastika is thus an image which is now so tainted, by virtue of history and the ongoing legacy of the Nazi party, as to be almost universally recognized as an image of pure hatred. The swastika is a toxic symbol, sure to arouse intense anxiety in many persons, but likely particularly powerful and painful for Jewish persons subjected to its depiction.

Similarly, for many Black people, and African Americans in particular, a cross burning is a powerful signifier of hatred, racial violence and white supremacy which is now unmoored from its Scottish ancestry.<sup>33</sup> Part of the power of the American racial caste system, which O'Mara and Elliott drew upon, is the ability of symbols or words to invoke the nightmarish history of violent racial oppression and its legacy of hostility in a heartbeat. Indeed, the decision of the majority of the United States Supreme Court recognized cross burning as inextricably intertwined with the history of the Ku Klux Klan and directed violence.<sup>34</sup>

In *R.A.V. v. City of St. Paul, Minnesota*, the Supreme Court found an ordinance violate of the First Amendment. The relevant ordinance made it a misdemeanor for persons to place, on public or private property, symbols, objects, appellations, characterizations or graffiti which they knew, or reasonable should have known, would invoke anger, alarm or resentment on the basis of race, color, creed, religion, or gender.<sup>35</sup> In contrast, the Court held in *Virginia v. Black*

---

<sup>32</sup> The History of the Swastika, <http://history1900s.about.com/cs/swastika/a/swastikahistory.htm> (last visited Sept. 28, 2004).

<sup>33</sup> Cross burnings have been used to communicate both threats of violence and messages of shared ideology. The Supreme Court noted that first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. *Virginia*, 538 U.S. at 354 (Thomas, J., concurring) ("For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches... After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few throats and see what happens."").

<sup>34</sup> *Id.*

<sup>35</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380, 396 (1992). In finding the statute facially unconstitutional, the Court states:

Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or

that Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. The majority determined that unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics."<sup>36</sup> Specifically, under the disputed Virginia statute it does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's political affiliation, union membership, or homosexuality.<sup>37</sup> Rather a generalized ban on cross burning carried out with the intent to intimidate was held fully consistent with the Court's holding in *R. A. V.* and is, therefore, permissible under the First Amendment.<sup>38</sup> While I applaud the ultimate

---

provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. *Id.* at 391.

<sup>36</sup> *Virginia*, 538 U.S. at 345.

Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, e.g., *supra*, at 8 (noting the instances of cross burnings directed at union members); *State v. Miller*, 6 Kan. App. 2d 432, 629 P. 2d 748 (1981) (describing the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S.E. 2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus"). *Virginia*, 538 U.S. at 362

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 344.

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating

outcome of this decision, the ruling is a-historical and de-contextualized due to over-zealous application of abstracted colorblindness. Justice Thomas, in dissent, spoke of this abstraction when he commented upon the historical significance of the sacred and profane. In his opinion, the unique position of the American flag was a quintessential example of the sacred, while cross burning is a paradigmatic illustration of the profane.<sup>39</sup>

While rightfully acknowledging that “the person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan,” the majority of the Court ignores the historical and contemporary reality of the racialized identity of the enemies of the KKK – particularly persons of color. This is remarkable given the origin, history and continued activities of White Supremacist groups and their involvement in domestic terrorism.<sup>40</sup> White supremacy has deep roots in America – most Americans, African-Americans in particular, are aware of the randomized violence historically unleashed by White Supremacists for more than a century.<sup>41</sup> Such violence is not merely a historical fixity or an aberration. Indeed, white supremacist groups, which should properly be deemed terrorist organizations, continue to operate throughout the United States.<sup>42</sup> Recent examples of their racial violence include the Jasper, Texas lynching and the copycat acts of racial violence perpetrated against Black men in Belleville, Illinois and Slidell, Louisiana.<sup>43</sup>

The majority recognizes the potency of cross burning as an effective form of racialized abuse, even when used by those without Klan affiliation. They state, “as the cases of respondents Elliott and

---

messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. *Id.*

<sup>39</sup> *Id.* at 388.

<sup>40</sup> See JAMES ALLEN ET AL., WITHOUT SANCTUARY LYNCHING (Twin Palms Publishing 2000); The Murder of James Byrd Jr., <http://www.wsws.org/news/1998/jun1998/byrd-j13.shtml> (last visited Sept. 28, 2004); The Oklahoma City Bombing, [http://www.indystar.com/library/factfiles/crime/national/1995/oklahoma\\_city\\_bombing/ok.html](http://www.indystar.com/library/factfiles/crime/national/1995/oklahoma_city_bombing/ok.html) (last visited Sept. 28, 2004).

<sup>41</sup> FEAGIN & MCKINNEY, *supra* note 1, at 49.

<sup>42</sup> *Id.* at 49.

<sup>43</sup> *Id.*

O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence."<sup>44</sup> The non-affiliation of Elliott and O'Mara with the KKK does not render the cross burning benign. Such racism is malignant and has both profound physiological and psychic consequences for those victimized – the intentions or group membership of the abuser(s) is irrelevant for purposes of gauging the harm experienced. For instance, critical psychology has demonstrated that Blacks exposed to racist imagery experience significant changes in galvanic skin response and heart rate acceleration upon observation of the abuses.<sup>45</sup> To expect the Jubilee family to peer out of their window and ascertain the niceties of the cross burner's affiliation or non-affiliation with White supremacists is to expect the ridiculous. At the moment of an intimidating cross burning few Blacks in America will care whether or not the cross-burners are KKK members, KKK supporters or even KKK detractors. The import, threat and impact is the same regardless of affiliation – racial violence and abuse. Accordingly, the impact must be the starting point – unintentional racism does not hurt less. The consequences of racial abuses persist even in the absence of intention.

Similarly, Justice Thomas highlights the salience of America's history of racial violence. He stated that, while a White Protestant man would likely be alarmed to find a cross burning on his lawn in the middle of the night he would likely call the fire department, however a Black family finding the same thing would be wise to call the police.<sup>46</sup> History has taught Blacks in America that those who would burn crosses in their yards mean to send a particular type of message that inflicts a particular type of harm. In the lexicon of racialized imagery, cross burning, together with lynching imagery and images of police brutality invoke a particular kind of vulnerability<sup>47</sup> for Blacks in

---

<sup>44</sup> *Virginia*, 532 U.S. at 357.

<sup>45</sup> Linda Myers et al., *Physiological Responses to Anxiety and Stress: Reactions to Oppression, Galvanic Skin Potential, and Heart Rate*, 20 JOURNAL OF BLACK STUDIES 80, 90 (1989).

<sup>46</sup> *Virginia*, 538 U.S. at 388.

<sup>47</sup> See generally ANXIETY DISORDERS IN AFRICAN AMERICANS (Steven Friedman ed., 1994); Mikhailin Karina, *Treating Anxiety Disorder in African Americans*, AM. WKLY., Oct. 20, 1998, at 2, available at [http://veracity.univpubs.american.edu/weekly\\_site/weeklypast/102098/story\\_3.html](http://veracity.univpubs.american.edu/weekly_site/weeklypast/102098/story_3.html) (last visited Sept. 28, 2004).

America.<sup>48</sup> One cannot witness such racial hostility as a Black person without having one's insides turned out. "Connections between hostile epithets and acts in the distant or recent past and those in the present are central aspects of individual and collective memories in [B]lack communities."<sup>49</sup> In this vein, Justice Thomas recollected the effects of a cross burning in another fairly recent case.

After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person.' Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. ... Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct." *United States v.*

---

physiological symptoms that are not experienced as often or at all in white Americans. He cites a 1994 study by Horwith, Johnson, and Hornig, in which 55 percent of African Americans surveyed reported strong tingling and numbness in extremities at times when they become very anxious, while only 29 percent of white Americans surveyed had these sensations. Also, 77 percent of African Americans, versus 58 percent of white Americans, experienced hot and cold flashes; and 61 percent of African Americans, but only 46 percent of white Americans, felt tightness and pain in the chest.

Similarly, in a 1986 study by Bell, 36 percent of African Americans- and no white Americans-reported experiencing "isolated sleep paralysis, when the person is either asleep or waking up, when they find themselves to be essentially paralyzed," says Carter. "So, consciously you are awake and alert to what is going on in your surroundings, but you can't actually do anything. You feel thoroughly trapped in that particular situation and it brings on quite a bit of anxiety." Karina, *supra*, at 2.

<sup>48</sup> Andy Humm, *Reactions to Police Killings of Unarmed Black New Yorkers*, GOTHAM GAZETTE (June 2, 2003), <http://www.gothamgazette.com/article/20030602/3/409> (last visited Sept. 28, 2004); CNN.com, *Probe Under Way into Death of New York Man, Fired Upon 41 Times by Police*, <http://www.cnn.com/US/9902/05/police.shooting> (last visited Sept. 28, 2004).

<sup>49</sup> FEAGIN & MCKINNEY, *supra* note 1, at 49-50.

*Skillman*, 922 F.2d 1370, 1378 (CA9 1991) (emphasis added).<sup>50</sup> (Emphasis in original)

Accordingly, there are symbols, icons and imagery so profound in their implication as to trigger powerful physical and mental reactions in the victim of racist abuse.<sup>51</sup> Interestingly, in assessing, and ultimately allowing, greater punishment for hate crimes in *Wisconsin v. Mitchell*,<sup>52</sup> Chief Justice Rehnquist accepted the theory of greater punishment for greater harms. Writing for the majority, the Chief Justice accepted that bias-inspired conduct “is thought to inflict greater individual than societal harm.”<sup>53</sup> Indeed, the court noted that, “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict emotional harms on their victims, and incite community unrest.”<sup>54</sup> Accordingly, in upholding the Wisconsin statute, the court determined that “the State’s desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provisions over and above mere disagreement with offenders’ beliefs and biases.”<sup>55</sup>

It is not, therefore, inconsistent with existing Supreme Court recognition of the impact of racialized abuses to acknowledge the legitimacy of the critical psychology and sociology. Accordingly, in the face of claims denying racist intentions, a cross burning is a catalyst so intense as to generate extreme physical and mental reactions, not the least of which include anger, fear, panic,<sup>56</sup> sorrow, humiliation,

---

<sup>50</sup> *Virginia*, 538 U.S. at 390.

<sup>51</sup> Racism and Power in the South, <http://www.cbsnews.com/stories/2002/02/25/national/main330498.shtm> (last visited Sept. 28, 2004); Lawsuit Against the Southern Company, <http://www.dogonvillage.com/petition/lawsuit.htm> (last visited Sept. 28, 2004).

<sup>52</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 488.

<sup>55</sup> *Id.*

<sup>56</sup> Ewald Horwath et al., *Epidemiology Of Panic Disorder*, in ANXIETY DISORDERS IN AFRICAN AMERICANS 62-63 (Steven Friedman eds., 1994).

...this study found that panic disorder is a similar illness among African Americans and whites in terms of prevalence, symptoms and other clinical features. It is a disorder associated with substantial comorbidity and risk for suicide attempts. Most African Americans with panic disorder never reach appropriate treatment. Other studies have suggested that those who do get treatment are likely to be misdiagnosed and have a poor treatment outcome. With the exception that African Americans are more likely to report tingling of extremities and a higher mean number of symptoms during their worst episode, the

desperation, devastation and the corresponding physiological responses which include increased heart rate, galvanic skin response and elevated blood pressure.<sup>57</sup> Increasingly, sociologists and psychologists are studying the impact of racism. This growing body of social science research is informative for lawyers and activists seeking to encourage the recognition of impact-driven assessments of racism and other forms of discrimination.

### **B. Racial Hostility and Psycho-Social Stress**

The debilitating effects of racism stem not only from obviously racialized abuses, but also from specific social situations and lifetime experiences of racialized hostility. These discriminatory experiences are not isolated, but accumulate over the course of one's life, in workplaces, schools, businesses and other randomized locations. As events, they often include driving, walking, shopping, studying or standing while Black or Brown. Like the death of a family member, racialized encounters can become crises, which in turn have serious health consequences.<sup>58</sup> It should not be surprising, therefore, that both physical and mental health are negatively impacted by racist encounters.<sup>59</sup> It has been noted by psychologists that "fearful and racially noxious images" produced elevated heart rates in Blacks.<sup>60</sup> Further, it should not be surprising that exposure to racist stimuli

---

clinical features of panic disorder do not appear to differ significantly between African Americans and whites.

Despite the clinical similarity of this disorder in African Americans and whites, there is reason to believe that panic disorder is not adequately recognized and treated among African Americans. The evidence for misdiagnosis and poor treatment outcomes among African Americans indicates the need for improved diagnosis and treatment of panic disorder in this population. *Id.*

<sup>57</sup> See recent study finding that racial discrimination not only is associated with systolic and diastolic blood pressure but accounts for a part of the association between race and blood pressure. Nancy Krieger & Stephen Sidney, *Racial Discrimination and blood pressure: the CARDIA study of young black and white women and men*, 86 AM. J. PUB. HEALTH 1370-1378 (1996) (cited in Williams, *supra* note 5, at 338).

<sup>58</sup> See LYDIA RAPPOPORT, *The State of Crisis: Some Theoretical Considerations*, in CRISIS INTERVENTION: SELECTED READINGS 22-31 (Howard J. Parad ed., 1965). ROBERT A. KARASEK & TORES THEORELL, *HEALTHY WORK* 71 (1990) (cited in FEAGIN & MCKINNEY, *supra* note 1, at 54).

<sup>59</sup> FEAGIN & MCKINNEY, *supra* note 1, at 54.

<sup>60</sup> Vetta L. Sanders Thompson, *Perceived Experiences of Racism as Stressful Life Events*, 32 COMMUNITY MENTAL HEALTH J. 224 (1996).



results in increased blood pressure<sup>61</sup> or that prejudiced treatment based on race resulted in self-reporting of hypertension.<sup>62</sup> Anderson, using the experience of racism as a stressor, demonstrated the physiological (increased cardiovascular reactivity) and psychological (anger) reactivity of African Americans to racism.<sup>63</sup>

While the majority opinion in *Black* adequately recognizes the pernicious use of cross burning as a signal of impending violence, the decision fails to recognize cross burning as violence in itself. Further, the decision fails to recognize the particularly abusive consequences of impending violence as it has been historically deployed against those racially marginalized in American society. "Stressful life events have been characterized as those situations that are tension producing and could adversely affect an individual's mental health... [while] distress is considered a subjective state that occurs when the individual is unable to cope effectively with the stressor."<sup>64</sup> Being victimized by a cross burning is indeed a stressful life event.

Short of a lynching or being the victim of non-lethal physical violence, there are few other images so capable of inflicting horror in the minds of a racialized person. The psychological sequelae of racialized abuses is completely ignored by the majority, as are the many other instances of racial hostility with which Blacks in America are all too familiar. Instances of racialized abuse leave long-lasting mental scars, which are seldom recognized by the legal system.

[O]ne African American psychologist once explained [...] that, when he hears the epithet "nigger," in the back of his mind he sees a [B]lack man hanging from a tree. This is not surprising, because he grew up in the segregation era when lynchings of [B]lack men were much more common than they are today. In this way, past experience informs and contextualizes present events. Indeed, the impact of racist epithets is often underestimated by outside, especially

---

<sup>61</sup> Sanders Thompson, *supra* note 60, at 224 (citing C. Armstead et al., *Relationship of Racial Stressors to Blood pressure Responses and Anger Expression in Black College Students*, 8 HEALTH PSYCHOLOGY 541, 541-56 (1989)).

