

American University Washington College of Law

## Digital Commons @ American University Washington College of Law

---

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

---

2016

### Frontlines: Policing at the Nexus of Race and Mental Health

Camille Nelson

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch\\_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

# FRONTLINES: POLICING AT THE NEXUS OF RACE AND MENTAL HEALTH

Camille A. Nelson\*

## ABSTRACT

*The last several years have rendered issues at the intersection of race, mental health, and policing more acute. The frequency and violent, often lethal, nature of these incidents is forcing a national conversation about matters which many people would rather cast aside as volatile, controversial, or as simply irrelevant to conversations about the justice system. It seems that neither civil rights activists engaged in the work of advancing racial equality nor disability rights activists recognize the potent combination of negative racialization and mental illness at this nexus that bring policing practices into sharp focus. As such, the compounding dynamics and effects of racism, mental health, and policing remain underexplored and will be the foci of this Article.*

*Lurking beneath the surface of these policing encounters is an issue of mental disability or, as I prefer to recognize this fluid state, mental vulnerability. Picking up from where my earlier Article, Racializing Disability, Disabling Race: Policing Race and Mental Status, left off, this Article will explore a contextually informed psycho-legal explanation for some of the policing incidents, which have attracted national attention, and others that have not. Specifically, my theory is that negatively racialized suspects (read non-White, in particular Black and Latino/a) who the police experience as defiant or disrespectful are constructed by police as “crazy,” regardless of their actual Diagnostic and Statistical Manual of Mental Disorders 5 (DSM) status.<sup>1</sup>*

---

\* Dean and Professor of Law, American University Washington College of Law. The author wishes to thank her former research assistant Gary Prado for his engaged assistance with this project, as well as law librarians from Suffolk University School of Law, Ellen Delaney, Jeanie Fallon, and Richard Buckingham, as well as the superb editors of the Fordham Urban Law Journal, particularly Michael D’Ambrosio.

*In such situations, the policing encounter is fraught. On one hand, police, expecting a certain level of deference, especially from people of color, often escalate a situation to the point that the indignation, or lack of respect, from the person stopped by police paradoxically reinforces the police assumption about their impaired judgment, behavior, and mental health. It is this felonizing process through which the deviant criminal subject/suspect is created. As I discussed in Racializing Disability, Disabling Race, Suspect Identity Construction (SIC) provides a fruitful lens through which to analyze such processes in a policing encounter—SIC is a lever around which an encounter is amplified.<sup>2</sup> Such intensification in turn serves as a rationale for an elevated police response, regardless of the fact that an escalated response is likely the opposite of what would alleviate the building situational pressure.*

*On the other hand, police encounters, which are transformed into confrontations through escalation and/or racism, may catalyze a range of mental vulnerabilities in the mind of even the most mentally healthy person of color. Racism is abusive—individually, systemically, and structurally. It is persistent. We know what abuse does to the body, mind, and spirit (cortisol, fight or flight, etc.). Even for the most mentally sound individual, such racialized police encounters are potentially debilitating and disabling. The racism-health link indicates the impactful nature of discrimination. The residue of this societal puncture builds up in our bodies and is corrosive, debilitating, and ultimately disabling. Thus, it is not unreasonable to expect that preexisting mental illnesses or new*

---

1. See Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 16–20, 63 (2010). See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS (5th ed. 2013) (DSM-5).

2. See Nelson, *supra* note 1, at 63–64 (exposing “racing” phenomenon of disability); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2002–04 (2000) (enunciating enormity of American racism and implicit racism); Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 468–69 (2005) (“Notwithstanding the availability of the ‘disparate impact’ claim under Title VII, which has ‘all but vanished from the scene,’ the law does not define discrimination as a set of culturally-accepted and institutionally-perpetuated social practices rooted in the legacies of white supremacy and male dominance.”); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakish and Jamal are White*, 2005 WIS. L. REV. 1283, 1296 (2005) (indicating society “‘often link[s] color with undesirable personal qualities such as . . . hostility’”).

*mental vulnerabilities might be activated or created in racially charged policing encounters.*

#### TABLE OF CONTENTS

Introduction .....	617
I. Lingering Pathologies of History .....	627
II. “Particularly in the United States, Race Has Always Played a Central Role in Constructing Presumptions of Criminality” .....	638
A. Historical Context .....	639
B. Instances of Lethal Escalation or Controversial Killings—Increased Contact, Increased Killing.....	647
1. Whither the Data.....	651
2. Manifestations of Discretion; Racialized Disablement .....	653
C. Guaranteeing Inequality: Marginalizing Structures and Systems by Design.....	664
III. Provoking Mental Vulnerability: SIC at the Intersection of Race, Gender, and Mental Health.....	676
Conclusion.....	681

#### INTRODUCTION

*Into the Void—“[S]ocial justice is the foundation of public health.”<sup>3</sup>*

A surprising void exists in three bodies of literature, each probing similar justice concerns from different vantage points. Criminal law scholars, analyzing a broken justice system, have proposed solutions to police misconduct and questionable uses of force against vulnerable populations.<sup>4</sup> Critical Race scholars and activists have

---

3. Nancy Krieger, *Embodying Inequality: A Review of Concepts, Measures, and Methods for Studying Health Consequences of Discrimination*, 29 INT’L J. HEALTH SERVS. 295, 296 (1999).

4. See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–81 (1994) [hereinafter Harris, *Factors for Reasonable Suspicion*] (noting paradoxical way in which high crime areas are determined based on racially biased over-policing in certain areas, which in turn is used to support the determination that an area is a high crime area); David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) [hereinafter Harris, *Driving While Black*]; NAT’L INST. FOR JUSTICE, RACIAL PROFILING AND TRAFFIC STOPS (Jan. 10, 2013), <http://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx> [<https://perma.cc/VR9K-FHCF>] (“Research has verified that

questioned the exercise of police discretion as it disparately impacts people of color, particularly African Americans and Latino/as, with whom police engage.<sup>5</sup> Disability scholars and activists, with few exceptions, have mainly focused on physical disability to the exclusion of mental health, and have largely ignored the compounding impacts of racism on disability.<sup>6</sup>

This Article explores the interacting constitutive dynamics at work in the construction of the criminal subject and, further, encourages study of the ways that disability is racially constructed, just as racism is disabling in the criminal justice system. Race and disability morph into one another to construct the perfect criminal who is perceived as requiring the use of disciplinary force and punishment. This Article analyzes the ways in which disability, especially mental illness, and negative racialization (read non-White, in particular Black and

---

people of color are more often stopped than whites. Researchers have been working to figure out how much of this disparity is because of discrimination and how much is due to other factors, but untangling these other factors is challenging [including]: . . . [d]ifferences in driving patterns . . . [d]ifferences in exposure to the police . . . [d]ifferences in offending.”).

5. See Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect,”* 56 OKLA. L. REV. 833, 839 (2003) (considering the implications of the *Terry* stop and frisk decision, “*Terry’s* grant of excessive officer discretion creates the potential for a seesaw from extreme racial profiling to depolicing”). See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (arguing that, read together, *Brignoni-Ponce* and *Whren* ensure the existence and continuation of racial profiling in American policing). In *Brignoni-Ponce*, the Court ruled that U.S. Border Patrol had the power to stop vehicles near the Mexican border and question the vehicle occupants because being of Mexican ancestry gives a high likelihood that the person is an alien and, thus, “appearance [is] a relevant factor” into the inquiry. Debra C. Weiss, *Think Racial Profiling Is Unconstitutional? Read Brignoni-Ponce, Law Profs Say*, A.B.A. J. (July 13, 2010, 3:50 PM), [http://www.abajournal.com/news/article/think\\_racial\\_profiling\\_is\\_unconstitutional\\_reed\\_brignoni-ponce\\_law\\_profs\\_sa/](http://www.abajournal.com/news/article/think_racial_profiling_is_unconstitutional_reed_brignoni-ponce_law_profs_sa/) [<https://perma.cc/8YGQ-FJNC>]. Nonetheless, law professors Gabriel Chin and Kevin Johnson have criticized the ruling, writing that it has been “out of the constitutional mainstream” since its inception. *Id.* Moreover, practitioners have also questioned the exercise of police discretion under *Brignoni-Ponce*. See Renata A. Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), 23 HOUS. J. INT’L L. 233, 243–251 (2001) (arguing police discretion unjustified under *Brignoni-Ponce*).

6. See, e.g., Ronda Cress et al., *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307, 342 (2006) (indicating mentally disabled people present major challenges to law enforcement who “mistake” demonstrations of mental illness for criminal activity); Mary T. Zdanowicz, *Keeping the Mentally Ill Out of Jail: Sheriffs as Litigants*, 8 ALB. GOV’T L. REV. 536, 544–47 (2015) (claiming jails have become “psychiatric facilities by default”).

Latino/a),<sup>7</sup> are mutually reinforcing and constitutive of the conceptual offender in policing interactions. I refer to this process as “felonization,” the move to construct criminality, ideally in heightened form. This is the dynamic through which a defiant suspect is constructed as a subjectively deviant and dangerous criminal who is, in turn, the proper focus of heightened law enforcement scrutiny.

I posit two different intersecting criminal justice concerns, both intricately intertwined with issues of race and mental health.<sup>8</sup> First, picking up from where my earlier Article, *Racializing Disability, Disabling Race: Policing Race and Mental Status*,<sup>9</sup> left off, this Article will explore a plausible explanation for policing incidents that have attracted national attention. My theory is that Suspect Identity Construction (SIC) is a contingent variable in policing interactions.<sup>10</sup> Negatively racialized suspects who are seen by police as defiant or disrespectful are constructed by police as “crazy,”<sup>11</sup> the suspect’s judgment implicated by their lack of deference, regardless of their actual Diagnostic and Statistical Manual of Mental Disorders-5 (DSM) status.<sup>12</sup>

---

7. See Nelson, *supra* note 1, at 63–64 (exposing phenomenon of “racing” disability through construction of Blacks and Latino/as “crazy”).

8. Conor Friedersdorf, *Methods That Police Use on the Mentally Ill Are Madness*, THE ATLANTIC (Mar. 25, 2015), <http://www.theatlantic.com/politics/archive/2015/03/methods-that-cops-use-with-the-mentally-ill-are-madness/388610/> [<https://perma.cc/B8RT-UL2A>].

9. Nelson, *supra* note 1.

10. See *id.* at 7 (“SIC is the ‘what is the person’ question . . .”). The Article continues this discussion until page 11.

11. See *id.* at 63 n.462 (“By utilizing this terminology, it is not my intention to be disrespectful, but rather to connote the disrespect and stigmatization implicit in such a categorization. This category is an ascribed identity which deviates from professionally identified DSM diagnosis, as it is typically lay people who use such terminology and who feel competent, even in the absence of any medical, psychological or psychiatric training, to label others as such.”).

12. See *id.* at 18 (Dukakis speaks about biases towards people with mental illness); *id.* at 18–20 (claiming convergence of criminality and mental impairment often leads to stereotyping of mentally ill based on fear); see also KERRY ANN ROCKQUEMORE & DAVID L. BRUNSMAN, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA, at ix (2001) (“Blacks and whites continue to be the two groups with the greatest social distance, the most spatial separation, and the strongest taboos against interracial marriage.”); Andy Alford, *Resistance, Race Affect Police Response: Minorities Not Charged with Resisting Arrest Subject to Unequal Force Compared to Whites*, AUSTIN AM. STATESMAN (Mar. 28, 2004) (“The problem with police brutality is that sometimes, officers react with violence to defiance. Minorities might be more defiant, might give the cops more sass. And people who do that are likely to get hit, especially if the officer has a racist attitude.”). As Professor Cooper has noted, this mistranslation often culminates in a contest and is even more acute when white police encounter men of color. See Frank Rudy Cooper, “Who’s the Man?”:

This construction, in turn, increases the likelihood that the encounter will escalate or devolve.<sup>13</sup> I refer to this as a “felonizing” process, which is to say that felonization (the process by which a suspect is transformed into a more serious offender deserving of harsher criminal justice responses) is a negative spiral that tracks identity and consequent marginalization. It encompasses the strategic police moves to construct suspects into misdemeanor offenders, and the more consequential move to construct misdemeanor offenders into felons. In this way, felonization is an overbroad and encompassing policing maneuver. Such interactions are particularly fraught for individuals who are mentally or physically vulnerable, as they may struggle or be unable to comport their behavior to police dictates for obedience and compliance.<sup>14</sup>

---

*Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 730 (2009) [hereinafter Cooper, “Who’s the Man?”] (asserting that there is also a hegemonic form of police masculinity whereby police feel the need to dominate civilians, especially those who show signs of disrespect, through masculinity contests); see also Frank Rudy Cooper, *Against Bi-Polar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 904 (2006) [hereinafter Cooper, *Against Bi-Polar Black Masculinity*] (“Now more than ever, we need laws to limit police discretion to act on the stereotypes of the Bad Black Man image and laws allowing difference in the workplace to counter the assimilationist assumptions of the Good Black Man image. Only when we get beyond bipolar black masculinity might we have arrived at the point when we can get beyond law.”). See generally Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illness: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143, 145 (2003) (“Approximately a quarter million individuals with severe mental illnesses are incarcerated at any given moment—about half arrested for nonviolent offenses such as trespassing or disorderly conduct.”).

13. See Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 209, 218 (2011) (“Mental illness is on the one hand the discrediting charge used to stigmatize rebellion, explain distress at supposedly benign circumstances, and police the borders of acceptable behavior.”).

14. See David H. Chae et al., *Conceptualizing Racial Disparities In Health: Advancement of a Socio-Psychobiological Approach*, 8 DU BOIS REV. 63, 70 (2011).

In addition to the indirect health effects of racial discrimination (e.g., through its impact on housing, employment, education, and other socioeconomic indicators) as a source of psychosocial stress, racial discrimination may have direct effects on mental health and maladaptive health behaviors . . . . Discrimination may also increase the risk of engaging in maladaptive health behaviors, including illicit substance use, smoking, and alcohol consumption. Prior studies have found that drinking is often used to relieve and manage psychosocial strains particularly in response to those that are more severe and chronic, and when stressors are perceived as being unavoidable, uncontrollable, or occur in the absence of social support. Along these lines, racial discrimination, as a source of stress, may contribute to maladaptive substance use patterns.

According to the Department of Health and Human Services' Office of Minority Health, Black people in the United States are significantly more likely than White people, indeed twenty times more likely, to report having had serious psychological distress.<sup>15</sup> Not surprisingly, people who exhibit mental health challenges are more likely to attract heightened police scrutiny and reasonable suspicion; they are less likely to respond to police in ways that comport with police behavioral expectations and may, thereby, prompt unfortunate police escalation.<sup>16</sup> Moreover, even those who are not emotionally or mentally vulnerable experience the negative psychological impact of racism on their mental and physical well-being.<sup>17</sup>

---

*Id.*; see also Matt Agorist, *Cops Beat a Deaf Man for Seven Minutes Because He Didn't Respond to Their Yelling*, THE FREE THOUGHT PROJECT (Jan. 15, 2014), <http://thefreethoughtproject.com/cops-beat-deaf-man-minutes-respond-yelling/> [https://perma.cc/6KKQ-MUSV]; Claudia Center, *How Police Can Stop Shooting People with Disabilities*, ACLU: SPEAK FREELY (Mar. 20, 2015), <https://www.aclu.org/blog/speak-freely/how-police-can-stop-shooting-people-disabilities> [https://perma.cc/6SGN-PRXQ]; Brad Heath, *Policeman Who Shot, Killed Detroit Man Shares His Story*, USA TODAY (Aug. 26, 2014), <http://www.usatoday.com/story/news/nation/2014/08/26/krupinski-detroit-police-shooting/14634913/> [https://perma.cc/CH2M-T4EX]; Theresa Vargas, *Grand Jury Rejects Criminal Charges in Death Of Robert Saylor, Man with Down Syndrome*, WASH. POST (Mar. 22, 2013), [https://www.washingtonpost.com/local/no-criminal-charges-in-death-of-robert-saylor-frederick-man-with-down-syndrome/2013/03/22/3a723b6c-932f-11e2-8ea1-956c94b6b5b9\\_story.html](https://www.washingtonpost.com/local/no-criminal-charges-in-death-of-robert-saylor-frederick-man-with-down-syndrome/2013/03/22/3a723b6c-932f-11e2-8ea1-956c94b6b5b9_story.html) [https://perma.cc/25VP-J4J3]. See generally Radley Balko, *Policing and the Deaf*, WASH. POST (Apr. 24, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/24/policing-and-the-deaf/> [https://perma.cc/838C-MQMD] (providing several examples and video of police interactions with deaf people); Greg Botelho & Joseph Netto, *Delaware Police Shoot Man in Wheelchair; His Relatives Ask Why*, CNN (Sept. 26, 2015), <http://edition.cnn.com/2015/09/25/us/delaware-police-shoot-man-wheelchair/index.html> [https://perma.cc/4V3C-QLJN].

15. Terrell J. Starr, *6 Ways White Supremacy Takes its Toll on Black People's Mental Health*, SALON (June 11, 2015), [http://www.salon.com/2015/06/11/6\\_ways\\_white\\_supremacy\\_takes\\_its\\_toll\\_on\\_black\\_peoples\\_mental\\_health\\_partner/](http://www.salon.com/2015/06/11/6_ways_white_supremacy_takes_its_toll_on_black_peoples_mental_health_partner/) [https://perma.cc/6HJJ-PH72].

16. See Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM J. PUB. HEALTH 2321, 2321–27 (2014).

17. For a comprehensive overview of the impacts of racism on well-being, see Camara Jules P. Harrell et al., *Multiple Pathways Linking Racism to Health Outcomes*, 8 DU BOIS REV. 143 (2011) and Michelle J. Sternthal et al., *Racial Disparities in Health: How Much Does Stress Really Matter?*, 8 DU BOIS REV. 95 (2011).

Sociological research on segregation may help explain the higher prevalence of stress exposure among Blacks and American-born Hispanics. Because of segregation, the conditions under which Blacks and a growing number of Hispanics live are far worse than those of the rest of the population. For those residing in areas of concentrated disadvantage—marked by pathogenic physical and social conditions (e.g., extreme poverty and

Further adding to a debilitating situation, police subjectively interpret these racialized and ableist<sup>18</sup> encounters as necessitating a heightened, often forceful, response, no matter how relatively minor the nature of the precipitating contact.<sup>19</sup> Thus, despite ostensible police intentions, their interactions and behavior towards non-compliant and non-deferential suspects of color often escalate the exchange, thereby creating a paradoxical downward spiral, which is subsequently (and perhaps opportunistically) used by police to justify an arrest or the use of force.<sup>20</sup>

unemployment, pollution, deteriorating housing, violence)—multiple stressful encounters may be normative.

Sternthal et al., *supra*, at 107; *see also* Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 8 DU BOIS REV. 115, 116 (2011) (“Reviews consistently find that persons who self-report exposures to racism have greater risk for mental and physical ailments.”).

18. Ableism is the discrimination or prejudice against individuals with disabilities. *Ableism*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/ableism> [<https://perma.cc/F9U5-Z2FV>].

19. *See As Outrage Mounts, Teen Who Shot Video of Police at Texas Pool Party Says Situation Was ‘Uncalled For,’* KTLA (June 8, 2015), <http://ktla.com/2015/06/08/teen-speaks-out-after-recording-viral-pool-party-video/> [<https://perma.cc/877X-K6HQ>]; Joshua Berlinger & Steve Almasy, *Police Looking at Videos that Show Texas Deputies Shoot Man*, CNN (Sept. 3, 2015), <http://edition.cnn.com/2015/09/01/us/san-antonio-bexar-county-texas-police-shooting/index.html> [<https://perma.cc/3Y3E-P43M>]; Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0) [<https://perma.cc/7NHL-TAGN>] (indicating Michael Brown shot dead after allegedly stealing cigarillos); Dana Ford, *Video Shows Teen’s Arrest After Scuffle in Stockton, California*, CNN (Sept. 19, 2015), <http://edition.cnn.com/2015/09/17/us/stockton-california-teen-arrest-video/index.html> [<https://perma.cc/K2GU-9XJS>]; Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html> [<https://perma.cc/4RYF-78FD>] (asserting Eric Garner choked to death by NYPD after illegally selling cigarettes); Hugo Gye et al., *‘He Had a Gun, and Trayvon had Skittles’: Family Demands Justice as ‘Neighborhood Watch Captain who Shot Dead Unarmed Teen’ STILL Hasn’t been Charged*, DAILY MAIL (Mar. 10, 2012), <http://www.dailymail.co.uk/news/article-2113068/He-gun-Trayvon-Skittles-Family-demands-911-tapes-local-Neighbourhood-Watch-captain-shot-unarmed-teen-STILL-charged.html> [<https://perma.cc/D5KW-9ZG9>] (highlighting that Trayvon Martin was in possession of iced tea and Skittles when murdered); Jethro Mullen, *Texas Woman Says Sheriff’s Deputies Carried Out Cavity Search in Parking Lot*, CNN (Aug. 14, 2015), <http://edition.cnn.com/2015/08/14/us/texas-woman-search/index.html> [<https://perma.cc/CNX4-HYC6>].

20. *See* Vesko Cholakov et al., *Police Officers Prosecuted for Use of Deadly Force*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/graphics/investigations/police-shootings/> [<https://perma.cc/PA3M-8LHY>]; Kimberly Kindy & Kimbriell Kelly, *Police Officers Charged in Fatal Shootings While on Duty: 54 Cases in the Past Decade*, WASH. POST (Apr. 12, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on->

The corollary concern that will be explored in this Article is the way in which people of color, who may not be noticeably mentally impaired, or who might suffer from episodic or latent mental illness, can be provoked into a state of mental illness through brutalizing police encounters.<sup>21</sup> I explore both of these connected concerns through an examination of the Sandra Bland case, as her life and death may evidence the felonization process, and straddle situational defiance dynamics.<sup>22</sup>

Ms. Bland's interaction with the arresting officer, specifically her questioning of his rationale for stopping her, and her contestation of his rationale, may have been interpreted by the officer as insufficiently deferential (for a Black woman). Thereafter, subjectively in the mind of the officer, his interpretation of this lack of deference may have justified his use of escalating police tactics, and led to Ms. Bland's subsequent arrest.<sup>23</sup> Given Ms. Bland's death in

duty-54-cases-in-the-past-decade/ [https://perma.cc/UK93-A3YU]; Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [https://perma.cc/4AJD-6PW2].

21. 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, 131–32 (2003) (articulating clear racist subtext to early mental health “science”); Ribet, *supra* note 13, at 241–42 (tracing disability rights and race); Jason Silverstein, *How Racism Is Bad for Our Bodies: ‘Stop and Frisk’ is a Threat to Public Health on a Large Scale*, THE ATLANTIC (Mar. 12, 2013), <http://www.theatlantic.com/health/archive/2013/03/how-racism-is-bad-for-our-bodies/273911/> [https://perma.cc/5F5E-NLGC]; see also ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL 4–8 (2002); ANTI-DEFAMATION LEAGUE, DAVID DUKE: IN HIS OWN WORDS (May 2000), [http://www.adl.org/special\\_reports/duke\\_own\\_words/print.asp](http://www.adl.org/special_reports/duke_own_words/print.asp) [https://perma.cc/6K4M-VL8W] (“Divorced from White influence and culture, [Blacks] reverted quickly to their genotype . . . . Males exhibited exaggerated sexual aggression and promiscuity . . . . White people don’t need a law against rape, but if you fill this room up with your normal [B]lack bucks, you would, because niggers are basically primitive animals.”).

22. See ANTHONY V. BOUZA, POLICE UNBOUND: CORRUPTION, ABUSE, AND HEROISM BY THE BOYS IN BLUE 217 (2001) (“It is not safe to fail the ‘attitude test.’ This is another way of describing defiance, the questioning of an officer’s authority, or even failure to demonstrate appropriate levels of deference.”); see also LARRY GAINES & ROGER MILLER, CRIMINAL JUSTICE IN ACTION 503 (9th ed. 2016) (noting that during interactions with police, minority youth are often seen as failing the attitude test, “after the seriousness of offense and past history, the most important factor in the decision of whether to arrest or release appears to be the offender’s attitude . . . . Furthermore, police officers who do not live in the same community with minority youth may misinterpret normal behavior as disrespectful or delinquent and act accordingly.”).