<sup>62</sup> Sanders Thompson, *supra* note 60, at 224 (citing Nancy Krieger, *Racial and Gender Discrimination: Risk Factors for High Blood Pressure?*, 30 SOC. SCI. MED. 1273, 1273-81 (1990)).

<sup>63</sup> *Id.*

<sup>64</sup> Sanders Thompson, *supra* note 60, at 224 (citing Judith G. Rabkin & Elmer L. Struening, *Life Events, Stress, and Illness*, 194 SCIENCE 1013, 1013-1020 (1976)).

[W]hite, observers.<sup>65</sup>

Such pain and distress are typically manifested in one of two ways – either as “depression, demoralization and hopelessness” or as “anxiety, fear and worry.”<sup>66</sup> In turn, these psychological reactions spiral to create effects on physical health. Recognizing this disparate vicious cycle, it has been suggested that experiences of racial discrimination are causally linked to health problems and are associated with higher incidence of disability and psychological distress as well as with decreased levels of life satisfaction and well-being.<sup>67</sup>

As one noted therapist has commented, “[n]ot only do our African American clients encounter racism on a daily basis, but their lives seem to contain more major stress and minor hassles than the lives of our white clients.”<sup>68</sup> Specifically, racism has been found to contribute significantly to psychiatric symptoms among Blacks.<sup>69</sup> Racist discrimination contributes uniquely to somatization, obsessive-compulsive scales, interpersonal sensitivity, depression and anxiety beyond the contribution of generic and status stressors.<sup>70</sup> The cyclical nature of racism bears noting. One longitudinal research study revealed that “African-Americans who reported racial discrimination at one point in time were more likely to report high levels of psychological distress in a subsequent interview.”<sup>71</sup> Further, the impact of racial discrimination has temporal aspects since it has stressful sequelae over

---

<sup>65</sup> FEAGIN & MCKINNEY, *supra* note 1, at 48.

<sup>66</sup> FEAGIN & MCKINNEY, *supra* note 1, at 54 (citing JOHN MIROWSKY & CATHERINE E. ROSS, *SOCIAL CAUSES OF PSYCHOLOGICAL DISTRESS* (2003))

<sup>67</sup> *Id.* (citing DAVID R. WILLIAMS & AN-ME CHUNG, *Racism and Health*, in *HEALTH IN BLACK AMERICA* (Rose C. Gibson & James S. Jackson eds., 1995)).

<sup>68</sup> WILLIAMS & CHAMBLESS, *supra* note 68, at 159.

<sup>69</sup> Elizabeth A. Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH.* 329, 333 (1999).

<sup>70</sup> Klonoff, *supra* note 69, at 333 tbl. 2 (“[i]rrespective of the type of analysis conducted, racist discrimination emerged as a powerful predictor of Blacks’ psychiatric symptoms. In the stepwise regressions, racist discrimination was the best predictor of half of the symptoms measured and was a more powerful predictor of those symptoms than generic stressors and social status. In the hierarchical regressions, racist discrimination contributed significantly to symptoms above and beyond the contribution of contextual factors such as age, gender, education, social class and generic stressors.”)

<sup>71</sup> FEAGIN & MCKINNEY, *supra* note 1, at 42.

time.<sup>72</sup>

Thus the majority opinion in *Black* considers cross burning in a vacuum – a whitewashed vacuum which is unyielding in its refusal to acknowledge the impact of racial abuses. Recent studies of people of color in the United States have found that the experience of discrimination is linked to higher levels of stress and psychological suffering, including depression and lower levels of life satisfaction.<sup>73</sup> Ignorance of such an impact results in judicial racial abstraction. This, in turn, produces a legally (e)raced history devoid of the particular effects of racism as targeted and effective abuse. To be sure, such racialized abuse would have particular effects on Mr. Jubilee, a Black man, as the intended victim of harassment.

Typically the KKK does not burn crosses on the homes of White Anglo-Saxon Protestants, unless they associate with other enemies of the KKK i.e. “Niggerlovers.”<sup>74</sup> Blacks in America have the experience to know that such events are not isolated, “but rather form a continuum of racist events, - ranging from nonviolent to extremely violent – that characterize the everyday lives of most African Americans.”<sup>75</sup> The experience of such racism produces measurable symptoms of subjective distress. Indeed, the presence of intrusion

---

<sup>72</sup> See generally Vicki M. Mays et al., *Perceived Race-Based Discrimination, Employment Status, and Job Stress in a National Sample of Black Women: Implications for Health Outcomes*, 1 J. OCCUPATIONAL HEALTH PSYCH. 319 (1996); CHARLES B. WILKINSON & JEANNE SPURLOCK, *Mental Health of Black Americans: Psychiatric Diagnosis and Treatment*, in ETHNIC PSYCHIATRY 13-50 (Charles B. Wilkinson ed., 1986); Jewelle Taylor Gibbs & Diana Fuery, *Mental Health and Well-Being of Black Women: Toward Strategies of Empowerment*, 22 AM. J. COMMUNITY PSYCH. 559 (1994); Ezra E. H. Griffith & F.M. Baker, *Psychiatric Care of African Americans*, in CULTURE, ETHNICITY, AND MENTAL ILLNESS 147-173 (Albert C. Gaw ed., 1993); Tony R. Brown et al., *Being Black and Feeling Blue: The Mental Health Consequences of Racial Discrimination*, 2 RACE & SOCIETY 117 (2000) (cited in FEAGIN & MCKINNEY, *supra* note 1, at 42).

<sup>73</sup> See generally Hortensia Amara et al., *Family and Work Predictors of Psychological Well-Being among Hispanic women Professionals*, 11 PSYCH. WOMEN Q. 505 (1987); V. Nelly Salgado de Snyder, *Factors Associated with Acculturative Stress and Depressive Symptomology among Married Mexican Immigrant Women*, 11 PSYCH. WOMEN Q. 475 (1987); SARA E. GUTIERRES ET AL., *Job Stress and Health Outcomes among White and Hispanic Employees*, in JOB STRESS IN A CHANGING WORKFORCE: INVESTIGATING GENDER, DIVERSITY, AND FAMILY ISSUES 107-125 (Gwendolyn Puryear Keita & Joseph J. Hurrell eds., 1994).

<sup>74</sup> See Stormfront White Nationalist Community, <http://www.stormfront.org/forum/showthread.php?t=151205> (last visited September 23, 2004).

<sup>75</sup> FEAGIN & MCKINNEY, *supra* note 1, at 49.

(characterized by unbidden thoughts and images, troubled dreams, strong pangs or waves of feelings and repetitive behavior), or avoidance (characterized by ideation constriction, denial of the meaning and consequences of events, blunted sensation, behavioral inhibition and awareness of emotional numbness) suggests a psychological response similar to post-traumatic stress disorder.<sup>76</sup> Victims of trauma, regardless of degree, appear to experience stress reactions similarly. While people undoubtedly experience and process trauma differently, the crucial point is that the same elements persist across various types of traumatic experiences, be that sexual assault, death or stigmatization.<sup>77</sup> Interestingly, some researchers have determined that it can be even more difficult to cope with emotional and psychological wounds than with physical or material deficiencies.<sup>78</sup>

Further, given the typical randomized nature of racial hostility, such abuse has a trickle down, or trickle-around effect, as others in racialized communities absorb some of this stress. Given the continuing reality of hostility towards Blacks in America, it is not surprising that many violent attacks motivated by racism are reported each year.<sup>79</sup> The images of the worst of the attacks, instances of police brutality for instance, are repeatedly communicated in the mass media and the internet with significant mental sequelae for those similarly situated who realize the randomness of such abuse.<sup>80</sup> As such, it is not just the individual racial attacks that a Black person must face and process. Rather, family and community similarly internalize and process these racialized incidents collectively in group memory and collective consciousness.<sup>81</sup> Accordingly, memories of racism are formative on many levels, not the least of which is the impact upon the development of basic human sentiments, but also upon coping and survival strategies

---

<sup>76</sup> Vetta L. Sanders, *Perceived Experiences of Racism as Stressful Life Events*, 32 COMMUNITY MENTAL HEALTH J. 231 (1996). See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, at 425-28 (4th ed. 2000).

<sup>77</sup> See Laura Leets, *Experiencing Hate Speech: Perceptions and Responses to Anti-Semitic and Antigay Speech*, 58 J. SOCIAL ISSUES 341, 343 (2002).

<sup>78</sup> *Id.* at 344 (citing Laura Leets & Howard Giles, *Words As Weapons: When Do They Wound? Investigations of Racist Speech*, 24 HUMAN COMMUNICATION RESEARCH 260 (1997)).

<sup>79</sup> See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 188 (122nd ed. 2002); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 206 (123rd ed. 2003); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005 193 (124th ed. 2004-2005).

<sup>80</sup> FEAGIN & MCKINNEY, *supra* note 1, at 42, 48-49.

<sup>81</sup> *Id.*

of the individual and the community.<sup>82</sup>

### C. Racial Hostility and Physiological Disparities

Critical psychology demonstrates that individuals who perceive the experience of racism experience measurable psychological distress.<sup>83</sup> While those looking at such experiences in the criminal law setting tend to focus on the experience of anger flowing from racism, there are other equally relevant emotions such as hurt, pain and anxiety which the victim of racism experiences.<sup>84</sup> In addition to discrimination at the

---

<sup>82</sup> *Id.*

<sup>83</sup> Vetta L. Sanders, *Perceived Experiences of Racism as Stressful Life Events*, 32 COMMUNITY MENTAL HEALTH J. 223, 232 (citing Williams, *supra* note 5, at 341).

Blacks are more likely than Whites to report major experiences of discrimination in employment and in contact with the police. Only slightly more Blacks than Whites (29% v.25%) report one discriminatory event, but Blacks are twice as likely to report two discriminatory experiences and seven times more likely to report three experiences. Blacks also have significantly higher scores on the chronic ongoing indicators of everyday discrimination, although the magnitude of the racial gap is not as large as for the major experiences of discrimination. There is a significant racial difference on chronic stress, with Whites having higher levels of chronic stress than Blacks. Levels of financial stress are significantly higher for Blacks than for Whites and the average score on the life-events scale for Blacks is almost twice that of Whites.

<sup>84</sup> Indeed, this matter is all the more significant for those already suffering from diagnosable mental illness. For instance racialized persons afflicted with agoraphobia face increased prospects of panic attacks from encountering racism during exposure sessions. The manner in which discrimination can interfere with the process of treatment is revealing by the excerpt below. It is a reconstructed dialogue between a white behavior therapist and her African-American Patient regarding exposure treatment.

(As client and therapist approach a shopping mall)

Client: "I really don't want to do this today."

Therapist: (*thinking anticipatory anxiety was the issue*) "I know you are anxious about going in there, but think of it as a chance to confront and overcome the fear."

Client: "No, you don't understand. I don't have any money with me. I can't buy anything."

societal level, stressful life experiences linked to racialization also adversely impact the health of communities of color in at least two ways. First, stress is not randomly distributed in the population. It is linked to social structure, status and roles determined both by the quality and quantity of stress to which an individual is exposed.<sup>85</sup> The structural location of Blacks in society, as intersected by SES, leads Blacks in America to have higher levels of stress than Whites. Second, the experience of specific incidents of racial bias can generate psychic distress and lead to alterations in physiological processes that can adversely affect health.<sup>86</sup>

While the example of a cross burning provides an extreme instance of racial/ethnic/religious hatred, many, if not most, instances of racial abuse are neither quite so obvious nor dramatic in their invective. Nonetheless, the cumulative effect of such micro or macro-aggressions takes its toll upon racialized victims.<sup>87</sup> Noted critical sociologist Prof. Feagin, has found that "...accumulated experiences

---

Therapist: "That's OK. You can window shop. A lot of people do that. For some people, it's a cheap way to have a good time."  
 Client: "That's OK for you. White people can go into a store and just browse. But if a black person does it, the store security people will watch her like a hawk. If I don't act like I'm really buying something, they'll think I'm stealing."

WILLIAMS & CHAMBLESS, *supra* note 68, at 159. Accordingly, issues linked to prejudice may interfere with treatment outcomes. The frequent incidence of racism experiences by persons of color make it more difficult to treat persons suffering from mental illnesses when their illness itself is aggravated by encounters of racism.

<sup>85</sup> Williams, *supra* note 5, at 338.

<sup>86</sup> *Id.*

<sup>87</sup> See Helen Epstein, *Ghetto Miasma: Enough to Make You Sick?*, N.Y. TIMES, Oct. 12, 2003, at 77. See also B.S. McEwen & E. Stellar, *Stress and the Individual: Mechanisms Leading to Disease*, 153 ARCHIVES INTERNAL MED. 2093 (1993). McEwen and Stellar coined the term "allostasis" to refer to the normal fluctuations of certain body systems that maintain stability and "provide protection to the body by responding to internal and external stress." According to McEwen, allostatic load is increased under four conditions: (a) frequent stress exposure, which promotes frequent exposure to stress hormones; (b) inadequate habituation to stressful experiences, which also results in prolonged exposure to stress hormones; (c) inability to recover, in which physiological arousal and reactivity continue even after the stressor has been removed or terminated; and (d) system fatigue or dysfunction, which triggers pathological compensatory responses in other systems. Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Mental Illness*, 9 MICH. J. RACE & L. 77, 86 n.34 (2003) (citing Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338 NEW ENG. J. MED. 172, 172-75 (1998)).

with White racist practices often reaches into thousands of minor and major incidents by the time a Black American reaches her sixties or seventies.”<sup>88</sup> For Blacks in America, spending significant time in predominantly White settings may be a (mental) health hazard as it has been reported that such cross-racial exposure produces over a hundred racist encounters annually.<sup>89</sup>

Blacks working in, or traversing, historically white places commonly report pain, anguish, anger, and rage. These reactions may be immediately expressed in their words, the tone of their comments, the character of their facial expressions or they may be internalized in some fashion. [All of the focus group respondents in Professor Feagin’s *The Many Costs of Racism*] indicated that they suffer substantial recurring stress and frustration in racially hostile workplaces or other societal settings. As one Midwestern respondent stated, she knows her stress is linked to the workplace because her symptoms do not happen “on weekends or after five o’clock.”<sup>90</sup>

Furthermore, for many people of color in America, past and present discrimination as well as responses to that oppression are often inscribed in collective memory. Not surprisingly, communities pass along information from one generation to the next about discrimination, coping strategies and the anger and disenchantment caused thereby.<sup>91</sup> It is, therefore, reasonable that membership in the Black race has been described by critical psychologists as entailing “exposure to highly stressful experiences, triggered essentially by the fact of race.”<sup>92</sup> Stress and anxiety are defined in relation to one’s ability to copy with one’s environment – these concepts address the reaction of an individual in circumstances where their coping resources do not meet the demands of

---

<sup>88</sup> FEAGIN & MCKINNEY, *supra* note 1, at 53.

<sup>89</sup> Such discriminatory events can have a major impact on the way one looks at the world. The accounts explored in *The Many Costs of Racism* explore unexpected or severe White-generated discrimination. FEAGIN & MCKINNEY, *supra* note 1, at 53.

<sup>90</sup> FEAGIN & MCKINNEY, *supra* note 1, at 44.

<sup>91</sup> *Id.* at 53.

<sup>92</sup> Linda James Myers et al., *Physiological Responses to Anxiety and Stress: Reactions to Oppression, Galvanic Skin Potential, and Heart Rate*, 20 J. BLACK STUDIES 80, 80 (1989) (citing HECTOR MYERS, *Holistic Definition and Measurements of States of Non-Health*, in AFRICAN PHILOSOPHY: ASSUMPTIONS AND PARADIGMS FOR RESEARCH ON BLACK PERSONS (Lewis M. King et al. eds., 1976)).

the context.<sup>93</sup> “Coping strategies, in turn, are mediated by past experiences, previctimization, psychological and physical strength, status, needs, goals etc.”<sup>94</sup> Stress, however, is not simply an unfortunate fact of life as its impacts extend beyond the realm of the psyche. Indeed, the sequelae of stress flow from the psyche into the physical and the physiological thereby becoming a potential disease component.

It is increasingly being recognized that socially induced stress is a factor which leads to chronic diseases, not just those diseases designated as “psychosomatic”.<sup>95</sup> As Dodge and Martin have expressed it, “the diseases of our times namely the chronic diseases, are etiologically linked with excessive stress and in turn this stress is a product of specific socially structured situations inherent in the organization of modern technological societies.”<sup>96</sup> While it was previously thought that only exposure to sources of infection lead to diseases, we now know that environmental conditions, including socially constructed situations, create physiological stress – this in turn contributes to our susceptibility to microbial infections.<sup>97</sup>

Accordingly, there is substantial evidence that stressful life events commonly precede the onset of a wide variety of physical and psychiatric disorders in populations.<sup>98</sup> Racism is, therefore, not merely stressful, it is harmful psychologically, physiologically and physically. Like anyone else, Blacks are susceptible to certain types of disease and propensities for inherited illness. Such propensity, or the diseases stemming from it, can cause much stress. In this regard, the relationship between stress and poor health for Blacks in American is like that for White Americans.

Blacks in America, however, must content with further sources of health-related stress, both of which are linked to the continuing salience of race.<sup>99</sup> Firstly, interpersonal relationships at work across racial lines often lead to increased and unhealthy stress due to the discrimination faced by African-Americans from co-workers and employers alike.<sup>100</sup> Of course, Whites also experience negative treatment in the workplace, but such encounters are usually race neutral

---

<sup>93</sup> Rabkin & Struening, *supra* note 64, at 1014.

<sup>94</sup> See FRANKLYN S. HAIMAN, *SPEECH ACTS AND THE FIRST AMENDMENT* (1993) (cited in Leets, *supra* note 77, at 354, 357).

<sup>95</sup> Rabkin & Struening, *supra* note 64, at 1014.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1015.

<sup>99</sup> FEAGIN & MCKINNEY, *supra* note 1, at 43.

<sup>100</sup> *Id.* at 43.



or color-blind, as it were.<sup>101</sup> Secondly, the long-term consequence of American racism has meant that there exists significant “racism-generated impoverishment.”<sup>102</sup> Such “lack” impacts a number of societal factors from education, to health care, to housing. It means that “...for many Blacks in America, the lack of certain types of material assets or social-network resources can mean additional detrimental effects on their health.”<sup>103</sup> A smaller percentage of Whites are similarly situated hence a smaller proportion are affected by such stress.<sup>104</sup>

Racial abuse in the form of cross burning, for instance is an example of a racialized stressful occurrence – an occurrence profoundly assaultive in nature and consequence. Class does not mitigate all of the effects of racism. The stress experienced by Blacks in America, even when social class is controlled for, is both more frequent and more severe than Whites.<sup>105</sup> Additionally, the legacy of slavery, Jim Crow and contemporary racism has meant that Blacks in America generally have less socio-economic resources than their similarly situated white counterparts.<sup>106</sup> This relative deprivation can lead to greater financial stress and worry, even for middle class Blacks.<sup>107</sup> This in turn “can contribute to the everyday stress that can generate pain, frustration, anger, and physical illness. Whites do not, on a structural and institutional level, encounter anti-white racism or the long-term consequences of such racism.”<sup>108</sup> Again, the contribution of economic instability and experiences of racial animus produces mental and physical health vulnerability.

Social forces of racism, coupled with economic disadvantage, have worked against the health of Blacks in America for centuries – this is nothing new. Further, structural barriers such as intersecting variables of SES and

---

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Rabkin & Struening, *supra* note 64, at 1017.

<sup>106</sup> FEAGIN & MCKINNEY, *supra* note 1, at 43. For instance, the average Black family has approximately one tenth of the wealth of the average White family. *Id.*

<sup>107</sup> *Id.* See WILLIAM A. DARITY & SAMUEL L. MYERS, PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945, at 7-10 (1998). See generally MELVIN L. OLIVER & THOMAS M. SHAPIRA, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (1995).

<sup>108</sup> FEAGIN & MCKINNEY, *supra* note 1, at 43.

race combine to alienate men of color from health care resources. Indeed, many of the mental health issues plaguing Blacks in America are related to the unique stresses experienced at the interface of poverty and racism.<sup>109</sup>

Of course, not all people exposed to acute or chronic stressors develop diseases or psychiatric conditions. Admittedly, exposure to stressors alone is not a sufficient explanation for the onset of illness, mental or physical. Other factors must be considered such as "...characteristics of the stressful situation, individual biological and psychological attributes, and characteristics of the social support systems available to the individual that serve as buffers."<sup>110</sup> The effects of stress are dependent upon factors such as its "magnitude, intensity, duration, unpredictability and novelty."<sup>111</sup> Furthermore it has been established both that there is a linear relationship between the "magnitude of a stressor and the extent of psychiatric and physical disability" and, that "regardless of predisposition, stressors of sufficient intensity and duration will induce an acute stress response in all so exposed."<sup>112</sup> This is important for racialized persons subjected to racist abuse as the cumulative effects of racism include prolonged exposure to stress which, in turn, heightens the impact of even acute stressful events.<sup>113</sup> Notwithstanding societal gains which have been made in the appreciation of American cultural and racial diversity, the persistence of racism continues to exact a toll.

Despite significant progress in race relations and racial tolerance in American society, African Americans continue to be at risk for encountering day-to-day acts and experiences of discrimination because of their racial group membership. There is increasing evidence that everyday experiences of racial discrimination affect the mental health of African Americans and are related to higher levels of psychological distress and lower levels of psychological

---

<sup>109</sup> John A. Rich, *The Health of African American Men*, 569 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 149 (2000).

<sup>110</sup> Rabkin & Struening, *supra* note 64, at 1018.

<sup>111</sup> *Id.* Magnitude of stress includes any departure from baseline conditions, while intensity of stress refers to the rate of change. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

well-being.<sup>114</sup>

Critical psychology and sociology supports the views of critical race theorists in establishing that in addition to overt and blatant racial abuses, people of color are subjected to recurrent indignities and irritations, referred to as micro-aggressions,<sup>115</sup> on an ongoing basis.<sup>116</sup>

Not surprisingly, longitudinal research of concentration camp survivors has similarly indicated that such "profound and protracted stressful conditions" may produce lifelong effects which cannot be reversed.<sup>117</sup> Such critical psychology sheds light on other prolonged

---

<sup>114</sup> Lionel D. Scott, *Cultural Orientation and Coping With Perceived Discrimination Among African American Youth*, 29 J. BLACK PSYCHOL. 235, 235 (2003) (internal citations omitted). See generally JAMES S. JACKSON & SHERRILL L. SELLERS, *African-American Health over the Life Course: A Multidimensional Framework*, in HANDBOOK DIVERSITY ISSUES IN HEALTH PSYCHOLOGY 301, 308 (Pamela M. Kato & Traci Mann eds., 1996). See generally James S. Jackson & Monica L. Wolford, *Changes from 1979 to 1987 in Mental Health Status and Help-Seeking among African Americans*, 25 J. GERIATRIC PSYCHIATRY 15 (1992) (cited in FEAGIN & MCKINNEY, *supra* note 1, at 42).

<sup>115</sup> See, e.g., Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (where Peggy Davis coined this term, articulating the concept of microaggression in critical legal theory and discussing those stunning, sudden acts of racial hostility that remind persons of color of their precarious status).

<sup>116</sup> See, e.g., PHILOMENA ESSED, *UNDERSTANDING EVERYDAY RACISM* (1991) (emphasizing that discrimination is a structured part of everyday experiences and includes not only major stressful life experiences but recurrent indignities and irritations in everyday situations) (cited in Williams, *supra* note 5, at 338). Another measure, which is akin to the notion of racism as micro-aggression, considers

[E]veryday discrimination and attempts to measure more chronic, routine, and relatively minor experiences of unfair treatment. It assesses nine items that capture the frequency of the following experiences in the day-to-day lives of respondents: (1)being treated with less courtesy than others; (2)less respect than others; (3)receiving poorer service than others in restaurants or stores; people acting as if you are not smart, they are better than you; they think you are dishonest; being called names or insulted; and being threatened or harassed. Examples of such cumulative behavior include making exclusionary decisions in college admissions, employment, treating successful Blacks as exceptions that prove the rule of Black inferiority, and the randomized disparate treatment which a person of color may encounter from the bus to the boardroom. Williams, *supra* note 5, at 341.

<sup>117</sup> See MARDI J. HOROWITZ, *STRESS RESPONSE SYNDROMES* 39 (1976) (cited in Rabkin & Struening, *supra* note 64, at 1018). See generally Laura Leets,

periods of racialized abuses such as slavery, Jim Crow<sup>118</sup> and racial apartheid as it is manifested in contemporary America. It is important to emphasize both their cumulative impact and the reciprocal relationship between stress and the consequent response. The more rigorous and severe the external situation, the less significant are social and individual characteristics in determining the likelihood and nature of the response.

When conditions are sufficiently harsh, as in wartime situations, prolonged sensory deprivation, or concentration camps, for example, breakdown is virtually universal and individual variations are reflected only in the length of time before the reaction occurs and perhaps in subsequent recovery time. When the stressful situation is less severe, social supports, resources and individual characteristics contribute to an understanding of why some people become ill and others do not.<sup>119</sup>

The social environment in which one operates adds much to the stress equation, or detracts from the ability to cope, as the social position of an individual or group materially influences the experience of stress and the vulnerabilities to chronic disease. Specifically, the negative effects of stress are exacerbated for those suffering from social isolation and minority group membership.<sup>120</sup> Accordingly, social marginality denotes a precarious societal positioning which itself increases vulnerability of the already marginalized. The reality of what urban sociologists noticed long ago is evidence of the impact of societal marginality. Specifically, deteriorating urban areas, have disproportionably high rates of both physical and mental health disorders.<sup>121</sup> Such marginalized and isolated societal positions create a negative cycle with significant physical and mental health consequences.<sup>122</sup>

---

*Experiencing Hate Speech: Perceptions and Responses to Anti-Semitic and Antigay Speech*, 58 J. SOC. ISSUES 341 (2002).

<sup>118</sup> See generally RICHARD WRIGHT, *THE ETHICS OF LIVING JIM CROW: AN AUTOBIOGRAPHICAL SKETCH* (1937).

<sup>119</sup> Rabkin & Struening, *supra* note 64, at 1018.

<sup>120</sup> *Id.* at 1019.

<sup>121</sup> ROBERT E. LEE FARIS, *MENTAL DISORDERS IN URBAN AREAS* (University of Chicago Press 1939) (cited in Rabkin & Struening, *supra* note 64, at 1019).

<sup>122</sup> FEAGIN & MCKINNEY, *supra* note 1, at 34.

...marginal social status due to membership in a low-status group or simply in one that constitutes a numerical minority in the area has also been associated with increased health risks. Sheer numerical size of a given group, sometimes referred to as ethnic density, has been found to be inversely related to psychiatric hospitalization rates.... Presumably the smaller the community of ethnically similar members, the less the social support available to any one member.<sup>123</sup>

While shedding a disturbing light on the consequences of continued segregation, this critical psychology is equally distressing for those persons with minority status operating in majority settings.<sup>124</sup> Hence, the ramifications for racialized persons in corporate, or academic, America are particularly stark and implicate token status as more than an annoyance, but as a potential health concern.

Such "vulnerability" on the part of a victim does not preclude recovery for damages. Indeed, some tort law doctrine [] expressly contemplates compensation for a victim who might vary from the norm in terms of susceptibility to injury. This is extremely important given that "[i]ndividual and family memories of past discrimination, including recent racist events, compound the damage of everyday discrimination. Connections between hostile epithets and acts in the distant or recent past and those in the present are central aspects of individual and collective memories in Black communities."<sup>125</sup> Social

---

<sup>123</sup> Rabkin & Struening, *supra* note 64, at 1019 (citations omitted).

<sup>124</sup> Critical psychologists Kessler and Neighbors have explained that:

It is... possible that the joint effects of poverty and discrimination have synergistic effects or that financial success functions to shield blacks from the more distressing aspects of discrimination. Any of these processes would lead to an interaction in which the effects of race are most pronounced at the lower end of the social class distribution. Alternatively, race differences in distress could be most pronounced at high levels of social class, because financially successful Black-group members might experience the psychological stresses associated with this marginal position. Inferential evidence consistent with this possibility was reported in a treatment study . . .

Nelson, *Breaking the Camel's Back*, *supra* note 87, at 90 (quoting Ronald C. Kessler & Harold W. Neighbors, *A New Perspective on the Relationships Among Race, Social Class, and Psychological Distress*, 27 J. HEALTH & SOC. BEHAV. 107, 108 (1986)).

<sup>125</sup> FEAGIN & MCKINNEY, *supra* note 1, at 50.

scientist who have researched collective and community memories have determined that "collective memories of racism can multiply racially related stress for individuals."<sup>126</sup> Indeed, Robert Bellah has noted that "human communities have a history and 'they are constituted by their past' – for this reason we can speak of a real community as a 'community of memory', one that does not forget its pasts." These collective memories are not always positive: "Remembering heritage involves accepting origins, including painful memories of prejudice and discrimination."<sup>127</sup>

Moreover, in the case of the racially hostile or abusive perpetrator, the infliction of harm upon their intended victims is not accidentally, nor negligently done. Rather, the leveler of a racial abuse and the orchestrator of racial conduct intentionally inflict harm based upon race - this is usually calculated and premeditated behavior. For instance, hate crimes have increased throughout American, especially in the wake of September 11, 2001.<sup>128</sup> Even in the absence of the most vicious forms of racism, studies suggest that ethnic and racial minorities experience discrimination regularly.<sup>129</sup> Although poverty

---

<sup>126</sup> ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 153 (1985) (cited in FEAGIN & MCKINNEY, *supra* note 1, at 52-53).

<sup>127</sup> *Id.*

<sup>128</sup> Beth Velliquette, *3 Teens Held In Sikh Assault*, CHAPEL HILL HERALD, Apr. 3, 2004, at 1, *available at* <http://www.sikhcoalition.org/news.asp?mainaction=viewnews&newsid=480> (last visited Jan. 23, 2006).

A Sikh student at UNC claims he and his friend were beaten by a trio of teenagers on Franklin Street after one of them called him Osama bin Laden. Chapel Hill police charged each of the teens with assault inflicting serious injury and simple assault after the student identified them shortly after the assault Sunday morning. Although police categorized the assault as a hate crime, they did not charge the teens with ethnic intimidation -- the state statute that covers hate crimes.