23. See Eric Zorn, *Why, Yes, Sandra Bland Was ‘Irritated,’* CHI. TRIBUNE (July 24, 2015), <http://www.chicagotribune.com/news/opinion/zorn/ct-bland-encinia-texas-suicide-zorn-perspec-0726-20150724-column.html> [https://perma.cc/7639-MNEL].

police custody from an apparent suicide, any latent mental vulnerabilities<sup>24</sup> from which she suffered were no doubt exacerbated by her arrest and jailing for an incident that commenced with an improper lane change.<sup>25</sup>

Part I of this Article briefly explores disabling constructions that create a reality of disparate police interactions for people of color and mentally vulnerable individuals.<sup>26</sup> Admittedly, much of this literature has examined police encounters in a bifurcated manner: race, or disability. This analysis, however, ignores the interwoven constitutive social constructions of racialized disability, as well as the ways in which ableism informs social conceptions of race.<sup>27</sup> This Part will also discuss societal factors that desperately impact the mental well-being of people of color in the United States.<sup>28</sup>

---

The lesson here is that you must always defer meekly to the police. Even when they're acting like bullies, goading you or issuing you preposterous orders like to put out your cigarette as you sit in your own car, don't challenge their authority. As I reminded my kids in the wake of this story, things will never go better for you if you argue with police officers. Comply. And if you feel your rights are being violated, take it up later with a judge.

*Id.*

24. My terminology of "latent" is similarly referred to as "emergent" by other scholars. See Ribet, *supra* note 13, at 211 ("Citing the disproportionate rates of certain disabilities among African Americans, they invoke the Disability Studies literature on 'emergent disabilities,' which stress the salience of disability as the consequence of injuries and deprivations rooted in racial and class oppressions.").

25. See *id.* at 220–21 ("[O]ne of the consequences of subordination can be intensified vulnerability to and frequency of disablement or that the occurrence of violent disablement is likely to be proportionate to, and intensified by, intersecting forms of racial, ethnic, gender, economic, sexual, and age-based vulnerability.").

26. See *infra* Part I.

27. As with other "isms," ableism marginalizes people, in this ideology along the lines of ability or disability: "[f]rom the moment a child is born she [or he] emerges into a world where she [or he] receives messages that to be disabled is to be less than[,] . . . a world where disability may be tolerated but in the final instance is inherently negative. We are all, regardless of our subject positions shaped and formed by the politics of ableism." Fiona Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23 *DISABILITY & SOC'Y* 151, 151 (2008). Thus, ableism is a discriminatory frame grounded in the belief that people should be defined by their abilities, and thus people who are deemed disabled are seen as inferior to non-disabled people. See SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 9 (1998).

28. See PETER CONRAD, *THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS* (2007); BESSEL VAN DER KOLK ET AL., *TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY & SOCIETY* (2006); E. Christi Cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 *RUTGERS L.J.* 707, 719 (1999) (analyzing Race Consciousness Violence); Vickie M. Mays et al., *Race, Race-Based Discrimination, and Health Outcomes Among African-Americans*, 58 *ANN. REV. PSYCHOL.* 201

Part II analyzes criminal law encounters in which police officers have escalated arguably minor interactions with people of color in the face of subjectively interpreted disrespect and noncompliance.<sup>29</sup> It is posited in this Article that such situational disobedience has deep historical roots, and is connected to racialized expectations of

---

(2007); *see also* DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 3 (2001), [http://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/Bookshelf\\_NBK44243.pdf](http://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/Bookshelf_NBK44243.pdf) [<https://perma.cc/CC6D-GUSU>] (asserting that high-need populations in which African-Americans are disparately represented include the homeless, the incarcerated, those in foster care and also those exposed to violence). The supplement to the Surgeon General's report referenced above is devoted in its entirety to the disparate racial, ethnic, and cultural consequences of uneven mental health and systemic disparities that exist with respect to access to mental health care. For a discussion on the stress and trauma on inner-city communities due to the lack of police accountability, *see The Rachel Maddow Show: Facts Dispute 'Ferguson Effect' on Crime Rate* (MSNBC television broadcast Oct. 15, 2015), <http://www.msnbc.com/rachel-maddow/watch/facts-dispute-ferguson-effect-on-crime-rate-543329859503> (Melissa Harris-Perry observing “community trauma” resulting from fatal police shootings).

29. *See infra* Part II; *see also* Cooper, “Who’s the Man,” *supra* note 12, at 701 (indicating policemen stage masculinity contests to boost their masculinity esteem). The Louima case in New York City is an example of this, where an officer handed his equipment belt to another officer and traded blows with Louima in the street. The officer later anally raped Louima with a broomstick at the station. For a general discussion of the Louima assault, *see* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (using Louima case to investigate the ethics of racialized prosecutions). *See also* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2000); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 64–65, 66–69 (2014) (examining stop and frisk as a form of terror and the path from slavery to stop and frisk); Jacob Koffler, *University of Cincinnati Cop Indicted in Killing of Unarmed Black Men*, TIME (July 29, 2015), <http://time.com/3976976/samuel-dubose-footage/> [<https://perma.cc/Y4BQ-HYKB>]; J. David Goodman, *Eric Garner Case is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html> [<https://perma.cc/YZ8J-FW2H>]; Mark Berman & Wesley Lowery, *Cleveland Judge Finds Probable Cause for Murder Charge in Tamir Rice Shooting*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/11/cleveland-judge-finds-probable-cause-for-murder-charge-in-tamir-rice-shooting/> [<https://perma.cc/85SN-9RLP>]; Charles Blow, *Library Visit, Then Held at Gunpoint: At Yale, the Police Detained My Son*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/26/opinion/charles-blow-at-yale-the-police-detained-my-son.html> [<https://perma.cc/XM8B-PR8Q>]; Keri Blakinger, *Heroin Addiction Sent Me to Prison. White Privilege got Me Out and Into the Ivy League: Second Chances Don't Come This Easily to People of Color*, WASH. POST (Jan. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/01/21/heroin-addiction-sent-me-to-prison-white-privilege-got-me-out-and-to-the-ivy-league/> [<https://perma.cc/9LTG-X94Z>]; Hannington Dia, *NYPD Officer's Secret Taping Reveals Superior Ordered Him to Stop and Frisk Black Males 14–21*, NEWSONE (Mar. 22, 2013), <http://newsone.com/2298223/pedro-serrano-stop-and-frisk-nypd/> [<https://perma.cc/F9VU-8WWF>].

deference to White authority figures on the part of people of color.<sup>30</sup> When such expectations are not met, the law enforcement authorities exercise their discretion to “felonize” the person with whom they are interacting—meaning, through their escalating tactics, the authority figures transform an otherwise minor encounter into a criminal event in order to justify their heightened scrutiny, and eventual use of force.

Part III examines the Sandra Bland arrest and her death in custody.<sup>31</sup> This Part asserts that for such a minor infraction, the interaction between Ms. Bland and the arresting officers should never have escalated to the point of incarceration for an offense that might merit a mere warning. It is further suggested in the section that Ms. Bland’s underlying mental vulnerabilities were exacerbated by ongoing systemic racial disparities, as well as the individual disparate treatment she endured.<sup>32</sup>

In conclusion, this Article calls first for interdisciplinary study of these biased interactions; secondly, for improved police policies, training, and practices underwritten by this interdisciplinary information; third, for fortified training dictates with data driven incentives and accountability; and fourth, for these undertakings to be coupled with serious interdisciplinary dialogue about the role of unconscious racism and ableism, as well as its structural and individual machinations.<sup>33</sup> To continue to do otherwise has dire consequences for people of color who are mentally vulnerable, or whose victimization and structural subordination is societally disabling, as well as for policing efficacy.<sup>34</sup>

---

30. See Ribet, *supra* note 13, at 218 (“Mental illness is on the one hand the discrediting charge used to stigmatize rebellion, explain distress at supposedly benign circumstances, and police the borders of acceptable behavior.”); see also DWIGHT FEE, *PATHOLOGY & THE POSTMODERN: MENTAL ILLNESS AS DISCOURSE & EXPERIENCE* (2000); Cooper, *Against a Bi-Polar Black Masculinity*, *supra* note 12, at 857.

31. See *infra* Part III.

32. See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/6FB5-Y9LH>]; see also Mark Berman & Wesley Lowery, *12 Key Highlights from the Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-scathing-ferguson-report/> [<https://perma.cc/B93Y-YYBM>].

33. See *infra* Part IV; see also Tracey G. Gove, *Implicit Bias and Law Enforcement*, THE POLICE CHIEF (Nov. 2015), <http://fairandimpartialpolicing.com/docs/thepolicechief.pdf>.

34. AJ Vicens & Jaeah Lee, *Here Are 13 Killings by Police Captured on Video in the Past Year*, MOTHERJONES (May 20, 2015), <http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video> [<https://perma.cc/EC6M-KRE2>].

### I. LINGERING PATHOLOGIES OF HISTORY

*“That men do not learn very much from the lessons of history is the most important of all the lessons that history has to teach.”*<sup>35</sup>

Race and disability are both socially constructed.<sup>36</sup> They are intentionally hierarchical, competitive, active, and imbued with biases, which are productive of societal privileges and disadvantages.<sup>37</sup> As I noted above,<sup>38</sup> one’s race can be societally disabling, as “even in the absence of mental illness, diagnosable or constructed, . . . negative racialization . . . alone appears to be disabling.”<sup>39</sup> In addition to lay ascriptions, expert disciplines have also been involved in creating disabling societal constructions. For instance, with respect to ableism, it has been noted that public health was instrumentally used to include and exclude people from the polity.<sup>40</sup> The inclination and ability to comport one’s behavior to societal norms was assessed as indicative of good health and perceived as more conducive to membership in civil society.<sup>41</sup> As such, individuals who could not or would not conform their behavior

35. ALDOUS HUXLEY, COLLECTED ESSAYS 222 (1959).

36. See DAVID JOHNSTONE, AN INTRODUCTION TO DISABILITY STUDIES (1998); see also THE DISABILITY STUDIES READER (Lennard J. Davis ed., 1997); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990s 55 (3d ed. 2014) (“[R]ace is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies . . . . We define racial formation as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.”) (emphasis omitted); IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 78 (1996) (“Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.”); ALLAN V. HORWITZ, CREATING MENTAL ILLNESS IN NON-DISORDERED COMMUNITY POPULATIONS, *in* ESTABLISHING MEDICAL REALITY: ESSAYS IN THE METAPHYSICS AND EPISTEMOLOGY OF BIOMEDICAL SCIENCE 123 (Harold Kincaid et al. eds., 2007). See generally TOMMY L. LOTT, THE INVENTION OF RACE: BLACK CULTURE AND THE POLITICS OF REPRESENTATION (1999).

37. See Ribet, *supra* note 13, at 217 (building analysis on dynamics in association with racial domination disablement through torture and noting that “it would be unsurprising, even predictable, to find that disability is (as several disability theorists have argued) linked to notions of defeat and subordination, while the idea of victory, might, and political entitlement is grounded in having disabled all others who have not been outright destroyed.”).

38. See Ribet, *supra* note 13, at 212 (“Specifically, I suggest that race can be coded as in itself a disability, and disability as evidence of inferiority, which then reinforces White supremacy.”).

39. Nelson, *supra* note 1, at 64.

40. Merlin Chowkwanyun, *The Strange Disappearance of History from Racial Health Disparities Research*, 8 DU BOIS REV. 253, 261 (2011).

41. *Id.*

were often excluded and stigmatized.<sup>42</sup> For such reasons, it has been noted that disciplines provide “general formulas of domination.”<sup>43</sup>

It is well documented that learned scientists and physicians have contributed to the fallacy of racialized superiority and inferiority, specifically white supremacy and black inferiority.<sup>44</sup> Using a Foucauldian lens, I have noted elsewhere that:

Foucault identifies the intersection of policing, psychiatry and the penal system<sup>45</sup> as crucial in utilizing enhanced surveillance and in constructing a class of perpetual suspects.<sup>46</sup> “[S]o one sees penal discourse and psychiatric discourse crossing each other’s frontiers . . . at their point of junction, is formed the notion of the ‘dangerous’ individual.”<sup>47</sup>

Specifically, medico-legal logic conspired to further marginalize those deemed genetically criminal and feeble minded, meaning people of color, Black people in particular.<sup>48</sup> These constructions furthered Blacks conscription into convict lease systems and chain gangs, thereby further marginalizing and “containing” them.<sup>49</sup> As Michelle Alexander has noted in her book, *The New Jim Crow*, these social constructions and containments persist.<sup>50</sup>

42. *Id.*

43. MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 137 (Alan Sheridan trans., 2d ed. 1995).

44. For a comprehensive analysis of scientific and medical racism, see W. MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE: BEGINNINGS TO 1900* (2000); W. MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: RACE, MEDICINE, AND HEALTH CARE IN THE UNITED STATES, 1900–2000* (2001).