Chapel Hill Police Chief Gregg Jarvis said the charge of ethnic intimidation was not filed because it was not clear whether the assault occurred because of the victim's race, clothing or religion. The charge of ethnic intimidation would have to be provable, Jarvis said. "You may believe one thing, but we can't prove it," he said. *Id.*

<sup>129</sup> See, e.g., David Goldberg & Matthew Hodes, *The Poison Of Racism and The Self-Poisoning of Adolescents*, 14 J. FAMILY THERAPY 51 (1992); John Dovidio, *The Subtlety of Racism*, 47 TRAINING & DEVELOPMENT 51 (1993) (cited in Vetta L. Sanders, *Perceived Experiences of Racism as Stressful Life Events*, 32 COMMUNITY

most certainly plays a role in the mental health of Blacks in America, critical psychological factors suggest that racism may play as large, or perhaps an even larger role, than social class.<sup>130</sup> Measures of SES are not equivalent across racial groups.<sup>131</sup> For instance, there are racial differences in income returns for a given level of education, the quality of education, the level of wealth associated with a given level of income, the purchasing power of income, the stability of employment and the health risks associated with working in particular occupations. "Further, it has been emphasized that SES is not just a confounder of the relationship between race and health, but part of the causal pathway by which race affects health."<sup>132</sup> Accordingly, "race is an antecedent and determinant of SES, and SES differences between blacks and whites reflect, in part the impact of economic discrimination as produced by large-scale societal structures."<sup>133</sup> Hence, even after adjustment for SES, the salience of race as a societal force negatively impacting the health of people of color in America is evidenced by the concretization of disparate health consequences.<sup>134</sup> Racism is a powerful variable in Black mental health, specifically the prevalence and incidence of symptoms and disorders. Racism is also an important variable with regards to racial differences in mental health-related behaviors such as coping, seeking psychotherapy and remaining in and complying with treatment.<sup>135</sup>

Race, although a social construct, exposes Blacks in America to highly stressful experiences.<sup>136</sup> According to the Department of Health

---

MENTAL HEALTH J. 224 (1996)). National Criminal Justice Reference Service, Hate Crimes Resources Facts and Figures, [http://www.ncjrs.org/hate\\_crimes/facts.html](http://www.ncjrs.org/hate_crimes/facts.html) (last visited Sept. 28, 2004); Human Rights Campaign, 2002 FBI Hate Crimes Statistics, [http://www.hrc.org/Content/NavigationMenu/HRC/Get\\_Informed/Issues/Hate\\_Crimes/Background\\_Information/2002\\_FBI\\_Hate\\_Crimes\\_Statistics.htm](http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Hate_Crimes/Background_Information/2002_FBI_Hate_Crimes_Statistics.htm) (last visited Sept. 28, 2004).

<sup>130</sup> Elizabeth A. Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 329, 333 (1999).

<sup>131</sup> Continued segregation is an example of a societal structure that restricts the socio-economic opportunity and mobility of people of color. Williams, *supra* note 5, at 337.

<sup>132</sup> *Id.* at 337.

<sup>133</sup> *Id.*

<sup>134</sup> Williams, *supra* note 5, at 338.

<sup>135</sup> Elizabeth A. Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 329, 333.

<sup>136</sup> See generally C. Mack, *A Theoretical Model of Psychosomatic Illness in Blacks and An Innovative Treatment Strategy*, 7 J. BLACK PSYCH. 27 (1980) (cited in Marcia E. Sutherland & Jules P. Harrell, *Individual Differences in Physiological Responses to*

and Human Services "Black Americans have a greater chance than White Americans of dying of stress-related illnesses, including cancer and heart disease."<sup>137</sup> Not only do personal experiences of racism disparately impact Blacks in America, but specific knowledge of the experiences of friends and relatives, combined with collective memories of racism in America, can result in cumulative or multiplied racially related stress.<sup>138</sup> Furthermore, there is a spiral effect whereby the psychic implications of racism feed into physical manifestations, which again cycle back upon the psyche. Indeed, a Harvard University and Kaiser Foundation study confirms the correlation between elevated blood pressure levels in Blacks and self-reported experiences of discrimination.<sup>139</sup> The researchers concluded that "reported experiences of racial discrimination, along with self-reported responses to unfair treatment, were associated with high blood pressure" and that the reported experiences of racial discrimination "could contribute to Black-White differences in blood pressure among young adults."<sup>140</sup>

Furthermore, focus on the emotional distress of racial hostility reveals applicable critical psychology and medical information capable of informing the tort law objective test, as discussed below.

---

*Fearful, Racially Noxious and Neutral Imagery*, 6 IMAGINATION, COGNITION & PERSONALITY 133 (1986)).

<sup>137</sup> S.R. Greg, *The Black-White Health Gap: Disparity Widening Congressional Caucus is Told*, WASHINGTON POST, October 10, 1984, at C5.

<sup>138</sup> FEAGIN & MCKINNEY, *supra* note 1, at 52. See also, Joe R. Feagin and Melvin P. Sikes, *Living with Racism: The Black Middle Class Experience* (Boston: Beacon Press, 1994); JAMES S. JACKSON & MARITA R. INGLEHART, *Reverberation Theory: Stress and Racism in Hierarchically Structured Communities*, in *EXTREME STRESS AND COMMUNITIES: IMPACT AND INTERVENTION* 353-373 (Steven E. Hobfoll & Marten W. deVries eds., 1995).

<sup>139</sup> Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The CARDIA Study of Young Black and White Adults*, 86 AM. J. PUB. HEALTH 1370, 1373-74 (1996). See Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77 (2003).

<sup>140</sup> Marjorie A. Bowman & David E. Nicklin, *New Guide to Clinical Preventive Services Published by the U.S. Preventive Services Task Force: Depression and Other Stressors Associated with Hypertension*, 227 JAMA 1857, 1857 (1997) ("[T]he increased prevalence of hypertension in African Americans may reflect stresses of racial discrimination, particularly for those who remain silent in the face of perceived oppression."). See Shawn O. Utsey, *Racism and the Psychological Well-Being of African American Men*, 3 J. AFR. AM. MEN 69, 84 (1997) ("Contemporary African American men also face risks in responding to their oppression in what might be perceived as an aggressive fashion. Responding to societal cues to temper all direct objections to their racial oppression, African American men often direct these hostilities inward.").



Specifically, a Duke University study indicated that "African Americans experience increased cardiovascular reactivity and emotional distress when confronted with racist provocation."<sup>141</sup> Researchers concluded "the racist provocation condition produced greater increases in [cardiovascular] and emotional self-report measures [i.e., anger, resentment, cynicism, and anxiety] than did the controversial but nonracist condition."<sup>142</sup> Of note, "the greatest cardiovascular reactivity was observed when the minority subjects were speaking in response to the racist provocation versus merely listening." Further, researchers found that the "recovery period", the time during which the subjects' cardiovascular activity returns to pre-stress levels, lasted for at least ten minutes after the end of the confrontation.<sup>143</sup> This reveals a durable level of distress experienced by racialized subjects. Whether the reasonable person would exhibit similar symptomology is likely irrelevant to the person so abused and seeking compensation.<sup>144</sup>

#### D. Racial Hostility and the Link to Other Stressors

Is it a legitimate hypothesis that mental illness may be exacerbated, or caused, by racism?<sup>145</sup> The case of those suffering from agoraphobia provides a simple example. In the course of treatment, therapists attempt exposure based management of symptoms in order to overcome fear engendered by going outside or attending in public spaces.

---

<sup>141</sup> Maya McNeilly et al., *Effects of Racist Provocation and Social Support on Cardiovascular Reactivity in African American Women*, 2 INT'L J. BEHAV. MED. 321, 321-22 (1995) (cited in Terry Smith, *Everyday Indignities: Race, Retaliation and the Promise of Title VII*, 34 COLUM. HUMAN RIGHTS L. REV. 529 (2003) [hereinafter Smith, *Everyday Indignities*]). The Duke researchers subjected a group of thirty black women, all of normal health, to individual conversations with a white "challenger" who engaged them on controversial topics of a racial and non-racial nature. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 334. These carryover effects may lead to vascular pathology in minorities. *Id.*

<sup>144</sup> Of course, I have advocated previously for subjectivization of such objective tests. See Camille A. Nelson, *(En) Gaged or (En)Raged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH L. REV. 1007 (2002); Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77 (2003). As such, one can certainly attempt to infuse the reasonable person with the subjective information developed by the critical medical information.

<sup>145</sup> Racism has been defined as a symbolic system organizing a range of social inequalities and negative associations and judgments construed around the concept of race. David Mason, *On the Dangers of Disconnecting Race and Racism*, 28 SOCIOLOGY 845, 855 (1994). See *infra* n.57 (providing a general definition of race).

However, Blacks in America often encounter daily hassles which exacerbate the likelihood of panic attacks. For instance, the daily hassle of "being glared at when one sits next to a white person on the bus, being asked for extra identification when one tries to cash a check at a bank, and being told that the health club one wants to join is not currently accepting new members[.]"<sup>146</sup> aggravate the condition itself and decrease the likelihood of successful treatment sessions.

If clients already dread entering a restaurant (due to fear of a panic attack), it is not helpful for them to be stared at when they finally summon the courage to go to an upscale restaurant. When agoraphobics undergoing exposure by standing in a long grocery checkout line then feel snubbed when cashiers place the change on the counter instead of in the client's hands, feelings of anger, humiliation, and sadness may be aroused and interfere with the habituation of anxiety.<sup>147</sup>

By engaging the mental health literature, it may be possible to determine what, if any, role racism plays in creating, or exacerbating, mental illness. "Studies of the mental health of Blacks generally report that, compared to Whites, Blacks have higher levels of psychological distress and lower levels of subjective well-being."<sup>148</sup> There is increasing psychological and physiological evidence to support the existence of racism-related disorders.

One of the most firmly established and frequently reported patterns in the distribution of health status in the United States is that African Americans (or blacks) have higher rates of death, disease and disability than whites have. This pattern has been documented for over 150 years (Krieger) and in 1990 blacks had higher rates than whites for 13 of the 15 leading causes of death in the United States (National Center for Health Statistics).<sup>149</sup>

Given the revelations of critical psychology and sociology, if a victim of racial abuse wished to pursue a legal remedy based upon her

---

<sup>146</sup> WILLIAMS & CHAMBLESS, *supra* note 68, at 159.

<sup>147</sup> *Id.*

<sup>148</sup> Williams, *supra* note 5, at 336.

<sup>149</sup> *Id.* at 336.

racial victimization, what avenues are available to her? While the options might not be intuitive, there is reason for guarded optimism in the capacity of some traditional tort law doctrine to embrace social science developments, including critical psychology and sociology.

## PART II: RECONSIDERING TORT LAW

*"But the facing of so vast a prejudice could not but bring the inevitable self-questioning, self-disparagement, and lowering of ideals which ever accompany repression and breed in an atmosphere of contempt and hate."*<sup>150</sup>

The capacity of tort law doctrine to actualize equality-seeking norms can be analyzed by problematizing a widely reported St. Louis incident. In Green Acres, north St. Louis County, an ongoing controversy between two neighbors was featured in the press.<sup>151</sup> Keith Allen Dagenais, one of the neighbors, was accused of disturbing the peace and destruction of property and was under a court order to leave his neighbors alone. In response he erected a sign reading, "[t]his is our property. Thou shalt not take."<sup>152</sup>

The feud started when Mr. Dagenais and his housemate moved in. The dispute initially centered on a paved parking space shared by the neighbors. A standoff began after Mr. Dagenais, who is White, insisted that Ms. McIntosh, who is Black, remove part of the driveway slabs that crossed onto his property line, while Ms. McIntosh insisted that the city had ordered her to construct the driveway as it existed. Of direct relevance for purposes of this article, McIntosh has alleged that Dagenais erected a cross on the driveway, called her racist names, hung a black doll by the neck in his window which faces her house, and damaged her side of the driveway when he used a sledgehammer to break up the pavement on his side. Not only are there racial issues, but there are shadows of the occult as Dagenais' response to the allegations was that he was practicing witchcraft not racism.<sup>153</sup>

<sup>150</sup> W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 7-9 (Bantam Books 1989).

<sup>151</sup> Denise Hollinshed, *FBI May Decide Whether Neighbors' Dispute Is Witchcraft - Or Racism*, ST. LOUIS POST-DISPATCH, Jan. 27, 2003, at B2.

<sup>152</sup> *Id.*

<sup>153</sup> These events are described in police reports:

In terms of this article's goal of reconceptualizing tort law to further the goal of racial recompense, it is relevant that McIntosh, lived with her children, aged 10 and 15 at the time of the incidents. In the press, McIntosh indicated that her 10-year-old daughter needed therapy and is now afraid to play outside due to the activities of Mr. Dagenais. She was quoted in the press as saying, "[e]verybody just blows this up as a driveway issue and it isn't." "When I walk out my door and when I pull up, I don't know what's coming," she added. "I have two children ... and I don't want anything to happen to them." McIntosh eventually got an order of protection barring Dagenais and his housemate from abusing, threatening, molesting or stalking her and from communicating with her in any manner.<sup>154</sup>

---

On July 26, Dagenais constructed a wooden cross, placed it on the driveway and poured a liquid over the cross. The report says he was wearing a black skull cap and a black turtleneck. Dagenais said that for years he has practiced Wicca, a belief whose adherents practice a form of witchcraft. "I put up a cross. I was sitting out there in black trying to scare them," he said. "I didn't dress in a white cloak like the Ku Klux Klan."

On Aug. 15, McIntosh's estranged husband was at her house and saw a black-faced doll clothed and hanging by the neck in a porch window of Dagenais' house, facing toward the McIntosh home. The police report stated that a crucifix had been applied to the window with tape, and the garage door was painted with the number "666," a biblical reference to the devil. Subdivision trustees told Dagenais to remove the items. Dagenais said the doll was actually a black cat figure dressed in a brown dress.

On Dec. 2, McIntosh arrived home to find her neighbor's vehicle partially blocking her driveway. When she got out of her car, Dagenais called her by a series of offensive names. Dagenais told police he had been raking leaves and drinking wine and had moved the car to sweep leaves. "Before I had a chance to move my car, Patricia got out of her car and swore at me. I in turn swore at her," he said. *Id.*

<sup>154</sup> *Id.* Subsequently, Police charged Dagenais with three counts of disturbing the peace and one count of destruction of property, with each count punishable by fines of up to \$1,000. *Id.* Police have also sent their files to the FBI to determine whether the complaints can be prosecuted as a hate crime. *Id.*

### A. Intent and Negligence Distinguished

Not surprisingly, Mr. Dagenais has articulated both a lack of racial animus and a lack of racist intent in his actions.<sup>155</sup> Considering civil remedies provided under tort law, it is important to recognize that intent and negligence are entirely different concepts. “The Defendant has the intent to achieve a specified result when the defendant either (1) has a purpose<sup>156</sup> to accomplish that result or (2) lacks such a purpose but knows to a substantial certainty<sup>157</sup> that the defendant’s actions will bring about the result.”<sup>158</sup> Intent is not a general state of mind. One

---

<sup>155</sup> Dagenais has said he is not racist, but was following practices of his Wiccan philosophy to protect his home. See Patricia Rice, *Vigil Aims to Soothe Neighbors’ Dispute*, ST. LOUIS POST-DISPATCH, Feb. 10, 2003, at B2.