45. FOUCAULT, *supra* note 43, at 137.

46. *Id.* at 281.

47. *Id.* at 252; *Nelson*, *supra* note 1, at 55 (“This is the work of medico-legal dynamics—both medicine and law are essential to the construction of marginalized identities.”).

48. Referring to the state of Alabama, “[t]he state had a traditional institution for feeble-minded and criminal blacks—the convict lease system and its offspring the chain gang. After all, ‘White racists looked upon black criminality as a genetic trait’ that could not be corrected, just contained.” Gregory M. Dorr, *Defective or Disabled?: Race, Medicine, and Eugenics in Progressive Era Virginia and Alabama*, 5 J. GILDED AGE & PROGRESSIVE ERA 359, 388 (2006). *See also id.* (“Although many Alabama physicians accepted the eugenic redefinition of disability that merged racial distinctions into unfitness, Alabama’s intense popular racism prevented this redefinition from gaining enough lay support to translate into biracial public policy. Since lay Alabamians strongly adhered to racial distinctions, the scant appropriations for the feeble-minded effectively meant money and services ‘For Whites Only.’”).

49. *Id.*

50. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (2012) (“‘The more things change, the more they

In this way, racialized disability, as a created construct, is a presumptive justification for legal or societal disablement—a set of contingent corresponding deprivations and abuses flow from such societal marginalization. The fabric of societal disability is interwoven with our pervasive identity politics, and consequent social relegation. As Beth Ribet has noted, “the construct of White normalcy is synonymous with ability, and the constructions of People of Color are correspondingly synonymous with abnormalcy, dangerous, deviance or (infectious) moral sickness, damaged or less worthy or inferior bodies, less capable or intelligent minds—all of which bleed into the construction of disability.”<sup>51</sup>

Taking a socio-psychobiological approach, it is further understood that:

[T]he impact of race is in racism—historically informed, perpetuated by institutions, and manifested in the set of assumptions, stereotypes, and biases that are attached to race, both externally and internally—positioning groups of people into relative positions of power and deprivation . . . . [A] socio-psychobiological approach emphasizes how social inequalities generated by racism impact health, directly as well as by shaping psychological, behavioral, and biological vulnerability to disease.<sup>52</sup>

Thus, understanding the constructed nature of disability begs an analysis of the ways in which conscious discriminatory decision-making, and unconscious bias, interact to build systems and structures that are oppressive.<sup>53</sup> Biases additionally propel a lack of awareness of the disabling impact of such constructions, discriminatory interactions, or the intentional disregard of such constructions and their consequences.

---

remain the same’ . . . . Rather than rely [explicitly] on race, we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind . . . . We have not ended racial caste in America; we have merely redesigned it.”).

51. Ribet, *supra* note 13, at 213; see also Cynthia Lee, “*But I Thought He Had a Gun*”, *Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1 (2004) (analyzing how race factors into police perceptions of danger).

52. Chae et al., *supra* note 14, at 73.

53. See IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert S. Smith eds., 2012); see also Llewellyn Smith et al., *American Denial*, PBS (Feb. 23, 2015), <http://www.pbs.org/independentlens/films/american-denial/> (“*American Denial* sheds light on the unconscious political and moral world of modern Americans, using archival footage, newsreels, nightly news reports, and rare southern home movies from the ‘30s and ‘40s, as well as research footage, websites, and YouTube films showing psychological testing of racial attitudes.”).

Disability rights scholars have long noted that it is not so much the underlying physical (or mental) impairment that manifests the disability, but rather the consequent societal constructions (and I would add destructions) that create the disability.<sup>54</sup> The added rub is the known health disparities, which spiral from the debilitating impact of these socially disabling constructions.<sup>55</sup> Stated another way, as one is actively externally societally disabled, so too one becomes societally disabled. Meaning all of these constructions have real life implications and consequences; they take a toll on minority health and well-being, thereby further complicating and compounding the marginalizing effects and outcomes. For instance, “[d]iscrimination has been shown to increase the risk of stress, depression, the common cold, hypertension, cardiovascular disease, breast cancer, and mortality.”<sup>56</sup>

Additionally disconcerting are the ways in which oppression and discrimination not only negatively impact the individual, but also communities. Research is increasingly elucidating the impacts of intergenerational trauma as well as vicarious trauma.<sup>57</sup> For instance, “[r]ace-based stress reactions can be triggered by events that are experienced vicariously, or externally, through a third party—like

---

54. See Silverstein, *supra* note 21; Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418 (2000); Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 427–28 (2006); see also OMI & WINANT, *supra* note 36.

55. See Bagenstos, *supra* note 54, at 418; Emens, *supra* note 54, at 427–28; see also IAN F. HANEY-LÓPEZ, *supra* note 36, at 78 (“Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.”); OMI & WINANT, *supra* note 36, at 55. See generally LOTT, *supra* note 36.

56. Silverstein, *supra* note 21.

57. See, e.g., Karina L. Walters et al., *Bodies Don’t Just Tell Stories, They Tell History*, 8 DU BOIS REV. 179, 181 (2011) (“Individually, each event is profoundly traumatic; taken together they constitute a history of sustained cultural disruption and destruction directed at AIAN tribal communities. The resulting trauma is often conceptualized as collective, in that it impacts a significant portion of a community, and compounding, as multiple historically traumatic events occurring over generations join in an overarching legacy of assaults. For [American Indians and Alaska Natives] [(AIANS)], cumulative [historical trauma] [(JHT)] events are coupled with high rates of contemporary lifetime trauma and interpersonal violence, as well as high rates of chronic stressors such as microaggressions and daily discriminatory events. Together, these historical and contemporary events undermine AIAN physical, spiritual, and psychological health and well-being in complex and multifaceted ways.”); see also Helen Thomson, *Study of Holocaust Survivors Finds Trauma Passed on to Children’s Genes*, THE GUARDIAN (Aug. 21, 2015), <https://www.theguardian.com/science/2015/aug/21/study-of-holocaust-survivors-finds-trauma-passed-on-to-childrens-genes> [<https://perma.cc/Q38H-T6NT>].

social media or national news events.”<sup>58</sup> As one commentator has noted, the frequency and vividness of these encounters may propel a sense of dread, as we must continually deal with these ongoing issues.

Our screens and feeds are filled with news and images of black Americans dying or being brutalized. A brief and yet still-too-long list: Trayvon Martin, Tamir Rice, Walter Scott, Eric Garner, Renisha McBride. The image of a white police officer straddling a black teenager on a lawn in McKinney, Tex., had barely faded before we were forced to grapple with the racially motivated shooting in Charleston, S.C.<sup>59</sup>

Furthermore, insofar as the foci of this Article is concerned, there is increasing information about the debilitating psycho-social impact and vicariously traumatic experiences to which many Black people have been exposed, especially given the recent spate of police killings of Black people in the United States.<sup>60</sup> We are only beginning to recognize the myriad ways in which oppression, be that structural, systemic, and/or intentional or unintentional prejudice, takes a toll on victims of such abuse.

[E]xamination of racial discrimination highlights the importance of understanding the impact of accumulated discriminatory experiences including in interactions with the police . . . . In making appraisals, blacks not only draw from their own experiences, but also from patterns of events they are exposed to in their communities and knowledge imparted by members of their racial group. This is particularly the case in disadvantaged African-American neighborhoods, where aggressive policing strategies are widely used.<sup>61</sup>

As is being done with respect to studies of intergenerational and historic trauma in American Indian and Alaskan Native communities,<sup>62</sup> further research should be undertaken to examine the

---

58. Jenna Wortham, *Racism's Psychological Toll*, N.Y. TIMES (June 24, 2015), [http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html?\\_r=0](http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html?_r=0) [<https://perma.cc/2EK3-9MCU>].

59. *Id.*

60. See Karen Attiah, *How Black People Can Emotionally Protect Themselves in the Age of #BlackLivesMatter*, WASH. POST (July 24, 2015), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/07/24/how-black-people-can-emotionally-protect-themselves-in-the-age-of-blacklivesmatter/> [<https://perma.cc/8XKY-BHMB>] (including desire to “call in Black” to work); Rod K. Brunson, *Police Don't Like Black People: African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71 (2007).

61. *Id.*

62. See Paolo del Vecchio, *The Impact of Historical and Intergenerational Trauma on American Indian and Alaskan Native Communities*, SAMHSA

cumulative and intergenerational impact of the killings of record numbers of Black men over the course of recent years.<sup>63</sup> For instance, in terms of the lingering consequences of the violence of racism and colonization in Indigenous and American Indian communities, there is a growing exploration of the cumulative impact of legacies of systemic abuse:

[I]ndividually, each event is profoundly traumatic; taken together they constitute a history of sustained cultural disruption and destruction . . . . The resulting trauma is often conceptualized as collective, in that it impacts a significant portion of a community, and compounding, as multiple historically traumatic events occurring over generations join in an overarching legacy of assaults.<sup>64</sup>

Of course, the counter-analysis to this movement is a concern for pathologization; meaning, in this instance, an appropriate apprehension that such epidemiological genetics might be contorted into a marker of inherent biological inferiority and abnormality.<sup>65</sup> Taking epi-genetics<sup>66</sup> seriously, yet recognizing the historically moored ease with which notions of inferiority can infect even the most well-intentioned perspective, one must be cognizant of the problem of marking communities with badges of biological inferiority.<sup>67</sup> So, despite the phenomenon of living histories, and

DIALOGUE BLOG (Nov. 25, 2015), <http://blog.samhsa.gov/2015/11/25/the-impact-of-historical-and-intergenerational-trauma-on-american-indian-and-alaska-native-communities/#.VuRyzsfp7Jo> [<https://perma.cc/Q4U3-58A2>] (defining historical trauma as “cumulative emotional and psychological wounding across generations, including the lifespan, which emanates from massive group trauma”); Laurelle L. Myhra, “*It Runs in the Family*”: *Intergenerational Transmission of Historical Trauma Among Urban American Indians and Alaska Natives in Culturally Specific Sobriety Maintenance Programs*, 18 AM. INDIAN & ALASKAN NATIVE MENTAL HEALTH RES. 17, 25–26 (highlighting fear of trauma linked to racist history).

63. See *995 People Shot Dead by Police This Year*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (organizing homicide data).

64. Walters et al., *supra* note 57.

65. Pathologization is to view or characterize as medically or psychologically abnormal. *Pathologize*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/pathologize> [<https://perma.cc/FMX4-J2MY>].

66. See Stacy Lu, *How Chronic Stress Is Harming Our DNA*, MONITOR ON PSYCHOL., Oct. 2014, at 28, <http://www.apa.org/monitor/2014/10/chronic-stress.aspx>; *At Last, a Reason Why Stress Causes DNA Damage*, SCIENCE DAILY (Aug. 22, 2011), <http://www.sciencedaily.com/releases/2011/08/110821141135.htm>.

67. See K. TSINANINA LOMAWAIMA, *THE UNNATURAL HISTORY OF AMERICAN INDIAN EDUCATION, NEXT STEPS: RESEARCH AND PRACTICE TO ADVANCE INDIAN EDUCATION 2* (1999) (highlighting false pretenses relating to Native American mental ability); Jenny Reardon & Kim TallBear, “*Your DNA Is Our History*”:

these histories often being very much alive in contemporary bodies and minds, such historical resonance should not be taken as a marker of internal disease, but perhaps more appropriately as being rooted in external racialized unease and racism, (dis)ease.

Recent work on unconscious and implicit bias has led to an important conversation about the prevalence and force of their impact in our everyday lives.<sup>68</sup> Unlike known biases, of which most people have some awareness, and thus usually seek to conceal, unconscious biases operate at the subconscious level, making them more difficult to interrogate and eradicate.<sup>69</sup> Everyone has these

*Genomics, Anthropology, and the Construction of Whiteness as Property*, 55 CURRENT ANTHROPOLOGY S233, S234 (2012) (highlighting history associated with race and racism); Joseph P. Gone et al., *Potentially Harmful Therapy and Multicultural Counseling: Extending the Conversation*, 43 THE COUNSELING PSYCHOLOGIST 393, 397 (2015) (laying out psychological ethnoracial history); Joseph P. Gone et al., *In Search of Cultural Diversity, Revisited: Recent Publication Trends in Cross-Cultural and Ethnic Minority Psychology*, 17 REV. GEN. PSYCHOL. 243, 244 (2013) (highlighting prevalent issues relating to race and diversity).