<sup>156</sup> See DAN DOBBS, *THE LAW OF TORTS* §24, at 48.

The Purpose Test: Suppose the defendant attempts to hit a target by firing a rifle from a great distance. It may be unlikely that he can do so, but it is his purpose to do so if he can. Under the first clause, he has intent to hit the target because he has a purpose to do so. The intent is not necessarily tortious or wrong; to see whether the defendant has committed a tort will require other steps in proof and reasoning. The illustration given merely shows the intent element in what may or may not turn out to be a tort. *Id.*

<sup>157</sup> See *id.*

The Certainty Test: Suppose that the defendant puts sleeping powders in the food served by the cafeteria at a summer camp. His purpose is limited: He knows X will eat the food and wishes to put X to sleep. By the purpose clause, the defendant does not intend to put other to sleep at all. However, if he knows that others will also be eating the cafeteria food at the same time, he must know to a substantial or virtual certainty that they, too, will be affected. Under the certainty clause of the intent definition, the defendant intends to affect others who eat the same cafeteria food at the same time. Mere risk, however, even a very high risk, is not enough to show substantial certainty.

...

The substantial certainty is focused on the Plaintiff and on the source of the harm and a particular time and place. It will not suffice to say that the defendant maintains a dangerous condition on his land that, over a period of years, is almost certain to cause injury to someone. That might be negligence, but it is not an intent to harm or to commit any trespassory tort. *Id.*

<sup>158</sup> *Id.*

has a purpose to, or substantial certainty, of accomplishing an objective. As stated by Dobbs, “the defendant might intend to touch and also intend his touching to have harmful effects.” These are two different intents.<sup>159</sup>

As a state of mind, intent is definitionally subjective – it is in the mind of the tortfeasor. Conversely negligence is objective and is measured according to external norms of appropriate and expected behavior. “Thus a defendant is negligent if he departs from the standard of care expected of people generally, but he is not necessarily acting intentionally merely because other people acting in like circumstances would harbor intent.”<sup>160</sup> According to Dobbs, “negligence, therefore, entails unreasonably risky conduct with the emphasis on risk as it would be perceived by the reasonable person. Any given act may be intentional or it may be negligent, but it cannot be both, as intent and negligence are regarded as mutually exclusive grounds for liability.”<sup>161</sup> Therefore a tortfeasor, who while aware of a risk decides nonetheless to engage in risky behavior, lacking the high level mental requirement for “intentional tortious” conduct, will be liable for negligence.<sup>162</sup> In this way, negligence law may serve as a catch all or non-intentional default category for arguably non-intentional conduct falling below societal expectations.

As will be discussed below, there might be some legitimate creative use of intentional tort law doctrine capable of providing racial recompense in situations such as the Dagenais-McIntosh hypothetical. Generally, however, battery, assault, and intentional infliction of emotional distress might not be the preferred legal strategy for those seeking compensation in such circumstances. An alleged tortfeasor, such as Mr. Dagenais, may indeed create risks of harm without having either a defined purpose or certainty that harm will result – this lack of *mens rea*, if you will, would prevent application of intentional tort law doctrine. As such, a conception of negligent racism, whereby the plaintiff’s focus is not on establishing the defendant’s purpose or the certainty required to show intent, is likely better doctrine to achieve racial recompense.<sup>163</sup> The analysis that follows will, accordingly, focus on why negligence doctrine may be preferable for articulating such

---

<sup>159</sup> *Id.* at 49.

<sup>160</sup> *See id.*

<sup>161</sup> *See id.* at 51.

<sup>162</sup> *See id.* at 50.

<sup>163</sup> *See Smith, Everyday Indignities, supra* note 141, at 529-35 (analyzing concept of negligent racism as a basis for reconsideration of title VII doctrine).

claims. Since, negligence does not require a state of mind at all, but focuses instead on the outward conduct, an alleged tortfeasor, like Mr. Dagenais in the above hypothetical, might nonetheless be liable for compensating the McIntosh family.

### **B. Intentional Infliction of Emotional Distress**

While the utterer of racial invective knowingly intends to inflict harm, the tort of intentional infliction of emotional distress presents a difficult avenue for victims of racial abuse seeking compensation. "The rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind."<sup>164</sup>

Given the critical psychology, the criteria that "[t]he emotional distress must in fact exist, and it must be severe"<sup>165</sup> would not seem to be the main hurdle. Instead, intentional infliction of emotional distress would not likely lead to racial recompense for the McIntosh family due to the requirement that recovery be limited, unless it is established that the distress caused was "severe," "extreme" or "outrageous."<sup>166</sup> In addressing the threshold for a successful claim of intentional infliction of emotional distress the American Law Institute, the drafters of the Second Restatement of Torts, stated:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive

---

<sup>164</sup> Eckenrode v. Life America Insurance Co., 470 F.2d 1 (7th Cir. 1972). See RESTATEMENT (SECOND) OF TORTS § 46(g) (1964) ("in short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor's conduct has gone beyond all reasonable bounds of decency. The prohibited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'). See WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 61 & n.54 (5th ed. 1984).

<sup>165</sup> WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 63 (1984).

<sup>166</sup> See RANDAL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 81-88 (2002); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Namecalling*, 17 HARV. C.R.-C.L. REV. 133, 151 (1982).

damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, "Outrageous!"*<sup>167</sup> [Emphasis added]

It is the potential for abstracted (e)raced objective criteria, demanding that the facts so outrage the hypothetical reasonable person, which often sounds the death knell in cases involving racial invective.<sup>168</sup> Specifically, the construction of the reasonable person is a cite of much controversy and debate.<sup>169</sup> Indeed, it is unclear to what extent this hypothetical ordinary person will be contextualized and infused with relevant criteria i.e. sex, race, religion, ethnicity, sexual orientation, age, mental vulnerabilities and the intersections of these identity variables. Thus, the ordinary person is often not perturbed by racial animus, certainly not to the extent of the subjectivized reasonable person, i.e. the reasonable Black child confronted with racially derogatory imagery.<sup>170</sup> In addition to the high watermark for

---

<sup>167</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1964).

<sup>168</sup> CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (New York University Press 2003).

<sup>169</sup> *Id.*; Nelson, *supra* note 144, at 1007. See generally Stanley Yeo, *Proportionality in Criminal Defences*, 12 CRIM. L.J. 211 (1988); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (3rd ed. 2001).

<sup>170</sup> As I stated in *(En) Gaged or (En)Raged: The Implications of Racial Context to the Canadian Provocation Defence*, there is a need to contextualize and infuse reasonable person:

At some point it becomes necessary, in the interest of justice, to consider some of the attributes which the accused does not share with the ordinary person. For example, the potentially provocative impact of the desecration of a crucifix might only be understood if the ordinary person is catholic, whereas the same event for an agnostic or an atheist may be a matter of indifference. Similarly, it may be pointless to ask what the effect on an ordinary person would be of the desecration of the Koran, if the ordinary person were not Muslim. To fully appreciate and appropriately consider the provocative impact of the desecration of a synagogue, the reasonable person constructed should be Jewish.



outrageous conduct, the traditional objective standard adds to the difficulty of obtaining a successful result under the tort of intentional infliction of emotional distress. The infusion of this tort law doctrine with critical psychology might, however, be informative and provide a basis for racial recompense.

Indeed, there might be a foundation for such recompense built upon the line of reasoning found in the famous *Hadley v. Baxendale* case.<sup>171</sup> If the tortfeasor knows of the heightened sensitivities of the plaintiff, such as vulnerabilities flowing from racial abuse, the tortfeasor may similarly have a heightened duty of care. In this way, conduct which is normally acceptable, or even protected, is legally problematized due to the actual knowledge of the tortious wrongdoer.<sup>172</sup>

The case of *Caldor, Inc. v. Bowden*<sup>173</sup> is apt. The defendants' conduct toward the plaintiff was even more extreme and outrageous than in *Alcorn*, where a finding of emotional distress was made.<sup>174</sup> Two

---

Nelson, *supra* note 144, at 1025. See generally LEE, *supra* note 168; Yeo, *supra* note 169, at 211; DRESSLER, *supra* note 169.

<sup>171</sup> *Hadley v. Baxendale*, (1854) 9 Exch. 341 (stating that a breaching party is only responsible for consequential damages flowing from a breach of contract to the extent that damages are within the contemplation of the parties at the time of contracting, or are reasonably foreseeable).

<sup>172</sup> *Bridges ex rel. Bridges v. Park Place Entertainment*, 860 So.2d 811 (2003); *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F.Supp. 346 (E.D.P.A. 1993); *Eddy v. Casey's General Store, Inc.*, 485 N.W.2d 633 (1992). See also *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 498 (1970) (shouting racial insults and then firing employee is indeed outrageous. Held an employer's conduct toward a Black employee was extreme and outrageous, and found an action for intentional infliction of emotional distress where the employer, standing in a position of authority over plaintiff, aware of his particular susceptibility to emotional distress, and for the purpose of causing plaintiff to suffer such distress, intentionally humiliated plaintiff, insulted his race [by calling him a "nigger"]).

<sup>173</sup> *Caldor, Inc. v. Bowden*, 625 A.2d 959 (Md.1993).

<sup>174</sup> *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216, 216 (1970):

"Complaint that after Negro truck driver informed Caucasian field superintendent that driver, as shop steward, had advised another not to drive a certain truck superintendent intentionally disparaged driver's race in a rude, violent insolent manner for purpose of causing emotional and physical distress, that superintendent's conduct was ratified with knowledge that driver's emotional and physical distress would thereby increase and that as result thereof driver suffered emotional and physical distress and was sick for several weeks and unable to work and had sustained shock, nausea and insomnia, stated cause of action, as against general demurrer, but that statutes referring

of Caldor's security personnel imprisoned a teenager in a tiny room for many hours, preventing him from leaving or calling his parents. They threatened him, interrogated him and coerced a false confession from him. When he later voluntarily returned to the store with his mother to resolve the situation, other management personnel called him a "nigger" and told him that he would "burn" for the crime he did not commit, presumably because of his race. They cuffed his hands behind his back and marched him handcuffed through a public area to add to his humiliation.

Despite such extreme and outrageous conduct, the plaintiff was required by the majority to make a strong showing with regard to the severity of the emotional distress. For instance, the plaintiff was required to demonstrate that the emotional distress was so severe as to disable him for an indefinite period from performing all of his principal daily activities. Interestingly, in an opinion which acknowledges the cumulative affects of racism and specifically speaks the language of abuse, the dissenting judge astutely found that the teenage plaintiff was entitled to recover on the basis of intentional infliction of emotional distress.

Finally, the majority's requirement that, to recover for intentional infliction of emotional distress, one must have suffered a "disabling emotional response that hindered his ability to carry out his daily activities" ... will likely work against many members of groups which have, unfortunately and through no fault of their own, suffered more discrimination, harassment and abuse in our society than that suffered by the majority of individuals. Many members of certain minority and socio-economic groups, who have suffered discrimination and abuse, have developed a tougher hide than many other persons. Many of those who have more frequently been the victims of outrageous conduct have developed, from experience and necessity, the ability to continue functioning in their daily activities. While the emotional hurt may be as strong or stronger, the ability to function normally may be greater. *Under the majority's formulation of the tort, however, those persons who are able to carry on with their principal daily activities will not be able to recover damages for their*

---

to equal accommodations did not encompass discrimination in employment."

*severe emotional distress resulting from extreme and outrageous intentional conduct. In its application, the tort will discriminate against those who have developed a degree of resiliency because of past discrimination. This result is contrary to logic, fairness, and our prior opinions.*<sup>175</sup>

Ultimately in ruling for the plaintiff, the court overcame the stringent intent requirement by determining that the jury could have inferred from the evidence that the defendants' "suspicions" were merely pretexts, and that the defendants' had ulterior motives. Additionally, the jury was entitled to infer from the racial slur and statement of Caldor's manager, coupled with the other egregious conduct by Caldor's personnel, that the defendants were motivated by racial hostility.

Thus the real impediment to this doctrine, involves not the assessment of distress, to which the critical medical information is informative, but rather the requirement of intention. The doctrine as originally conceived insisted on substantial certainty. However, as Dobbs has analyzed, there may actually be greater elasticity in the examination of intentionality than originally formulated. This interpretation of a flexible, more realistic, intent standard may provide a glimmer of hope for victims of racialized abuses. Specifically, those who consciously disregard the impact of their racial abuse should be held accountable as reckless in the least.

In the great majority of the cases allowing recovery, the mental distress has been inflicted intentionally, the defendant either desiring to cause it or knowing that it was substantially certain to follow from the conduct. There are, however, a few cases which indicate that liability for extreme outrage is broader and extends to situations in which there is no certainty, but merely a high degree of probability that the mental distress will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct that is commonly called willful or wanton, or reckless.<sup>176</sup>

---

<sup>175</sup> *Caldor*, 625 A.2d at 980 (emphasis added).

<sup>176</sup> WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 64 (1984).

### C. Battery

A battery is harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such contact.<sup>177</sup> The restatement formula is that the defendant must intend a “harmful or offensive contact.”<sup>178</sup> Accordingly, the hallmark of battery is intentional nonconsensual harmful touching. Specifically, “intent to touch in a way the defendant understands is not consented to is sufficient. So is an actual intent to harm. The question is whether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended.”<sup>179</sup> While ambiguous, Dobbs states that the restatement formula likely requires dual intent to harm or offend, as well as an intent to touch.<sup>180</sup>

Traditionally courts have recognized tangible forms of touching as battery, i.e. plaintiffs are touched if struck by a bullet or if intentionally poisoned from a substance left in her cup.<sup>181</sup> Intangibles, such as gases, smoke and odors, have not been as easily recognized in battery cases despite their physical presence.<sup>182</sup>

Accordingly, the defendant must respect the plaintiff’s apparent wishes to avoid intentional bodily contact. Hostile, aggressive, or harmful touching are batteries because the plaintiff wishes to avoid them. But the plaintiff’s right to avoid unwanted intentional contact does not depend upon the defendant’s hostile intent or even upon the reasonableness of the plaintiff’s wishes.<sup>183</sup>

The restatement states that the tortfeasor is subject to liability for causing bodily contact that is *either* harmful or offensive in that it

---

<sup>177</sup> RESTATEMENT (SECOND) OF TORTS §13 (1965).

<sup>178</sup> *Id.*

<sup>179</sup> DOBBS, *supra* note 156, at 58.

<sup>180</sup> *Id.* at 59.

<sup>181</sup> Snouffer v. Snouffer, 621 N.E.2d 879 (1993) (cited in DOBBS, *supra* note 156, at 61).

<sup>182</sup> McCracken v. O.B. Sloan, 252 S.E.2d 250 (1979) (upholding smokers’ rights ad refusing to find battery) (cited in DOBBS, *supra* note 156, at 56 n.11, 61 n.3). “However, several decisions have found a battery resulting from smoke, with the qualification that the defendant must have a purpose to harm or offend and is not liable for merely substantial certainty touchings.” DOBBS, *supra* note 156, at 61.

<sup>183</sup> DOBBS, *supra* note 156, at 54.

“infringes a reasonable sense of personal dignity.”<sup>184</sup> Accordingly, “[a] person is entitled to refuse well-intentioned medical treatment as well as the bumptious grappling of an unwelcome swain.”<sup>185</sup> Accordingly, the protection of such dignitary interests may prove beneficial to victims seeking racial recompense for racialized abuses.