68. For a discussion among members of the Supreme Court, see *Schuette v. BAMN*, 134 S. Ct. 1623, 1651–83 (2014), with a particular emphasis on Justice Sotomayor’s dissent. See also Charles R. Lawrence III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The ID, The Ego, and Equal Protection”*, 40 CONN. L. REV. 931, 931–78 (2008); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).

69. The STANFORD ENCYCLOPEDIA OF PHILOSOPHY states, “‘Implicit bias’ is a term of art referring to relatively unconscious and relatively automatic features of prejudiced judgment and social behavior. While psychologists in the field of ‘implicit social cognition’ study ‘implicit attitudes’ toward consumer products, self-esteem, food, alcohol, political values, and more, the most striking and well-known research has focused on implicit attitudes toward members of socially stigmatized groups, such as African-Americans, women, and the LGBTQ community.” Michael Brownstein, *Implicit Bias*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 26, 2015), <http://plato.stanford.edu/entries/implicit-bias/>. I think the Open Society Foundations statement, “Implicit Bias and Social Justice,” is insightful in providing examples of the way implicit bias works:

For example, a doctor with implicit racial bias will be less likely to recommend black patients to specialists or may recommend surgery rather than a less invasive treatment. Managers will be less likely to invite a black candidate in for a job interview or to provide a positive performance evaluation. Judges have been found to grant dark-skinned defendants sentences up to 8 months longer for identical offenses. Implicit bias also affects how people act with people of another race. In spite of their conscious feelings, white people with high levels of implicit racial bias show less warmth and welcoming behavior toward black people. They will sit further away, and their facial expressions will be cold and withdrawn. These same implicitly biased white people are also are [sic] more apt to view black people as angry or threatening and to predict that a black partner would perform poorly on a joint academic task. White people with stronger

biases, usually against “outgroups,”<sup>70</sup> but not always.<sup>71</sup> With respect to racial unconscious bias, research indicates the role of implicit bias in many areas, including disparate educational outcomes for children of color, negative health and healthcare outcomes, and of course significant disparities in the criminal justice system.<sup>72</sup> Generally, these tests indicate that, “the vast majority of people are faster to pair together Good with White and Bad with Black.”<sup>73</sup> This is particularly important for the criminal justice system where the stakes are high, and include one’s freedom and dignitary interests. Indeed, there is an understanding that implicit bias and unconscious dynamics infect the criminal justice system in disparate and significant ways:

[S]tudies repeatedly reveal that people evaluate ambiguous actions performed by non-Whites as suspicious and criminal while identical actions performed by Whites go unnoticed . . . . “Arrest efficiency,” or hit-rate data, provides evidence of these biases. Arrest efficiency refers to the rates at which the police find evidence of criminal activity when conducting a stop and frisk. When available, these data consistently demonstrate that the hit rates are lower for non-Whites than for Whites, or that the rates are at least equal.<sup>74</sup>

---

implicit bias against black people actually do perform poorly on a difficult task after interacting with a black person—suggesting that, without knowing it, they were challenged mentally by the effort of appearing non-biased.

Hayley Roberts, *Implicit Bias and Social Justice*, OPEN SOC’Y FOUNDS. (Dec. 18, 2011), <https://www.opensocietyfoundations.org/voices/implicit-bias-and-social-justice> [https://perma.cc/A4XA-7EB4]. For a greater appreciation of the many ways in which implicit bias impacts the justice system, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 53; *see also Understanding Implicit Bias*, KIRWAN INST. (last visited Feb. 11, 2016), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

70. KIRWAN INST., *supra* note 69 (“We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.”).

71. *See* Nick K. Sexton, *Study Reveals Americans’ Subconscious Racial Bias*, NBC NEWS (Aug. 21, 2015), <http://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferences-americans-n413371> [https://perma.cc/R3A7-KKTK] (highlighting implicit bias study).

72. KIRWAN INST., *supra* note 69 (tracing school to prison pipeline and racial bias in medicine, criminal law, and school discipline, as well as comparing Madison and Ferguson).

73. Huajian Cai et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 188 (2010) (examining implicit bias’s psychological measures); *see* Mahzarin R. Banaji et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS: THEORY RES. & PRAC. 101, 105–06 (2002) (highlighting society’s racial attitudes).

74. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012) (“Implicit social cognition research demonstrates that implicit biases can affect whether police interpret an individual’s ambiguous behaviors as suspicious.”).

And, for decision-making, people hold “strong associations between Black and Guilty, relative to White and Guilty, [which in turn] predict[s] the way mock jurors evaluate[] ambiguous evidence.”<sup>75</sup> Meaning, the default manner of evaluating information or data, which supports neither the prosecutor nor the defendant, is factored against an accused of color, and utilized in ways that further white supremacy.<sup>76</sup>

Whether the genesis of the discrimination is structural, systemic, intentional, unintentional, unconscious, or accidental, it seems that the impact is consequential and debilitating for people of color. The ways in which racism undermines well-being and infiltrates one’s body are increasingly understood.<sup>77</sup> Just as other forms of physical and mental abuse and maltreatment imprint on the body, racism similarly takes a toll.<sup>78</sup> For instance, we know that Black men:

[F]ace a disproportionately high burden of prevalence and premature morbidity and mortality rates from injuries, illnesses, and

75. Cai et al., *supra* note 73, at 188 (addressing implicit bias empirical studies); see Banaji et al., *supra* note 73, at 105–06 (indicating race attitude patterns mimic laboratory data). “For example, Americans rate ambiguous pieces of evidence to be more probative of guilt when a suspect is dark-skinned and display a stronger implicit connection between “black” and the concept “guilty” than they do between “white” and “guilty.” Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871(2015); see Huajian Cai et al., *supra* note 73, at 190; see also Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 821 (2007).

76. See Smith et al., *supra* note 75. See generally, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1125 (2012).

77. Helen Epstein, *GHETTO MIASMA: Enough To Make You Sick?*, N.Y. TIMES (Oct. 12, 2003), <http://www.nytimes.com/2003/10/12/magazine/ghetto-miasma-enough-to-make-you-sick.html?pagewanted=all> [https://perma.cc/Q4NL-UGKH]. “‘There are so many fists in the face of poor African-Americans’ . . . blacks are faced with a society that institutionalizes the idea ‘that you are a menace—and that demeans you.’” *Id.* Research indicated that:

[W]orking-class African-Americans who said they accepted unfair treatment as a fact of life had higher blood pressure than those who challenged it . . . . Geronimus calls the grinding everyday stress of being poor and marginalized in America ‘weathering,’ a condition not unlike the effect of exposure to wind and rain on houses.

*Id.*

78. See *Elder Abuse: Consequence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/elderabuse/consequences.html> [https://perma.cc/38CB-GUKC]; *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> [https://perma.cc/RD9D-V2NN]; *Child Maltreatment: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/childmaltreatment/consequences.html> [https://perma.cc/SH7B-HJYV].

chronic and stress-related conditions with high depression comorbidities (especially cancer, cardiovascular disease, HIV/AIDS, diabetes, and homicide). Black men also face more exposure to adverse social and economic environments (e.g., discrimination, unemployment, poverty, violence, etc.) that generate or aggravate psychological distress. This confluence of risk factors may contribute to outcomes typically linked to depression, including the steady rise in suicide rates reported among Black men and boys over the past several decades.<sup>79</sup>

It is also noteworthy, and perhaps relevant to the killing of twelve-year-old Tamir Rice by police, that Black boys are regularly judged as more culpable than similarly situated White boys, and their ages are overestimated by as much as four years.<sup>80</sup> That such unconscious bias manifests during police encounters is not surprising, given recent studies on implicit bias; it is a reality that law enforcement is loathe to admit, regardless of the dire consequences.<sup>81</sup> Indeed, compelling simulation studies have revealed a phenomenon termed “shooter

---

79. Angelitta M. Britt-Spells et al., *Effects of Perceived Discrimination on Depressive Symptoms Among Black Men Residing in the United States: A Meta-Analysis*, AM. J. MEN'S HEALTH 1, 2 (2016) (highlighting Black men face more exposure to adverse socio-economic environments that generate psychological distress) (“According to the National Center for Health Statistics, between 1950 and 2004, the age-adjusted suicide rate for Blacks of all ages increased by approximately 28%, while it decreased by approximately 14% for Whites.”).

80. “The evidence shows that perceptions of the essential nature of children can be affected by race, and for black children, this can mean they lose the protection afforded by assumed childhood innocence well before they become adults . . . . With the average age overestimation for black boys exceeding four-and-a-half years, in some cases, black children may be viewed as adults when they are just 13 years old.” Press Release, Am. Psychological Ass'n., *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds* (Mar. 6, 2014), <http://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx>; see also Carmen M. Culotta et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 524, 528–31 (2014) (indicating from ages 0–9, children were seen as equally innocent regardless of race; however, perceptions diverged at age 10, with overestimation and heightened culpability for Blacks and Latino boys); Christopher Ingraham, *Why White People See Black Boys Like Tamir Rice as Older, Bigger and Guiltier Than They Really Are*, WASH. POST (Dec. 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/28/why-prosecutors-keep-talking-about-tamir-rices-size-36-pants/> [<https://perma.cc/D67C-RBJV>] (affirming social science statistical data that “black boys are seen as older and less innocent” than their white peers); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180 (2005).

81. Recently, some police have started to explore information about implicit bias and its implications for policing. See Gove, *supra* note 33.

bias,”<sup>82</sup> the tendency of police officers to mistakenly shoot unarmed Black suspects more than unarmed White suspects.<sup>83</sup>

The real-life impact of “shooter bias,” in turn, fuels heightened fear, stress, and angst in Black communities, for our loved ones and ourselves.<sup>84</sup> When contemplating the intergenerational impacts of these racialized dynamics, it is interesting to note that “[r]esearchers have already shown that certain fears might be inherited through generations, at least in animals.”<sup>85</sup> It should not be totally surprising then that,

[M]any black Americans experience what psychologists call “race-based trauma” . . . it’s clear that African-Americans are hit hard by incidents that recall the country’s ugly history of institutionalized racism . . . . And such trauma can occur, even vicariously . . . we have this whole cultural knowledge of these sorts of events happening, which then . . . primes us for this type of traumatization.<sup>86</sup>

In this milieu of conscious racism and implicit bias, it seems naïve and uninformed to cling to notions of colorblindness. Rather, in a supposedly post-racial America, racial construction *itself* can become the societal impairment that actively disables an individual.<sup>87</sup> Ribet, too, notes “that race can be coded as in itself a disability, and disability as evidence of inferiority, which then reinforces White supremacy,”<sup>88</sup> such that “the social and legal disablement of People of

82. Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice> [<https://perma.cc/2M6A-EAMY>] (offering paradoxical explanation).

83. Plant & Peruche, *supra* note 80. With respect to my policy and practice urgings, these studies show promise insofar as with “extensive training with the program, in which the race of the suspect was unrelated to the presence of a weapon, the officers were able to eliminate this bias.” *Id.*

84. Hope Landrine & Elizabeth Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144 (1996); Cheryl Corley, *Coping While Black: A Season of Traumatic News Takes a Psychological Toll*, NPR: CODE SWITCH (July 2, 2015), <http://www.npr.org/sections/codeswitch/2015/07/02/419462959/coping-while-black-a-season-of-traumatic-news-takes-a-psychological-toll> [<https://perma.cc/2USL-2TCB>] (referencing Monnica Williams, director of the Center for Mental Health Disparities at University of Louisville).

85. Thomson, *supra* note 57.

86. Corley, *supra* note 84 (referencing Monnica Williams, director of the Center for Mental Health Disparities at University of Louisville).

87. See Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743, 745 (2009) (highlighting citizens both voted and refused to vote for President Obama because of race).

88. Ribet, *supra* note 13, at 212.

Color echoes and reinforces a history of White supremacist characterization of enslaved and colonized peoples as uncivilized or childlike.”<sup>89</sup>

Such supremacist ideology, in turn, feeds into the criminal justice system and policing. Indeed, the consistency of controversial killings of Black and Brown people by police in dubious circumstances demand interrogation of what is going on in the hearts and minds of police officers, and should lead to increased concern for, and attention to, the impact on communities of color. Stated otherwise, whether these killings portend conscious animosity, or are unconscious percolations of prejudice, the dire mental and physical consequences for people of color demand increased police accountability.