Admittedly, the battery doctrine’s general requirement of physical contact may act as a bar to recovery where the tortfeasors behavior does not include physical touching or contact of the sort outlined above.<sup>186</sup> Of course, where there is such contact, the doctrine may prove useful for victims of racial abuse, but in the case of the far more prevalent insult combined with gesture or gesticulation, other tort law doctrines may be of greater assistance. While there would likely be fear of such contact in the Dagenais-McIntosh matter thereby rendering the intentional tort of assault a more viable option, *Fisher v. Carrousel Motor*<sup>187</sup> thereby reveals that there is still one avenue worth considering within the intentional tort of battery.

*Emmit E. Fisher v. Carrousel Motor, Inc., et al.*,<sup>188</sup> involved a suit for actual and exemplary damages from an alleged assault and battery. Fisher, a Black man, was a mathematician with an agency of NASA. The defendants were the Carrousel Motor Hotel, Inc., the Brass Ring Club, which was located inside the hotel, and Mr. Robert Flynn an employee of the hotel and manager of the club. The issue before the Supreme Court of Texas was whether there was evidence of an actionable battery and, further, whether such a finding should lead to an award of exemplary damages for the malicious conduct of Mr. Flynn.

Fisher had been invited to a meeting, which included a luncheon, to be held at the Carrousel Hotel. Fisher confirmed he would attend the meeting by phone. After the morning session of the meetings, the group of between 25 and 30 guests went to the Brass Ring Club for the luncheon. The court decision states, “[t]he luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher’s hand and shouted that he, a Negro, could not be

---

<sup>184</sup> *Id.* at 62. “A touching that would not ordinarily offend a reasonable sense of personal dignity would presumably not be against the plaintiff’s wishes, in the absence of some expression to the contrary”. *Id.*

<sup>185</sup> *Id.* at 54.

<sup>186</sup> See Delgado, *supra* note 19.

<sup>187</sup> *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

<sup>188</sup> *Id.*

served in the club.”

While Fisher testified that he had not actually been touched, nor did he suffer fear or apprehension of physical injury, he did testify that, “he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.” At trial, the jury found that “Flynn had ‘forcibly dispossessed plaintiff of his dinner plate and ‘shouted in a loud and offensive manner’ that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity.” The jury further determined that Mr. Flynn had acted maliciously thus awarding Fisher \$400 actual damages for the humiliation and indignity caused him and \$500 exemplary damages for Flynn's malicious conduct.

Interestingly, the Court of Civil Appeals held there was no assault since there was no physical contact and no fear or apprehension of physical contact. “However, the court emphasized that it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.”<sup>189</sup> The court relied upon Prosser, Law of Torts which said:

The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient....*The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it.*<sup>190</sup>

As such, the intentional grabbing of plaintiff's plate by Mr. Flynn constituted a battery. “The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body.”<sup>191</sup> “To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done in an

---

<sup>189</sup> 1 HARPER & JAMES, THE LAW OF TORTS 216 (1956); RESTATEMENT (SECOND) OF TORTS §§ 18, 19 (1965).

<sup>190</sup> PROSSER, *supra* note 164, at 39.

<sup>191</sup> WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 32 (3rd ed. 1964).

offensive manner, is sufficient.”<sup>192</sup> The rationale for holding an offensive contact with an extension of a person to be a battery is explained in the Restatements as follows:

Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. *Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person.* There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.<sup>193</sup> [Emphasis added]

Thus, conceptually there might exist a zone of proximity beyond the physical body, yet deserving of tort law protection. This zone is important to those subjected to racial terrorism as the techniques of racial abuse are often more subtle than in yesteryear. Indeed, it is not uncommon for the manifestation of racial microaggressions to take the form of snatching items or utensils from the hand of a racialized persons, or the dropping or throwing of currency at the person etc. Indignities du jour<sup>194</sup> often involves such contact which is humiliating and offensive.

#### D. Assault

The intentional tort of assault protects “the interest in freedom from apprehension of harmful or offensive contact.”<sup>195</sup> Accordingly, the contact itself is not the focus of assault – rather that is the domain of battery. Thus for there to be an assault there need not be any actual contact as the plaintiff is “protected against...purely mental

---

<sup>192</sup> *Morgan v. Loyacomo*, 190 Miss. 656, 1 So.2d 510 (1941); Prosser, *supra* note 191, at 32.

<sup>193</sup> RESTATEMENT (SECOND) OF TORTS § 18 (1965).

<sup>194</sup> Patricia J. Williams, *Notes from a Small World*, NEW YORKER, Apr. 29 & May 6, 1996, at 87, 92. See *supra* n.153.

<sup>195</sup> PROSSER, *supra* note 164, at 43.

disturbance[s].”<sup>196</sup> It is important, therefore, to recognize that an assault “may constitute any act of such a nature as to excite an apprehension of a battery.”<sup>197</sup> The assault law requirement that the plaintiff apprehend physical injury or touching should not be an insurmountable hurdle for victims of racial abuses as many victims of racial insults and accompanying gestures do indeed fear for their safety, and indeed their lives, at the time of the racial terrorism. As the “apprehension must be one which would normally be aroused in the mind of a reasonable person,” to successfully claim assault on the basis of racial abuse, this “fear-factor” should not be located in the (e)raced mind of the hypothetical reasonable man, abstracted to the point of being raceless and genderless.<sup>198</sup> Thus, the prospects for successful litigation may be determined by the ability of the judge and jury to consider the reasonable person as racialized within an historical and political context.

“An assault is an act that is intended to and does place the plaintiff in apprehension of an immediate unconsented-to touching that would amount to a battery.”<sup>199</sup> The subjective focus of this intentional tort is useful for the racially victimized plaintiff as it is her subjective recognition or apprehension that is central to this tortious conduct – subjective fear or apprehension of touching is thereby protected.<sup>200</sup> As an intentional tort, “intent may be based either on the defendant’s purpose or on his substantial certainty that a trespassory tort will occur.”<sup>201</sup> Once the plaintiff apprehends an imminent battery from the tortious purpose, the defendant is liable for the assault.<sup>202</sup>

“Many opinions have asserted that the plaintiff’s apprehension must be reasonable or well-founded, that the defendant must have the apparent present ability to complete the battery, and that words alone, without accompanying action, cannot count as an assault.”<sup>203</sup> However,

---

<sup>196</sup> *Id.* at 43. Prosser notes that this action is the first recognition of a mental, as distance from a physical, injury as there is a “touching of the mind, if not the body.”

*Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See id.*

<sup>199</sup> RESTATEMENT (SECOND) OF TORTS §§ 21, 32.

<sup>200</sup> DOBBS, *supra* note 156, at 63, 64.

<sup>201</sup> *Id.* at 64 (“In the case of a secondary or extended assault, the defendant may be held liable if his misconduct is directed at a third person but miscarries so that it is the plaintiff who apprehends the immediate or “imminent” touching.”).

<sup>202</sup> *Id.*

<sup>203</sup> *Muslow v. A.G. Edwards & Sons, Inc.*, 509 So.2d 1012 (La. App. 1987) (“reasonable apprehension” based on “present ability”); *Hawkins v. Hawkins*, 400



even words alone cases tend to recognize that words must be interpreted in light of circumstances and may, therefore, count as an assault.<sup>204</sup> The apparent reality of the threat, based on circumstances and context, not form, is what matters. This is an important reality check for a racially abused person whose assessment of a hostile environment may be based upon a different lived reality than a majority tortfeasor.<sup>205</sup> Indeed, the threat of an imminent touching need not be explicit or verbal.

There is a temporal caveat. Although the plaintiff need not labor under fear, since apprehension or recognition of a threatened touching will suffice,<sup>206</sup> she must believe the threatened battery is imminent.<sup>207</sup> Accordingly, if the plaintiff is able to flee or if the battery will likely be delayed or prohibited, there is no assault.<sup>208</sup> “Future danger or a threatening atmosphere without reason to expect some immediate touching, in other words, is not enough.”<sup>209</sup>

Like the negligence rule, assault might be a helpful doctrine for plaintiffs facing situations like that presented in the Dagenais-McIntosh matter. As intentional torts provide an area in which the “foreseeability” limitation on recovery may be cast aside, in so far as the extent of the

---

S.E.2d 472 (1991) (“reasonable apprehension, apparent ability”) (cited in DOBBS, *supra* note 156, at 65).

<sup>204</sup> See *Muslow*, 509 So.2d at 1012; *Johnson v. Bolinger*, 356 S.E.2d 378 (1987); RESTATEMENT (SECOND) OF TORTS § 31 (cited in DOBBS, *supra* note 156, at 65).

In one sense there is no such thing as a “words alone” case; all words occur in a social context and that context may reinforce and add substance to the verbal threat.

DOBBS, *supra* note 156, at 65. See *Johnson v. Bollinger*, 356 S.E.2d 378 (1987) (“I’ll get you,” spoken by a defendant who wears a pistol in violation of the law may be an assault even though he does not draw the pistol); RESTATEMENT (SECOND) OF TORTS § 31 modifies the traditional statement by adding that threatening words may suffice if accompanied by action or circumstances that put the plaintiff in reasonable apprehension of imminent battery.

<sup>205</sup> DOBBS, *supra* note 156, at 65.

<sup>206</sup> Courts often define assault in terms of the plaintiff’s fear of an imminent touching, but this is probably not literal, as much as it is a recognition that a touching is threatened. See, e.g., *Lamb v. State*, 613 A.2d 402 (Md. Ct. Spec. App. 1993) (words like fear sometimes used loosely as shorthand for apprehension, but fear is not literally required, citing PROSSER, *supra* note 164, at § 10). See DOBBS, *supra* note 156, at 64.

<sup>207</sup> DOBBS, *supra* note 156, at 65.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

injury is concerned, assault may provide the opportunity for racial recompense.<sup>210</sup> Specifically, “the foreseeability, or risk rule, holds the defendant subject to liability if he could reasonably foresee the nature of the harm done, even if the total amount of harm turned out to be quite unforeseeably large.”<sup>211</sup> It is noteworthy that it has often been said that intentional torts offer a greater opportunity for extended liability.<sup>212</sup> As such, some of the impediments to recoverability presented by the negligence laws are mitigated with assault doctrine. For instance, in negligence law, the tortfeasor engages in risky behavior even though he should be aware of a risk of possible injury. The assault doctrine, while still keeping the “foreseeability” requirement for the possibility of injury, does not require that the tortfeasor foresee the extent of that possible risk. Therefore, while the “foreseeability” requirement is not eliminated under that assault doctrine, it is mitigated, applying merely to the injury itself and not the extent of such injury. Therefore a tortfeasor, who while aware of a risk decides nonetheless to engage in risky behavior, may lack the high level mental requirement for “intentional tortious” conduct, he or she will be liable for negligence

Interestingly, the substantive requirements of the tort of assault may provide for fertile consideration. Given the uncertain prospects for successful litigation in all but the most egregious and racially abusive situations, some scholars have called for the creation of novel theories to seek racial recompense. For instance, Professor Richard Delgado has called for a tort for racial insult.<sup>213</sup> While compelling, exploration and excavation of traditional and seemingly archaic legal doctrine may also prove a fruitful exercise in the unearthing of valuable doctrines for racial recompense and may provide alternative grounds for legal pleadings.

### **PART III:     CONSIDERING THE THIN-SKULL PLAINTIFF                   AND THE EGG-SHELL PERSONALITY DOCTRINES**

The Thin Skull or Eggshell rule extends tortious liability to situations where the tortfeasor, although foreseeing certain harm, does not foresee the amount or extent of the harm.

---

<sup>210</sup> See generally *id.* at § 43.

<sup>211</sup> *Id.* at 464 (citing RESTATEMENT (SECOND) OF TORTS § 435).

<sup>212</sup> *Id.*

<sup>213</sup> See generally Delgado, *supra* note 166.

The label derives from an imagined case in which the plaintiff has an unusually thin rule. The defendant, having no reason to know of the plaintiff's peculiar susceptibility, negligently injures the plaintiff's head. The blow would be uncomfortable to normal people, but to the plaintiff it causes a fractured skull and serious injury. It seems to be agreed that the plaintiff is entitled to recover for all the harm done, even though a fractured skull was definitely not foreseeable.<sup>214</sup>

The tortfeasor must, accordingly, take the victim as she is found.<sup>215</sup>

In an ironic use of this doctrine, Marta Sanchez, a University of Virginia law student, sued her professor, Kenneth Abraham, alleging assault and battery.<sup>216</sup> The irony stems from the fact that the lawsuit arose from an incident in an introductory class Prof. Abraham taught to first-year law students.<sup>217</sup> "As a demonstration of a legal principle known as the "egg-shell skull rule," Abraham touched Sanchez on the shoulder. Sanchez said the touch--which Abraham has said was a "tap" and Sanchez has described as a "caress"--caused her to experience disturbing memories of rape, pregnancy and abortion that she suffered in her native Panama."<sup>218</sup> Using the quintessential logic of the doctrine, Sanchez's lawyer remarked that "[s]he brought a lot of baggage with her."<sup>219</sup> "She had been terrorized and victimized as a child, and although we don't hold [Prof.] Abraham responsible for what happened to her as a child, what he did is exacerbate and bring to the surface once again her vulnerability to men with authority and power."<sup>220</sup> Such an unexpected and exacerbated reaction is an example of how far the Egg-shell doctrine can be extended. Once it is determined that a foreseeable and wrongful act has occurred, the tortfeasor is held responsible for the

---

<sup>214</sup> DOBBS, *supra* note 156, at 464.

<sup>215</sup> *Id.*

<sup>216</sup> Opinion Journal from the Wall Street Journal Editorial Page, Let's Sue all the Lawyers, <http://www.opinionjournal.com/best/?id=105001836> (last visited Jan. 12, 2006).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

full extent of the harm, despite the fact that the damage is greater than would normally be expected or experienced.<sup>221</sup>

A caveat is in order with respect to the parameters of the Thin-skull rule. It is important to recognize that the rule does not impose liability for the pre-existing condition itself. "The defendant's negligence today is not a cause in fact of a condition the plaintiff had yesterday."<sup>222</sup> Instead, the Thin-skull rule imposes liability for the unforeseeable aggravation of foreseeable harm – it is applicable to extend liability to cover the scope of the harm, despite the fact such scope was unforeseeable.<sup>223</sup> Second, the thin-skull doctrine does not require that a defendant apply any special care for a plaintiff's unforeseeable vulnerability, since the rule applies not to the negligence issue but only to the issue of proximate cause.<sup>224</sup> Essentially, this means that the thin-skull doctrine is applicable only when the defendant's conduct was outside the realm of ordinary care thereby placing normal people at risk.<sup>225</sup>

By having to "take the victim as one finds him"<sup>226</sup> the tortfeasor is forced to bear the results of any disparate and unexpected injury borne by the victim. So, in the hypothetical case of a cross burning on the private property of a victim who suffers a stroke or a heart attack upon the sight of the burning symbols, the tortfeasors must bear the burden of compensating the plaintiff for any exacerbated damages

---

<sup>221</sup> Opinion Journal from the Wall Street Journal Editorial Page, Let's Sue all the Lawyers, <http://www.opinionjournal.com/best/?id=105001836> (last visited Jan. 12, 2006).

<sup>222</sup> DOBBS, *supra* note 156, at 465.