**II. “PARTICULARLY IN THE UNITED STATES, RACE HAS ALWAYS PLAYED A CENTRAL ROLE IN CONSTRUCTING PRESUMPTIONS OF CRIMINALITY”<sup>90</sup>**

Numerous scholars and commentators have noted, and analyzed, the disparate ways in which the criminal justice system interacts with marginalized people, African Americans in particular.<sup>91</sup> My foci here are the compounding and escalating effects of police interactions with people of color; specifically, the ways in which such encounters often prove both mentally disabling and constitutive of mental vulnerability. Indeed, “[r]ecent studies suggest that *Terry* stops are typically harsh encounters in which physical violence, racial/ethnic degradation, and homophobia are commonplace, raising the potential for adverse mental health effects.”<sup>92</sup> As these encounters often quickly escalate, any reference by the suspect to rights discourse or constitutional law is read as situational disobedience and is (mis)interpreted as bespeaking disrespect, aberrant mental thought

---

89. Ribet, *supra* note 13, at 214.

90. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE 28 (2003).

91. See MONIQUE M. MORRIS, BLACK STATS: AFRICAN AMERICANS BY THE NUMBERS IN THE TWENTY FIRST CENTURY (2014); see also ALEXANDER, *supra* note 50; CHARLES J. OGLETREE, JR., FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sara eds., 2006); Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735 (2015); DEVON CARBADO & RACHEL MORAN, RACE LAW STORIES (2008); Mario Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Davis, *supra* note 89; ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2009).

92. Geller et al., *supra* note 16, at 2321–27.

processes, and/or obstructionism, and is ultimately deemed criminal—this is the felonization process.

On the other hand, such interactions take a psychological toll, proving to be yet another tax on blackness,<sup>93</sup> subjecting already vulnerable members of society to even more subjugation, and impacting the physical and psychological well-being of the “suspect” in such situations. For instance, sequelae<sup>94</sup> of subjugation to racism include both hypertension and high blood pressure.<sup>95</sup> Intersecting gender dynamics reveal that Black women who had been victimized by racism were “31% more likely to develop breast cancer than were those who did not report racial discrimination.”<sup>96</sup> These realities reveal the significant health consequences from racist interactions—this should not be dismissed.

### A. Historical Context

*Every social phenomenon is the result of historical process, that is societal factors operating over a period of time through human*

---

93. See Jamelle Bouie, *A Tax on Blackness: Racism Is Still Rampant in Real Estate*, SLATE (May 13, 2015), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/05/racism\\_in\\_real\\_estate\\_landlords\\_redlining\\_housing\\_values\\_and\\_discrimination.html](http://www.slate.com/articles/news_and_politics/politics/2015/05/racism_in_real_estate_landlords_redlining_housing_values_and_discrimination.html) [<https://perma.cc/AL23-N3G7>] (highlighting “grim, racist methods” of landlord); see also Donnell Alexander, *Racism Literally Costs America \$2 Trillion . . . Ready to Stop Payment?*, TAKEPART (Dec. 13, 2013), <http://www.takepart.com/article/2013/12/13/racism-literally-costs-america-too-much-continue> [<https://perma.cc/GEH8-Q43G>]; JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM* (2005).

94. Defined as, “a negative aftereffect.” *Sequela*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/medical/sequela> [<https://perma.cc/D32A-W9VV>].

95. David H. Chae et al., *Do Experiences of Racial Discrimination Predict Cardiovascular Disease Among African-American Men? The Moderating Role of Internalized Negative Racial Group Attitudes*, 71 SOC. SCI. MED. 1182, 1182 (2010). “Self-reported experiences of racial discrimination and the internalization of negative racial group attitudes are both found to be risk factors for cardiovascular disease among African American men, and the combination of internalizing negative beliefs about Blacks and the absence of reported racial discrimination are associated with particularly poor cardiovascular health.” Brian D. Smedley, *The Lived Experience of Race and Its Health Consequences*, 102 AM. J. PUB. HEALTH 933, 934 (2012). “[P]erceived race-based discrimination is positively associated with smoking among African Americans, and smokers find the experience of discrimination more stressful.” *Id.* at 933. “Experiences of racial discrimination also are associated with poor health among Asian Americans. A recent national survey of Asian Americans found that everyday discrimination was associated with a variety of health conditions, such as chronic cardiovascular, respiratory, and pain-related health issues. Filipinos reported the highest level of discrimination, followed by Chinese Americans and Vietnamese Americans.” *Id.* at 934.

96. Smedley, *supra* note 95, at 934.

*interaction . . . . As soon as large-scale phenomena are investigated, account must be taken of the historical facet.*<sup>97</sup>

The legacy of our collective history has implications for contemporary criminal law. In the early 1900s, the simultaneous construction of the “feebleminded” with the menace of genetic criminality fueled fervent eugenics impulses.<sup>98</sup> Additionally, constructions of madness have been used to further multiply intersecting oppression, including raced, gendered, classed, and sexualized oppression.<sup>99</sup>

97. George Rosen, *Health, History and the Social Sciences*, 7 SOC. SCI. & MED. 233 (1973).

98.

So long as southern Whites did not expect African Americans to contribute substantially to the intellectual progress of civilization, the need for eugenic improvement of Blacks lost urgency. African Americans did not need eugenic improvement to be hewers of wood and drawers of water. Moreover, Alabamians believed that strict segregation, enforced by extralegal violence, prevented miscegenation and any “pollution” of the white gene pool by mixed-race individuals who “passed” as white. Black feeble-mindedness would therefore be contained within the black population, which might hasten a “final solution” to the “Negro problem” as African Americans succumbed to dysgenic evolutionary pressures.

Dorr, *supra* note 48, at 389.

“Alabama’s physicians approached the menace of criminality and feeble mindedness from the same ideological perspective as their Virginia colleagues . . . . ‘[T]he moral disposition for good and evil, including criminal tendencies . . . are transmitted from . . . one generation to another . . . and is as firmly believed by all scientific men as the fact that parents transmit’ physical characteristics to their children. Arguing for eugenic segregation, Sommerville claimed that ‘born criminals’ were ‘degenerates’ and ‘true moral imbeciles’ and could never be reformed and should be ‘confined indefinitely and forever.’”

*Id.* at 383–84.

At the same meeting, Dr. John E. Purdon explicitly linked the social and therapeutic functions of eugenics. Taking as “a physiological and psychological axiom, that weakness begets weakness” and that, “sooner or later, in the struggle for existence . . . the weaker must go to the wall,” Purdon worried that humanitarianism created “preservative powers which assist the imperfect individual to escape the consequences of his physical and moral malformation.” As a result, the disabled survived and procreated, threatening to flood civilization with more of their kind. Sterilization offered “the simplest and most perfect plan” to achieve “the perfection of the race.”

*Id.* at 384.

99. See FEE, *supra* note 30, at 13 (“Closely connected is the problem of how meanings of madness have historically been used as tools of oppression along lines of gender, as well as sexuality and race.”).

For instance, the absurd medical diagnoses of Drapetomania, “the disease causing negroes to run away,” and Dysaesthesia Aethiopica, “a disease peculiar to negroes—called . . . ‘rascality,’”<sup>100</sup> promulgated by Dr. Samuel Cartwright, Chairman of the Medical Association of Louisiana,<sup>101</sup> are helpful for understanding the racialized “scientific” underpinnings of mental disability. These diagnoses invoked disciplinary responses through the criminal justice system or private sanction. For instance, “[i]f not sold away, a runaway [slave] was summarily punished . . . . Runaways were usually stripped, bound and whipped (the laws varied, but often included a specific number of lash strokes to be administered) and then their backs were washed in brine, a salt solution, to intensify the pain.”<sup>102</sup>

Such punitive responses to a slave’s asserted personhood were fundamentally structured, as slaves were legally property and their efforts of resistance were, by definition, considered criminal.<sup>103</sup> This information is important in elucidating the ways in which historical processes infiltrate medical “knowledge” and, in turn, underwrite criminal processes.<sup>104</sup> These two historical medical “diagnoses” are insightful in problematizing the social phenomenon at work in contemporary policing.

The diagnosis of Drapetomania, “[was determined to be] as much a disease of the mind as any other species of mental alienation.”<sup>105</sup> The

100. See Samuel Cartwright, *Diseases and Peculiarities of the Negro Race*, DE BOW’S REVIEW OF THE SOUTHERN AND WESTERN STATES, 1851, <http://www.pbs.org/wgbh/aia/part4/4h3106t.html> [<https://perma.cc/8FB2-UXSR>].

101. BARBARA A. HOLMES, RACE AND THE COSMOS: AN INVITATION TO VIEW THE WORLD DIFFERENTLY 62 (2002) (“Physician Samuel Cartwright, chairman of the Medical Association of Louisiana, determined that it was not a desire for freedom that drove slaves to escape but the medical mental disease of ‘drapetomania.’”); see also Brian Altonen, *The Southern Perspective on Disease and the Health of Slaves Around 1850*, BRIANALTONENMPH.COM, <http://brianaltonenmph.com/6-history-of-medicine-and-pharmacy/hudson-valley-medical-history/caribbean-and-african-medicine-in-the-valley/the-diseases-and-health-of-slaves-in-1850-southern-medical-reports-vol-2/> [<https://perma.cc/79CG-8L6Y>].

102. KATHERINE BANKOLE KEMI, SLAVERY AND MEDICINE: ENSLAVEMENT AND MEDICAL PRACTICES IN ANTEBELLUM LOUISIANA 16 (1998) (“Chronic runaways would be locked in plantation prisons each night and on weekends after laboring in the fields. Other chronic runaways were permanently consigned to the prisons of the towns and cities often labeled ‘the old ball and chain.’”).

103. *Id.*

104. See Emily Eaken, *Bigotry as Mental Illness or Just Another Term*, N.Y. TIMES (Jan. 15, 2000), <http://www.nytimes.com/2000/01/15/arts/bigotry-as-mental-illness-or-just-another-term.html?pagewanted=all> [<https://perma.cc/QDD5-Z9DH>] (highlighting behavioral definitions shaped by values of society).

105. See Cartwright, *supra* note 100.

historical context of this diagnosis was the lack of contentment of slaves. It was prescribed that if they were not compliant and content through “awe and reverence [of their masters, it] must be exacted from them, or they will despise their masters.”<sup>106</sup> Of course, when docile satisfaction was not manifest, discipline was in order. The prescription was clear:

[It was] decidedly in favor of whipping them out of it, as a preventive measure against absconding, or other bad conduct. It was called whipping the devil out of them . . . . [I]f any one of [sic] more of them, at any time, are inclined to raise their heads to a level with their master or overseer, humanity and their own good require that they should be punished until they fall into that submissive state which it was intended for them to occupy . . . .<sup>107</sup>

Dysaesthesia Aethiopica, “or hebetude of mind and obtuse sensibility of body,” also known as rascality,<sup>108</sup> similarly assigned mental illness to a failure to support white supremacy. Interestingly, this diagnosis was determined to be most appropriate for “free negroes,” who were “apt to do much mischief.”<sup>109</sup> Such “rascality” was perceived to be symptomatic of negro liberty, as “[t]he disease is the natural offspring of negro liberty—the liberty to be idle, to wallow in filth, and to indulge in improper food and drinks.”<sup>110</sup>

These “diagnoses” were created to construct subservience, deference, and obedience. When Black subjects did not demonstrate these “virtues,” it was the prerogative of the white master to exact compliance through force.<sup>111</sup> Now, do I think contemporary police officers know of these diagnoses? Of course not. But are there

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

It is much more prevalent among free negroes living in clusters by themselves, than among slaves on our plantations, and attacks only such slaves as live like free negroes in regard to diet, drinks, exercise, etc. It is not my purpose to treat of the complaint as it prevails among free negroes, nearly all of whom are more or less afflicted with it, that have not got some white person to direct and to take care of them.

*Id.*

110. *Id.*

The northern physicians and people have noticed the symptoms, but not the disease from which they spring. They ignorantly attribute the symptoms to the debasing influence of slavery on the mind without considering that those who have never been in slavery, or their fathers before them, are the most afflicted, and the latest from the slave-holding South the least.

*Id.*

111. *See id.* (instructing how to “treat” runaway slaves).

situational dynamics in contemporary policing that are demonstrable of similar diagnostic techniques and prescriptions? Yes, contemporary policing practices are not ahistorical, nor do they exist in cultural contextual vacuums. It makes me wonder how much racist medico-legal history lingers in service of contemporary societal constructs that work for the containment, or elimination, of blackness as degenerative.<sup>112</sup> As noted physician George Rosen stated, “[a]s soon as large-scale phenomena are investigated, account must be taken of the historical facet.”<sup>113</sup>

These two “diagnoses” form part of a racialized medical edifice in which physicians and psychiatrists routinely exploited Black bodies, and minds, in furtherance of medical advancements and their own careers. Take for example the medico-history of gynecology, which is tainted by the unanesthetized experiments routinely performed on female slaves in furtherance of breeding.<sup>114</sup> Also consider the development of anesthesia, specifically ether, through experimental amputations performed on slaves,<sup>115</sup> or the perfection of the cesarean section<sup>116</sup> and oviarotomies through experimentation on female

112.

In contrast to the illness among the unfit, morbidity among white elites—whose class status and race certified their fitness—deserved curative therapy. Curing these people would ensure the perpetuation of “fit germ plasm.” . . . . Moreover, recognizing that a subset of the “superior” white race—so-called poor white trash—was really inferior blurred the lines between black and white, superior and inferior, male and female, able and disabled . . . . In the long term, eugenics would give way to the confluence of changing science and rising social activism—modern genetics and the civil rights movement would quash, but not eradicate the hereditarian thinking that sought to parse humanity into the curable fit and the disabled defective.

Dorr, *supra* note 48, at 391–92.

113. Rosen, *supra* note 97, at 233–48.

114. See Camille Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEMINISM 1, 4 (2007) (providing background of gynecologist Dr. Sims).

115. See HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 70 (2008) (“Whatever his ethical sins, Sims’s surgical exploitation of enslaved blacks was consonant with the medical practice of his time. For black women, forced experimentation was the standard of care.”).

116. The procedure was perfected, however, by Dr. Francois Marie Prevost, a Louisiana surgeon. *Id.* Prevost performed thirty of thirty-seven cesarean sections on enslaved women. *Id.* at 70 (first surgery and twenty-nine others on slaves). His first operation was on an enslaved woman who had a “contracted pelvis.” *Id.* Many enslaved women required caesareans because malnutrition often led to improper bone development and malformed pelvises. See *id.* Louisiana physicians had performed the operation fifteen times between 1822 and 1861. *Id.* All of the procedures were performed on enslaved women. *Id.*

slaves.<sup>117</sup> Of course, there is also Thomas Jefferson's "testing" of a small pox vaccination on 200 of his slaves.<sup>118</sup>

If these instances of abuse seem a part of a long distant past, one might consider the experiments using African Americans, Puerto Ricans, and Japanese Americans, contrasted with a control group of Caucasians, to ascertain whether race played a role in how soldiers responded to mustard gas exposure.<sup>119</sup> There are also the Tuskegee syphilis experiments in which 399 African American men were neither told they were infected with the disease, nor treated.<sup>120</sup> It is also well known that throughout the 1960s and early 1970s, medical researchers at the University of Cincinnati exposed at least 90 cancer patients to large doses of radiation to study how much radiation a soldier could withstand before becoming disabled or disoriented.<sup>121</sup> Two-thirds of those irradiated were Black.<sup>122</sup>

Not surprisingly, most of the medical subjects were poor or working-class people.<sup>123</sup> In fact, these raced and classed moments of

117. See WASHINGTON, *supra* note 115, at 70. Dr. McDowell "perfected this dangerous and excruciatingly radical surgery on his four slave women." *Id.*

118. See *id.* at 59. He referred to the subjects as being of his 'own family.' Evidence suggests that most if not all of the initial test subjects were Jefferson's slaves. When the initial vaccinations were successful he vaccinated an additional seventy to eighty members of 'my own family.' In all it is estimated he tested the vaccination on two-hundred slaves including his own and the slaves of his neighbors and his son in law.

119. See Efthimos Parasidis, *Human Enhancement and Experimental Research in the Military*, 44 CONN. L. REV. 1117, 1120–21 (2012) (characterizing mustard experiments); see also *Facts about Sulfur Mustard, Emergency Preparedness and Response*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://emergency.cdc.gov/agent/sulfurmustard/basics/facts.asp> [<https://perma.cc/PGN8-4BPD>] (describing chemical composition, and facts, of sulfur mustard).

120. See FRED D. GRAY, *THE TUSKEGEE SYPHILIS STUDY: THE REAL STORY AND BEYOND* 62 (1998); JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 1* (1981); Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Sociopolitical Choices*, 11 HARV. BLACKLETTER L.J. 115, 122–26 (1994) (elucidating racist medicine); see also *U.S. Public Health Service Syphilis Study at Tuskegee: The Tuskegee Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/tuskegee/timeline.htm> [<https://perma.cc/P4NM-JWJ2>] (setting forth experiments' timeline).

121. See William Dicke, *Eugene Saenger, Controversial Doctor, Dies at 90*, N.Y. TIMES (Oct. 11, 2007), [http://www.nytimes.com/2007/10/11/us/11saenger.html?\\_r=0](http://www.nytimes.com/2007/10/11/us/11saenger.html?_r=0) [<https://perma.cc/96VF-H3U5>] (describing radiation experiments) ("[Dr. Saenger] was awarded the Gold Medal by the Radiological Society of North America, its highest honor.").

122. MARTHA STEPHENS, *THE TREATMENT: THE STORY OF THOSE WHO DIED IN THE CINCINNATI RADIATION TESTS* 54 (2002).

123. Dicke, *supra* note 121.

medical marginalization continue today.<sup>124</sup> One might even consider the recent revelations about the toxic water system in Flint Michigan

---

124. See MICHELE GOODWIN, *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* (2009); MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF HUMAN BODY PARTS* (2006). In 1951, Henrietta Lacks, a black mother of five, before administering radium for treatment of cervical cancer, the attending doctor cut two samples of tissue and gave the tissue to George Gey for use in reproducing a human cell line for use in cancer research. “No one asked permission or even informed her.” REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010); see also Jim Salter, *Secret Cold War Tests in St. Louis Raise Concerns*, YAHOO (Oct. 3, 2012), <https://www.yahoo.com/news/secret-cold-war-tests-st-louis-raise-concerns-214608828.html> [<https://perma.cc/BD83-38MT>] (highlighting several military tests); Mike Adams, *Guatemalan STD Medical Experiments Were Just One Crime in a Long History of Medical-Government Collusion to Use Humans as Guinea Pigs*, NATURAL NEWS (Oct. 2, 2010), [http://www.naturalnews.com/029924\\_medical\\_experiments\\_Guatemala.html#](http://www.naturalnews.com/029924_medical_experiments_Guatemala.html#) [<https://perma.cc/PRA9-N279>]. “Dr. Albert M. Kligman exposed approximately seventy-five prisoners at Holmesburg prison in Pennsylvania to high doses of dioxin, the main poisonous ingredient in Agent Orange. Dow Chemical paid Dr. Kligman \$10,000 to conduct the experiments on the toxicity effects of this Vietnam War-era chemical warfare agent.” Keramet Reiter, *Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations*, 97 CALIF. L. REV. 501, 501 (2009); see also Denise Gellene, *Dr. Albert M. Kligman, Dermatologist, Dies at 93*, N.Y. TIMES (Feb. 22, 2010), [http://www.nytimes.com/2010/02/23/us/23kligman.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/02/23/us/23kligman.html?pagewanted=all&_r=0) [<https://perma.cc/B2PV-962R>] (indicating Kligman remembered for Prison testing).

From 1988 to 2001 the New York City Administration for Children’s Services allowed foster care children to be used in NIH-sponsored experimental AIDS drug trials. See TIMOTHY ROSS & ANNE LIFFLANDER, *VERA INST. OF JUSTICE, THE EXPERIENCES OF NEW YORK CITY FOSTER CHILDREN IN HIV/AIDS CLINICAL TRIALS* (2009), [http://archive.vera.org/sites/default/files/resources/downloads/Experiences\\_of\\_NYC\\_Foster\\_Children\\_in\\_HIV-AIDS\\_Clinical\\_Trials\\_FINAL\\_appendices.pdf](http://archive.vera.org/sites/default/files/resources/downloads/Experiences_of_NYC_Foster_Children_in_HIV-AIDS_Clinical_Trials_FINAL_appendices.pdf) [<https://perma.cc/9P6B-JNC6>]. From 1992 to 1996 Columbia University’s New York State Psychiatric Institute and the Mount Sinai School of Medicine gave 100 males—mostly African American and Hispanics—dosages of fenfluramine (fen-fen) to test the theory that low serotonin levels are linked to violent or aggressive behavior. “In the experiment at the New York Psychiatric Institute, 34 children, all of whom were 6- to 10-year-old black or Hispanic boys, were given intravenous doses of fenfluramine to test a theory that violent or criminal behavior may be predicted by levels of certain brain chemicals.” Philip J. Hilts, *Experiments on Children Are Reviewed*, N.Y. TIMES (Apr. 15, 1998), <http://www.nytimes.com/1998/04/15/nyregion/experiments-on-children-are-reviewed.html> [<https://perma.cc/SL8X-3MNM>]. In 1997 the US-sponsored program withheld medical treatment from HIV-positive African-American pregnant women, giving them a placebo rather than AIDS medication. *Letter Concerning Funding of Unethical Trials Which Administer Placebos to HIV-infected Pregnant Women*, PUBLIC CITIZEN (Apr. 22, 1997), <http://www.citizen.org/Page.aspx?pid=2329> [<https://perma.cc/4YCX-J2ZV>]. Then “[f]rom 1988–2008, the number of overseas clinical trials for drugs intended for American consumption increased by 2,000%, to approximately 6,500 trials. These trials are often conducted in areas with large numbers of poor and illiterate people . . .” *Human Radiation Experiments Performed Without Consent or Knowledge*, AGR DAILY NEWS (Sept. 27, 2012), <https://agrailynews.com/2012/09/27/human-radiation-experiments-performed-without-consent-or-knowledge/> [<https://perma.cc/P5K2-FRWW>].

as showing similar willingness to imperil and risk the lives of Black people, including children.<sup>125</sup> If General Motors thought it best not to use the water supply, as it was corrosive to their parts, how much more troublesome is the fact that the people of Flint were left to drink this water?<sup>126</sup>

But systems of knowledge do not operate in isolation. Rather, they infiltrate and inform one another—medicine infuses law, as law interacts with economics, and economics implicates politics, and so on. Knowledge of the history of such medico-legal commissions and omissions allows for a more robust understanding, and interrogation, of contemporary policing policies, patterns, and practices.

Historical sensitivity . . . identifies . . . ‘the societal factors operating over a period of time’ that create the racial health disparities in the first place. By locating such factors and the human agents, decision-making, and the exercise of political power behind them, we are reminded that these disparities are not natural but created and thus undoable, however awesome the task. Finally, history forces us to reflect on the very way we interpret these inequalities, often exposing long, sometimes disturbing, lineages behind current ways of thinking, while also opening promising but less examined questions that have been sidelined.<sup>127</sup>

Given the above, I think it is appropriate to consider the ways in which the police shooting of Walter Scott,<sup>128</sup> in the back, as this 50-year-old man attempted to flee on foot, may evince traces of the diagnosis of Drapetomania. As we have seen, “the disease causing

125. See John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html> [https://perma.cc/ZV79-V42V]; Evan Osnos, *The Crisis in Flint Goes Deeper than the Water*, THE NEW YORKER (Jan. 20, 2016), <http://www.newyorker.com/news/news-desk/the-crisis-in-flint-goes-deeper-than-the-water> [https://perma.cc/UU3T-BRB5]; Derrick Z. Jackson, *Flint Evokes the Public Health Racism of Years Past*, BOS. GLOBE (Jan. 30, 2016), <https://www.bostonglobe.com/opinion/2016/01/29/flint-evokes-public-health-racism-years-past/a7TGWimWU3SrWWMQHb8B3K/story.html> [https://perma.cc/4MK9-WYC9]; Monica Alba, *Hillary Clinton: ‘What Happened in Flint is Immoral’*, NBC NEWS (Feb. 7, 2016), <http://www.nbcnews.com/storyline/flint-water-crisis/hillary-clinton-what-happened-flint-immoral-n513296> [https://perma.cc/U6BF-STLL].

126. Julie Lurie, *A Toxic Timeline of Flint’s Water Fiasco: This is How a Nightmare Unfolds*, MOTHER JONES (Jan. 26, 2016), <http://www.motherjones.com/environment/2016/01/flint-lead-water-crisis-timeline> [https://perma.cc/P5WU-B5VU] (“General Motors says it will stop using Flint River water in its plants after workers notice that the water corrodes engine parts.”).