<sup>223</sup> If the defendant knows or should know of the plaintiff's peculiar susceptibility, he is of course obliged to exercise ordinary care with that susceptibility in mind and is liable for injuries caused if he does not. But that liability does not invoke the thin skull rule, which deals with injuries of an unforeseeable extent.) Once the defendant does that, the thin skull rule provides that he is liable for all the personal injuries actually caused, although they may be greater than those that would be suffered by a normal person. *Vaughn v. Nissan Motor Corporation*, 77 F.3d 736, 738 (4th Cir. 1996) ("The tortfeasor's duty of care is measured by the ordinary person, but the plaintiff's injuries may not be. In short, if defendant breached its objective duty of care, it must take its victim as it finds her.").

<sup>224</sup> *Vaughn*, 77 F.3d at 738.

<sup>225</sup> *Id.*

<sup>226</sup> *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (Wisc. 1891) (espousing the 'thin skull' rule). Williams, *supra* note 5, at 338 ("In the realm of the physical, racism creates corresponding vulnerability as societal institutions disparately distribute the quality and quantity of health-enhancing benefits to racialized persons. Such profound impacts of racism at the level of the social institution shape the socio-economic opportunities, mobility and indeed the life chances for racialized communities.").

flowing from the trespass generated by a legacy of racialized abuse. Indeed, catalysts for exacerbation of mental trauma need not even be *prima facie* oppressive or racialized for an underlying mental vulnerability to be awakened from dormancy – even non-identity driven torts will suffice to ground the doctrine.

The tort law doctrines examining thin-skulled plaintiffs and egg-shell personalities as potentially responsive conceptual frameworks might be instructive points of departure for such an exploration.<sup>227</sup> Taking the “thin-skull” problem first, it has been held that the reasonable foreseeability test instructs that a tortfeasor ‘takes his victim as he finds him.’<sup>228</sup> The general policy rational for allowing recovery for such unanticipated aggravated injuries is that judges believe it would be unjust to deny such compensation.<sup>229</sup> Specifically, such aggravated injury can be seen as falling within the foresight doctrine as it is foreseeable that anything can happen to a fragile person who is hurt in an accident.<sup>230</sup> Others, such as Madam Justice Wilson,<sup>231</sup> have found separate support for the doctrine apart from the foreseeability test.

The concept that the wrongdoer takes his victim as he finds him has little to do with foreseeability. It has a great deal to do with who, as a policy matter, should bear the loss when for reasons of peculiar vulnerability the victim of the defendant’s negligence suffers greater injury or a different type of injury than the average victim would have suffered. It premises, as it were, a norm of vulnerability of the average person and makes the wrongdoer rather than the victim bear the damage suffered by those falling short of the norm.<sup>232</sup>

---

<sup>227</sup> Negligence law supposes a duty of care, which is breached, either willfully, recklessly, carelessly or negligently. The duty of care implies a standard of care. This duty and, corresponding standard, must be foreseeable in order for the plaintiff to be compensated. The injury must not be too remote and an intervening action cannot have occurred which absolves the initial tortfeasor or responsibility.

<sup>228</sup> *Smith v. Leech Brain & Co.*, (1961) 3 All E.R. 1159, 1161 (Q.B.).

<sup>229</sup> *See id.* at 1161–62.

<sup>230</sup> *See Negretto v. Sayers* (1963) S.A.S.R. 313.

<sup>231</sup> Justice Wilson was the first woman appointed to the Supreme Court of Canada.

<sup>232</sup> *Cotic v. Gray*, [1981] 17 C.C. L.T. 138, 178, aff’d, [1984] 26 C.C.L.T. 163. Justice Wilson’s interpretation of the thin-skull doctrine is akin to the doctrine of assumption of risk but in favor of the plaintiff. Assumption of risk is an affirmative defense for which the defendant bears the burden of proving. Donald H. Henderson et al., *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 ED. LAW REP. 13, 36 (1991). To succeed, the defendant generally

As a matter of policy, therefore, the wrongdoer should bear the costs, whether or not the thin-skull consequences are foreseeable. It may well be that, due to the difficulty of distinguishing between injuries that are foreseeable and those which are not, efficient administration of the tort law system requires that the plaintiff be reimbursed for all physical and mental consequences of the injury.<sup>233</sup> Thus the logic may be tied to the notion of corrective justice, as the costs must be borne by one of the two parties. Some scholars believe the thin-skull rule is expressly moral as it holds that the innocent plaintiff, however vulnerable or peculiar, should not bear the costs of the accident.<sup>234</sup>

Another example of the application of the thin-skull doctrine is found in *Smith v. Leech Brain & Co. Ltd.*<sup>235</sup> In *Smith*, spattering molten metal burned a workman's lip. The burn triggered the development of cancer at a place where the plaintiff had pre-malignant cancerous tissues. The workman died from this cancer three years later and his wife sued his employer. Lord Chief Justice Parker chose to preserve the Thin-skull plaintiff rule<sup>236</sup> and stated that,

The test is not whether these [defendants] could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely

---

must prove the plaintiff: "(1) knew of the risk; (2) had full subjective understanding of its nature; (3) voluntarily chose to encounter that risk; and (4) agreed in advance not to hold the defendant liable for the consequences of conduct that would ordinarily amount to negligence." *Id.* at 17. A majority of jurisdictions allow express assumption of the risk to serve as a complete bar to recovery by the plaintiff. *Id.* However, in some jurisdictions the application of the defense has been limited or completely abolished. *Id.*

<sup>233</sup> See Patricia Pattison & Philip E. Varca, *Workers' Compensation for Mental Stress Claims in Wyoming*, 29 LAND & WATER L. REV. 145,151 (1994) (stating that the eggshell or thin-skull doctrine applies to both physical and mental claims regardless of the preexisting makeup of claimant).

<sup>234</sup> See Dennis Klimchuk, *Causation, Thin Skulls and Equality*, 11 CAN. J.L. & JURIS. 115 (1998).

<sup>235</sup> *Leech Brain & Co.* (1961) 3 All E.R. at 1159.

<sup>236</sup> *Id.* This ruling was made despite the intervening decision of the court in *Wagon Mound (No. 1)*. *Overseas Tankship, Ltd. v. Morts Dock & Eng'g Co.*, (1961) 1 All E.R. 404 (always called *The Wagon Mound* case). Following *Wagon Mound*, there was cause for concern that the thin-skull rule would be abandoned on the ground that unusual susceptibility is not reasonably foreseeable. See ALLEN M. LINDEN, CANADIAN TORT LAW 325 (7th ed. 2001).

the burn. What, in this particular case, is the amount of damage which he suffers as a result of that burn depends on the characteristics and constitution of the victim.<sup>237</sup>

It has been accepted, since the turn of the century, that a negligent defendant must take his victim as he finds him. A plaintiff with a thin skull sustains a different degree of harm -- not a different kind of harm -- than a plaintiff with a "thick skull," because no set of precautions exists that would reduce the one harm significantly and efficiently without reducing the other harm.<sup>238</sup> It has been stated<sup>239</sup> that Lord Justice Kennedy in *Dulieu v. White and Sons*<sup>240</sup> enunciated this rule. This case considered the issues of nervous shock occasioned by fright and remoteness of damages. *Dulieu* involved a pregnant plaintiff who was involved in an accident where the defendant driver of a "pair-horse van" negligently drove into the public house where she was working. As a consequence the plaintiff sustained a severe shock, became seriously ill and prematurely delivered the baby. The reported decision states that, "[i]n consequence of the shock sustained by the plaintiff the said child was born an idiot."<sup>241</sup> The defendants argued that the damages sought to be recovered were too remote as he did not anticipate plaintiff's pregnant condition. In order to be successful, the plaintiff had to establish, "a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect."<sup>242</sup> The court stated:

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damage that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."<sup>243</sup>

The reasonable foreseeability test requires only that there be foreseeability of the type of injury and not its extent or the manner of its occurrence.

---

<sup>237</sup> *Smith*, (1961) 3 All E.R. at 1162.

<sup>238</sup> See generally Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984).

<sup>239</sup> LINDEN, *supra* note 236, at 324.

<sup>240</sup> *Dulieu v. White & Sons*, (1901) 2 K.B. 669, 679.

<sup>241</sup> *Id.* at 670.

<sup>242</sup> *Id.* at 671.

<sup>243</sup> *Id.* at 679.

The test is not whether these defendants could reasonably have foreseen that a burn would cause cancer and that Mr. Smith would die. The question is whether these defendants could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn depends on the characteristics and constitution of the victim.<sup>244</sup>

Thus, if the principles of the Thin-skull doctrine were applied where injury is inflicted to a racialized person, failures of proof that so often prevent recompense when intentional torts or civil rights arguments are presented, would pose less of a burden to overcome. For example, in the scenario of an injury inflicted by a white tortfeasor upon a racialized person, who is particularly vulnerable due to the ravages of racism, the fact that the effect of the tort is more serious than one would have expected ought to be of no particular consequence in the formulation of an appropriate remedy. The person's particular racism-induced vulnerability would in essence be that person's quintessential "thin-skull." The tortfeasor would be held liable for the full extent of the plaintiff's injuries, notwithstanding that they were more serious due to a pre-existing condition, or the increased vulnerability of the plaintiff, as long as the initial injuries were of a kind that was reasonably foreseeable.

One who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him — it is no answer to a claim for a fractured skull that its owner had an unusually fragile one.<sup>245</sup>

Thus, there may be possibilities for compensating racialized defendants, who are "thin skulled" due to racism, for the tortuous wrongdoings they have suffered. Utilization of this doctrine together with Egg shell personality and assumption of risk principles may prove useful tools in more accurately defining and shaping the proper remedy for racialized persons who are particularly vulnerable or susceptible to injuries due to micro and macro racial aggression.

---

<sup>244</sup> *Smith*, (1961) 3 All E.R. at 1162.

<sup>245</sup> *Owens v. Liverpool*, (1939) 1 K.B. 394, 400. (A.C.).



The principle is applicable to other pre-existing susceptibilities as well.<sup>246</sup> Indeed a defendant is liable for the full amount of the damages incurred by someone with a weak or “rotten” disc, if his negligence “aggravates or brings into activity a dormant or diseased condition or one to which a person is predisposed.”<sup>247</sup> Some cases speak of the pre-existing condition more generally as a “condition” — this should leave room for the examination of pre-existing mental conditions as pre-cursors to the thin-skull rule. For instance, in the Australian case of *Watts v. Rake*<sup>248</sup> the plaintiff’s leg was broken in an accident. The quiescent spondylitis from which he suffered developed into arthritis 13 years earlier than it ordinarily would have in the absence of the accident. The Australian High Court ruled that, “...if the injury proves more serious in its incidents and its consequences because of the injured man’s condition, that does nothing but increase the damages the defendant must pay.”<sup>249</sup> This analysis involves close examination of the circumstances of the case, including the peculiar susceptibility of the plaintiff.<sup>250</sup>

The extent to which the Thin skull doctrine has been stretched is evidenced by the case of *Warren v. Scruttons Ltd.*<sup>251</sup> The plaintiff had a pre-existing ulcer on his left eye when he cut his finger on a wire on the defendant’s equipment. The wire apparently had a type of chemical on it, described as “poison,” which led the plaintiff to contract a fever and a virus. This resulted in further ulceration of the eye. The defendant was found liable and the court held that, “any consequence which results because the particular individual has some peculiarity is a consequence for which the tortfeasor is liable.”<sup>252</sup>

In terms of equality arguments<sup>253</sup> women have been

---

<sup>246</sup> See *Wilkinson v. Lee*, 617 N.W.2d 305, 390, 397-98 (Mich. 2000) (permitting preexisting condition recovery where plaintiff’s doctor testified that the accident precipitated or accelerated the symptoms of plaintiff’s tumor); *Land and Lakes Co. v. Industrial Com’n* 359 Ill.App.3d 582, 592 (Ill. App. Ct. 2005) (finding that “even though an employee has a preexisting condition that makes him or her more vulnerable to injury, recovery will not be denied when employee can show that a work-related injury aggravated or accelerated the preexisting [condition]...”).

<sup>247</sup> *Owen v. Dix*, 196 S.W. 2d 913, 915 (Ark. 1946).

<sup>248</sup> *Watts v. Rake*, (1960) 108 C.L.R. 158 (Austl.).

<sup>249</sup> *Id.* at 160.

<sup>250</sup> See *id.*; LINDEN, *supra* note 236, at 327.

<sup>251</sup> *Warren v. Scruttons Ltd.*, (1962) 1 Lloyd’s Rep. 497 (Q.B.D.).

<sup>252</sup> *Id.* at 502.

<sup>253</sup> See Klimchuk, *supra* note 234, at 115 (advocating for the entrenchment of tort-like Thin skull principles in criminal law). Where, for instance, a victim is stabbed, loses a significant amount of blood, denies a blood transfusion on religious grounds and

compensated for injuries specific to our sex. For instance, the Thin-skull doctrine has been applied to compensate pregnant women who have suffered miscarriages or who have had stillborn children.<sup>254</sup> Similarly, where a woman whose ovaries were weakened by a previous operation suffered injury as a result of a sudden stoppage of a train, the court granted recovery on the basis that "the weak will suffer more than the strong."<sup>255</sup> If sex does not present a bar to recovery based upon particular vulnerabilities, why should race? Race-related, or racism-related mental disorders, might similarly be infused into the Thin-skull doctrine as it has generally allowed for recovery based upon such mental vulnerabilities. Alternatively, this might more properly justify consideration of the Eggshell personality doctrine. If a physical injury triggers mental suffering or nervous disorders, the defendant must pay the resultant damages, even if they are more serious than might be expected.<sup>256</sup> If, however, there is a pre-existing mental condition rendering the plaintiff particularly vulnerable, courts may still allow recovery, thus transforming the thin-skull plaintiff into a plaintiff with an eggshell personality.

### C. Utilization of the Egg-Shell Rule

The case of *Vargas v. John Labatt Ltd.*<sup>257</sup> is instructive. The plaintiff became ill upon drinking a bottle of beer which contained chlorine. Damages were awarded for mental suffering incurred as a result of a pre-existing hysteria condition. The court found that:

If you injure a person who suffers from hysteria, you must take him as you find him, and if the injury is out of all proportion to the event, if it is genuine, then the one who

---

dies, Klimchuk states that the thin-skull rule should allow for the finding of proximate cause - to do otherwise would violate principles of equality. The defendant should be found culpable for the death of the victim.

<sup>254</sup> *Malone v. Monongahela Valley Traction*, 104 Va. 417 (1927); *Schafer v. Hoffman*, 831 P.2d 897 (1992).

<sup>255</sup> *Linklater v. Minister for Railways*, [1900] 18 N.Z.L.R. 526, 540.

<sup>256</sup> *LINDEN*, *supra* note 236, at 330. Linden points out that in a case involving the claim for mental suffering by a plaintiff as a result of being thrown against a seat of a streetcar when it collided with a train, the Supreme Court of Canada recognized that the "nervous system is as much a part of a man's physical being as muscular or other parts." *Toronto Railway Co. v. Toms*, 44 S.C.R. 268, 276 (1911).

<sup>257</sup> *Vargas v. John Labatt Ltd.*, [1956] O.R. 1007.

suffers is entitled to damages.<sup>258</sup>

A young girl with latent schizophrenic tendencies was left with a scar following an accident in the case of *Enge v. Trerise*.<sup>259</sup> As a consequence of the accident and the resultant scar, she became schizoid, withdrawn, depressed, delusional and pre-occupied with the scar. Despite the dissenting judges concern for such “irrational”, “morbid”, “unreasonable” and indirect damages, the majority indicated that such mental repercussions were compensable.

Similarly, in *Malcolm v. Broadhurst*,<sup>260</sup> a married couple who was injured in a car accident both suffered mental and nervous sequelae. Due to the wife’s vulnerable personality, she experienced additional nervous symptoms because of her husbands changed behavior. In awarding compensation for all injuries, the court stated:

...there is no difference in principle between an eggshell skull [commonly known as thin-skull] and an egg-shell personality... Exacerbation of her nervous depression was a readily foreseeable consequence of injuring her... Once damage of a particular kind, in this case psychological, can be foreseen,...the fact that it arises in or is continued by reason of an unusual complex of events does not avail the defendant...<sup>261</sup>

As long as there is a direct link between the cause of the injury and the damages actually sustained, there exists ample jurisprudential support for the position that pre-existing mental disorders or vulnerabilities are equally appropriate for consideration within the confines of the Thin-skull or Eggshell doctrines.<sup>262</sup> An interesting

---

<sup>258</sup> *Id.* at 1022. See also *Love v. Port of London Authority*, [1959] 2 Lloyd’s Rep. 541 (where compensation was granted to a plaintiff with a “vulnerable personality” that flared up into an “hysterical neurosis”); *Beisak v. National Coal Board*, [1965] 1 All. E.R. 895

<sup>259</sup> *Enge v. Trerise*, [1960], 26 D.L.R. (2d) 529.

<sup>260</sup> *Malcolm v. Broadhurst*, (1970) 3 All E.R. 508.

<sup>261</sup> *Id.* at 511.

<sup>262</sup> See *Negretto*, (1963) S.A.S.R. at 317 (where a woman whose pelvis was fractured suffered post-concussional psychosis as a result of a “pre-existing tendency to mental disorder”). The court held, that the Thin-skull rule was applicable as foresight demands that one foresee any consequences “between negligible abrasion and permanent incapacity or death.” *Id.* Similarly, in *Leonard v. B.C. Hydro*, (1965), 50 W.W.R. 546, after falling on a bus and injuring her buttocks, the plaintiff suffered a psychotic condition. While ultimately denying recovery on the basis that the plaintiff

extrapolation explores possible links between race, racism and mental illness. Hence, even if mental illness, generally, were recognized and societally accorded as much significance as physical ailments,<sup>263</sup> the causal connection of the effects of racism, as producing mental health sequelae, may push the envelope even further.

#### **D. The Questionable Utility of A Race-Based Thin-Skull Doctrine**

Finally, consideration must be made of the utility of even considering race within the confines of the Thin-skull doctrine. While ethical utility is one thing, monetary value is another. Specifically, in assessing the amount that is to be paid to a thin-skull plaintiff as compensation for her loss, “the value of the “thin-skull” is less than that of a normal

---

was feigning pain, the judge remarked in *obiter dictum* that the defendants must accept the risk of a “frail skull or a weak heart...” as well as the risk of “aggravating the condition of a psychotic.” *Id.* at 553. See *Holian v. United Grain Growers*, [1980] 11 C.C.L.T. 184 (where the court held that the plaintiffs chronic depression, resulting from exposure to a poisonous chemical substance, was reasonably foreseeable and within the thin-skull principle, despite the fact that it was due to his “particular susceptibility to emotional injury.”); *Duwyn v. Kapielian*, [1978] 7 C.C.L.T. 121.

<sup>263</sup> Panel Set to Hear Coverage Complaints,

[http://news.minnesota.publicradio.org/features/200201/02\\_stawickie\\_bcbsappeals](http://news.minnesota.publicradio.org/features/200201/02_stawickie_bcbsappeals) (Sept. 28, 2004); Blue Cross Blue Shield Agrees to Cover Mental Health Costs, [http://news.minnesota.publicradio.org/features/200106/19\\_stawickie\\_bluecross](http://news.minnesota.publicradio.org/features/200106/19_stawickie_bluecross) (last visited Sept. 28, 2004).

Blue Cross and Blue Shield of Minnesota... [has] agreed to allow a third-party panel to review certain mental health claims as part of a settlement resolving the state’s allegations that the health plan had illegally denied mental health coverage to children and young adults (*Minnesota v. Blue Cross and Blue Shield of Minnesota*, Minn. Dist. Ct., No. CTOO-014012, 6/19/01). The settlement also requires the health plan to pay the state \$8.2 million. Blue Cross and Blue Shield of Minnesota (BCBSM) must also try to resolve policyholders’ claims that they were unfairly denied coverage. A spokesman for the attorney general’s office said he could make no estimate on how much the claims would cost BCBSM. A BCBSM news release said the settlement would make its mental health and chemical dependency services more accessible. The press release said the lawsuit pushed the insurer to move more quickly in refining its system of care for those with mental health disorders.

*BSBC of Minnesota Agrees to Allow Panel to Review Mental Health Treatment Claims*, 10 HEALTH L. REP. (BNA) 1016 (2001).

skull.”<sup>264</sup> Thus, although the tortfeasor must pay for the consequences of the injury of a particularly vulnerable plaintiff, it has been held that the actual cost of doing so is less than it would be for injuring a person who was not vulnerable in the same way.<sup>265</sup> This may, however, be too narrow an approach to the doctrine as the Thin-skull rule can also be understood as a bar to certain defenses. Indeed, to say that one must take one’s victim as he or she is found implies that it will not be a defense to say that one’s victim suffered greater injury than an average or “normal” person.<sup>266</sup> Thus the tortfeasor will have to absorb some of the costs of the injuries, however unforeseeable, and the plaintiff might be able to defend against any duty to mitigate damages. An example provided by one scholar states that “if I refuse medical treatment for reasons which under the thin-skull rule must be taken as found in me, the defendant must bear all the costs of my injury, even those which an average person would have taken steps to prevent.”<sup>267</sup>

#### **PART IV: CONCLUSION – PARADOXICAL USE OF THE MASTER’S TOOLS**

Even as we look upon each other like strangers from afar, we are trapped in each other’s imaginations. We cannot escape from our intimate histories, our unacknowledged racial mixtures, our awkward and unsatisfying efforts at integration. We have not completely purged the prejudices from our inner thoughts: We do not discount the body’s appearance, the voice’s sound, the suspicions of the mind’s inadequacy. We do not refrain from moral judgments; at the very least, we make them secretly inside our heads. We fear violence from the other, and no reasoned understanding entirely extinguishes our apprehension. We do not share power easily – not whites, who have almost all of it, and not blacks, when they get a piece.<sup>268</sup>

---

<sup>270</sup> LINDEN, *supra* note 236, at 329.

<sup>265</sup> See, e.g., *Warren*, (1962) 1 Lloyd’s Rep. at 497 (where the court considered fact that the injured eye was inferior and was subject to other injuries in assessing damages).

<sup>266</sup> Klimchuk, *supra* note 234 at 15.

<sup>267</sup> *Id.*

<sup>268</sup> DAVID K. SHIPLER, *A COUNTRY OF STRANGERS* 561–62 (1997).

The provisional answer to the question of the value of this enterprise is paradoxical. Surely, much of what had been stated above calls for an investment in victimhood. This status is unappealing as the very plea for recognition of (mental) vulnerability and demands for compensation further entrenches the power of the powerful. In a way, people or color must bleed for the court by articulating injury (re)cognizable within the legal power structures. "Thus rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation."<sup>269</sup> However, such paradox is not an impossible political condition for racialized claimants seeking compensation within the current legal system. It is, however, an obviously demanding and frequently unsatisfying one.<sup>270</sup> Additionally, this pragmatic enterprise operates within the existing structures of the law and utilizes existing legal doctrine in an attempt to translate an outsider position to an insider. As a counterpoint, the absence of creative deployment of traditional legal doctrine leaves the doctrine un-problematized and inaccessible – in either event the conditions for which remedy is sought remain intact.

This articulation of creative use of traditional doctrine for equality-seeking ends resonates with Wendy Brown's cogent articulation of the gendered terms of liberation as a paradoxical requirement that women's struggles engage masculinist discourse.

Women both require access to the existence of this fictional subject and are systematically excluded from it by the gendered terms of liberation, thereby making our deployment of rights paradoxical. ...Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way.<sup>271</sup>

This incitement to a radical re-examination of first principle legal doctrine is paradoxically simultaneously constrained by a formulation which essentially seeks to dismantle the master's house with his own

---

<sup>269</sup> WENDY BROWN, *Suffering the Paradox of Rights*, in LEFT LEGALISM / LEFT CRITIQUE 432 (Wendy Brown & Janet Halley eds., 2002).

<sup>270</sup> See *id.* at 430-432.

<sup>271</sup> *Id.* at 431.

tools – the existing discourse.<sup>272</sup> Such an enterprise is reminiscent of Audre Lorde's warnings that the master's tools will never dismantle the master's house.<sup>273</sup>

Dismantling of the structure itself is not part of the agenda of this analysis, not that such a re-conceptualization of the legal order is unnecessary for the pursuit of justice. Indeed, a radical dismantling and rebuilding is in order. It is, however, beyond the scope of this discrete endeavor which is aimed at justifying immediate compensation for those frequently victimized by racialized abuses and violence, and those who might not have resources or abundant coping skills, for instance the young McIntosh girl.

The pragmatic demands of those suffering under the burdens of cumulative racism demand immediate attention. However, an unintended and undesirable result of the analysis found in this article might be a chilling of inter-racial interactions and communications. Such a chilling-effect is, of course, undesirable. In fact, healthy inter-racial interactions are in need of greater and more honest communications, not fewer reserved encounters. Equality-friendly contact along all axis of identity is preferable to paranoid exchanges based in fear of litigation. It is already the case that the fallout of ongoing and historical racism poisons Black-White communications and interactions in America. Not surprisingly, researchers have observed that Blacks and Whites in America often do not communicate well with one another. As Shipler has pointed out,

Blacks and whites do not listen well to one another. They infer, assume, deduce, imagine, and otherwise miscommunicate. They give each other little grace and allow small room for benefit of the doubt. Dialogue is exceedingly difficult. Nor do blacks and whites listen well to themselves as they stigmatize, derogate, slur, slight, and otherwise offend. Quite innocently, whites make comments that trigger old stereotypes and then get

---

<sup>272</sup> While it might seem that this article disagrees with the tenets of Audre Lorde's profound work AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (1984), that would be a misreading. The approach to the legal doctrine advocated in this article is not mutually exclusive. Instead, this article contemplates a creative use of tort law doctrine as a short-term approach for pragmatic purposes of compensation. In keeping with Lorde's perspective, contemporaneous engagement with legal structures as a whole is the preferable long-term strategy for the ends of social justice.

<sup>273</sup> See LORDE, *supra* note 272, at 112.

defensive when blacks take umbrage. Blacks sometimes think their persecuted status cloaks them in permanent absolution for the sin of racial bigotry. And so they commit the sin without acknowledging it, infuriating whites and forestalling conversation.<sup>274</sup>

Racial distrust and miscommunication are unfortunate, yet prevalent, by-products of a history marred by racial injustice. According to Shipler, Whites and Blacks often perceive things very differently. Power, white privilege, and feelings of guilt all play significant roles in the relationships between Blacks and Whites, coloring our perceptions of one another's behavior. White privilege often "means that [W]hites can be comfortably deaf to the racial overtones that [B]lacks hear so vividly. And from across the line, [B]lacks can imagine racial dissonance where none is intended."<sup>275</sup> In Shipler's view, individual Blacks and Whites stand somewhere along a spectrum of assumptions about white and black behavior.

For Blacks, this spectrum ranges from those who see racism in every adverse encounter with a White person, to those who try not to see racism at all.<sup>276</sup> Critical psychology speaks to this reality of hyper-vigilance and constant-threat awareness. For Whites, the spectrum ranges from those "self-questioners" who constantly question their own thoughts and motivations, to those who are apathetic to racial issues, to those who display acute discomfort in dealing with and relating to racialized others.<sup>277</sup>

As Harlon Dalton so eloquently expresses in *Racial Healing*:

We are loath to confront one another around race. We are afraid of tapping into pent-up anger, frustration, resentment, and pain. Even when we are not aware of harboring such feelings ourselves, we recognize that they exist in others. Our natural tendency is to hold them in check, in hopes that they will somehow fade away. Unfortunately, they will not. Tangled emotions and inexplicable behavior are the inevitable by-products of our

<sup>274</sup> SHIPLER, *supra* note 268, at 447.

<sup>275</sup> *Id.* at 448.

<sup>276</sup> *Id.* at 455. In the case of those blacks in the middle of the spectrum, deciphering white behavior can be an exhausting effort. *Id.*

<sup>277</sup> *Id.* This discomfort can be seen "where whites get uptight, tiptoe around, walk on eggshells, choose their words, [and] calibrate their statements." *Id.*



nation's unresolved racial past. Until we deal with them, we resemble peasant villagers who continue to build on the slopes of an ancient but active volcano. Or more precisely, we are like the mountain itself: oblivious to the gurgling deep within, proud of the new life it has nurtured, and hoping against hope that history will not repeat itself.<sup>278</sup>

These interactions are complicated by the fact that, in order to avoid being accused of racism, Whites may use "extreme restraint" and avoid intimacy with Blacks, which only reinforces the distance between blacks and whites.<sup>279</sup> Certainly, fear of litigation will increase this distance. The relationship between Blacks and Whites on an individual level can be strained because "[m]ost white people probably do not feel guilty about race relations, and they certainly do not feel the guilt that [some] black people think they should."<sup>280</sup> These differences tend to alienate Blacks and Whites in America, reinforcing the differences and leaving us as a society of "strangers" rather than one united by common experience.<sup>281</sup> Accordingly, as we attempt to live out our lives in a multi-racial society, the line separating Blacks and Whites "also entangle[s] us."<sup>282</sup> The potential of tort law doctrine for racial recompense may paradoxically lead us further down the road to unhealthy entanglement – this time in the legal arena.

However, tort law deserves increased and renewed consideration given the challenges posed by other, perhaps more obvious, avenues for redress in communities of color in America. For instance, in the absence of a radical rearrangement of the political, education and social systems in the US, Blacks will likely continue to comprise the bulk of those confined to the underclass.<sup>283</sup> There is much to be gained from re-visiting and re-evaluating first-principle legal doctrine with a view to achieving racial recompense and the promotion of legal norms of equality. Indeed, activists and advocates for social change must not be deterred by the fact that such traditional legal tools were not created with such equality-seeking ends in mind. Limitation of civil and equal rights advocacy to the realm of constitutional law is

---

<sup>278</sup> HARLON L. DALTON, *RACIAL HEALING* 3 (1995).

<sup>279</sup> *Id.* at 455-56.

<sup>280</sup> *Id.* at 459.

<sup>281</sup> *Id.* at 561-62.

<sup>282</sup> SHIPLER, *supra* note 268, at 561.

<sup>283</sup> See generally DERRICK BELL, *supra* note 17.

an un-strategic self-limitation. Creative utilization of traditional legal principles is a challenge worthy of consideration if potentially fruitful for production of alternative equality-enhancing precedents. Specifically, by re-visioning some of the tort law doctrine through the lens of normative equality goals, the surprising result might be alternative frameworks for pleadings driven at racial recompense.