127. Chowkwanyun, *supra* note 40, at 266.

128. See Wortham, *supra* note 58.

negroes to run away” was met with the disciplinary force modality both for the rationale of punishment and deterrence.

**B. Instances of Lethal Escalation or Controversial Killings—  
Increased Contact, Increased Killing**

Extrapolating further, what might an analysis of the recent controversial police killing of seventeen-year-old Chicago teenager Laquan McDonald, through the firing of sixteen shots<sup>129</sup> by Chicago police, and subsequent cover up, reveal when analyzed through the lens of medico-legal lineages? A possible interpretation of the killing calls into question the police recourse to a disciplinary force steeped in racialized views of Mr. McDonald’s defiance in walking away, or perhaps his swagger, as indicative of his seeming “rascality” in failing to comply with officer directions.<sup>130</sup> Given the factual discrepancies now evident from the released video footage,<sup>131</sup> which contradict police statements, the teen seemed to be oppositional in the last moments of his life only insofar as his failure to stop walking *away* from officers and his apparent decision not to adhere to whatever instructions the officers may then have been giving. Thus, contrary to the post-killing statements of Chicago police, Laquan McDonald appears to have been shot because of his disobedience, perhaps

---

129. See Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015), <http://edition.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/> [<https://perma.cc/EG9Q-3A7G>].

130. See Nelson, *supra* note 1, at 18, n.61. “The problem with police brutality is that sometimes, officers react with violence to defiance. Minorities might be more defiant, might give the cops more sass. And people who do that are likely to get hit, especially if the officer has a racist attitude.” *Id.*

131. See Drash, *supra* note 129. For instance, it was evident after the release of dash cam footage the remarkable differences in accounts, appearing to create a “conspiracy” whereby officers were justified to use lethal force. *See id.* According to the officer, “McDonald was holding the knife in his right hand, in an underhand grip with the blade pointed forward. He was swinging the knife in an aggressive, exaggerated manner.” *Id.* “[The officer] ordered McDonald to ‘Drop the knife!’ multiple times. McDonald ignored [the officer’s] verbal direction to drop the knife and continued to advance toward [the officer] . . . McDonald raised the knife across his chest and over his shoulder, pointing the knife at [the officer]. [The officer] believed McDonald was attacking [him] with the knife and attempting to kill [him]. In defense of his life, [the officer] backpedaled and fired his handgun at McDonald to stop the attack.” *Id.* The video, however, shows McDonald walking away from officers with a knife in his hand. *See id.* The officer began firing approximately six seconds after arriving, and fired sixteen shots in fifteen seconds. *See id.* McDonald never faced the officer. *See id.* The officer subsequently emptied the magazine from his 9-mm Smith & Wesson handgun, striking McDonald sixteen times—most while limp on the ground. *See id.*

Dysaesthesia Aethiopica, not because he posed a threat to the lives of the officers.<sup>132</sup>

Several killings of men of color in recent years<sup>133</sup> raise similar concerns about the precipitating police conduct.<sup>134</sup> As with those men of color shot whilst fleeing,<sup>135</sup> it begs the question of the ongoing relevance of the underlying sentiments embodied in the diagnosis of Drapetomania. We should ponder the operative factors—including historical, sociological, economic, psychological, and political—that lead to racialized fatally disabling outcomes. Indeed, 2015 may have been the most deadly year yet on record in terms of such racialized killings.<sup>136</sup>

Young black men were nine times more likely than other Americans to be killed by police officers in 2015, according to the findings of a Guardian study that recorded a final tally of 1,134 deaths at the hands of law enforcement officers [in 2015]. Despite making up only 2% of the total US population, African American males between the ages of 15 and 34 comprised more than 15% of all deaths logged this

132. See Drash, *supra* note 129 (“Comparing the officers’ accounts of the moment of the shooting with the video reveals stunning differences and what appears to be a conspiracy to create a scenario in which deadly force would be justified.”).

133. See Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> [https://perma.cc/S88S-W7M7]; Leah Green et al., *US Police Killed 1,136 in 2015. Will 2016 be Different?*, THE GUARDIAN (Jan. 5, 2016), <http://www.theguardian.com/commentisfree/video/2015/dec/30/us-police-killed-1103-people-this-year-will-2016-be-any-different-video>.

134. See *The Counted: People Killed by Police in the US*, THE GUARDIAN (Feb. 15, 2016), <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#> [https://perma.cc/KFJ2-36TK] (maintaining a database compiled by The Guardian which uses reporting and verified crowd sourcing to count the “number of people killed by police and other law enforcement agencies in the United States . . . to monitor their demographics and tell the stories of how they died.”).

135. See Damien Cave & Rochelle Oliver, *The Videos That Are Putting Race and Policing into Sharp Relief*, N.Y. TIMES (Nov. 24, 2015), <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html> [https://perma.cc/9NGF-SUE4]; Catherine E. Shoichet & Mayra Cuevas, *Walter Scott Shooting Case: Court Documents Reveal New Details*, CNN (Sept. 10, 2015), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/> [https://perma.cc/FE6W-8QTT] (indicating Scott pulled over for broken taillight and was subsequently shot in back, while running away, by officer).

136. See Paul Hirschfield, *U.S. Laws Protect Police, While Endangering Civilians*, THE CONVERSATION (Jan. 18, 2016), <https://theconversation.com/u-s-laws-protect-police-while-endangering-civilians-52737> [https://perma.cc/535D-JE8G] (“2015 may have been American cops’ deadliest year on record. According to my analysis of the Fatal Encounters database, police violence directly caused or played a role in 1,126 deaths in 2015, up from 1,072 deaths in 2014.”).

year by an ongoing investigation into the use of deadly force by police. Their rate of police-involved deaths was five times higher than for white men of the same age. Paired with official government mortality data, this new finding indicates that about one in every 65 deaths of a young African American man in the US is a killing by police.<sup>137</sup>

This stark reality is compounded by the decades long trend away from the institutionalization of the mentally ill.<sup>138</sup> By some accounts, of those individuals killed by police in 2015, a quarter were suffering from mental illness or manifesting some psychological disturbance.<sup>139</sup> Other dynamics also add to the likelihood that police will encounter mentally vulnerable people in increasing numbers.

137. Swaine et al., *supra* note 133.

138. See Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicides in the United States, 1934–2001*, 40 J. LEGAL STUD. 39, 41 (2011) (“[D]uring the 1980s, 1990s, and into the twenty-first century, mental health populations dwindled to negligible levels, while state and federal prison populations exploded, rising exponentially to their present levels.”). For an overview of the impact of the deinstitutionalization of the mentally ill, see *Frontline, Deinstitutionalization: A Psychiatric “Titanic”*, PBS (May 10, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html> [<https://perma.cc/C9A5-4LUF>] (referencing E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS* (1997)); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1782–83 (2006) (“There is some evidence to suggest that the proportion of minorities in mental hospitals was increasing during deinstitutionalization.”); Haley S. Edwards, *Should Mentally Ill People Be Forced Into Treatment?*, TIME (Feb. 20, 2015), <http://time.com/3716426/mental-illness-treatment-cost/> [<https://perma.cc/4LU6-LQ2G>] (enunciating new Assisted Outpatient Treatment for mentally ill people).

139. See Keith L. Anderson et al., *Distraught People, Deadly Results: Officers Often Lack the Training to Approach the Mentally Unstable, Experts Say*, WASH. POST (June 30, 2015), <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/> [<https://perma.cc/RX2G-MYVC>]. “Nationwide, police have shot and killed 124 people this year who . . . were in the throes of mental or emotional crisis, according to a Washington Post analysis. The dead account for a quarter of the 462 people shot to death by police in the first six months of 2015.” *Id.* (the embedded “Officer Involved” video specifically addresses mental vulnerability); Elliot C. McLaughlin, *Video: Dallas Police Open Fire on Schizophrenic Man with Screwdriver*, CNN (Mar. 19, 2015), <http://www.cnn.com/2015/03/18/us/dallas-police-fatal-shooting-mentally-ill-man-video/> [<https://perma.cc/CV59-EQ5P>]; Michael Pearson et al., *‘We Called for Help, and They Killed My Son,’ North Carolina Man Says*, CNN (Jan. 7, 2014), <http://www.cnn.com/2014/01/07/justice/north-carolina-teen-killed/> [<https://perma.cc/4RYP-KC73>]; see also Liz Szabo, *People with Mental Illness 16 Times More Likely to Be Killed by Police*, USA TODAY (Dec. 10, 2015), <http://www.usatoday.com/story/news/2015/12/10/people-mental-illness-16-times-more-likely-killed-police/77059710/> [<https://perma.cc/TEC7-NLE8>].

Not only are greater numbers of mentally ill people counted amongst our swelling homeless populations,<sup>140</sup> many of our veterans are understandably psychologically impacted from their service and are vulnerable to Post Traumatic Stress Disorder (PTSD), among other ailments.<sup>141</sup> It is not surprising then that “in 45 [of the] cases [examined by the Washington post in 2015], police were called to help someone get medical treatment, or after the person had tried and failed to get treatment on his own.”<sup>142</sup> In other words, in a number of these lethal encounters between law enforcement and civilians, the police were initially sought out to help a person who was mentally vulnerable.

Adding yet another layer to this dynamic is the challenge of managing prison populations in which a significant segment of the population is mentally ill.<sup>143</sup> Whereas nine percent of the general population is believed to have some type of mental vulnerability, it is estimated that approximately twenty-six percent of state and federal prisoners suffer from at least one diagnosable mental illness.<sup>144</sup> One particularly consequential aspect of this reality is that prisoners who have untreated mental health issues are often rearrested post-release.<sup>145</sup>

---

140. See Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 191 (2013) (“To the extent that outpatient mental health services are inadequate, deinstitutionalization exposes severely and chronically mentally ill individuals to a number of competing risks. A risk that has received considerable attention concerns the relationship between untreated mental illness and homelessness. A competing risk that has received less attention concerns the probability of incarceration.”).

141. See Val Willingham, *Study: Rates of Many Mental Disorders Much Higher in Soldiers than in Civilians*, CNN (Mar. 4, 2014), <http://www.cnn.com/2014/03/03/health/jama-military-mental-health/> [<https://perma.cc/XW7X-EQLJ>] (finding U.S. soldiers suffer from mental illness at rates higher than civilians); see also Anderson et al., *supra* note 139 (“Nearly a dozen of the mentally distraught people killed were military veterans, many of them suffering from post-traumatic stress disorder as a result of their service, according to police or family members.”).

142. Anderson et al., *supra* note 139.

143. See Jennifer R. Gonzalez, *Mental Health Care for Prisoners Could Prevent Rearrest, but Prisons Aren't Designed for Rehabilitation*, THE CONVERSATION (Jan. 19, 2016), <https://theconversation.com/mental-health-care-for-prisoners-could-prevent-rearrest-but-prisons-arent-designed-for-rehabilitation-45628> [<https://perma.cc/KWN6-G43F>] (stating mental illness more common in prisoners than general population).

144. *Id.*

145. See *id.*

### 1. *Whither the Data*

A noteworthy challenge to fully apprising oneself of the complexity, scope, and meaning of deadly policing interactions is the lack of official data tracking the reporting such incidents. The U.S. Attorney General's office seemed to waiver with respect to previous commitments to track instances of police killings.<sup>146</sup> Former U.S. Attorney General (AG) Eric Holder found the lack of data on such interactions “unacceptable,”<sup>147</sup> stating that:

[He] heard from a number of people who have called on policymakers to ensure better record-keeping on injuries and deaths that occur at the hands of police. [He had] also spoken with law enforcement leaders—including the leadership of the Fraternal Order of Police—who have urged elected officials to consider strategies for collecting better data on officer fatalities . . . [His] response to these legitimate concerns is simple: We need to do both.<sup>148</sup>

Blurring the official response, former U.S. Attorney General Loretta Lynch stated that the federal government should not mandate such reporting, noting instead that, “[t]he statistics are important, but the real issues are: ‘what steps are we all taking to connect communities . . . with police and back with government?’”<sup>149</sup> It would seem to me, however, that we can do both. Attorney General Lynch had constructed a false binary, casting data collection and improved community policing as antithetical. They are not mutually exclusive; indeed, the former may go a long way to improving the latter.

Regardless of the statements of the AG, it was expected that the Department of Justice (DOJ) would pilot a partially crowd sourced database tracking police killings in 2016.<sup>150</sup> This was welcome news that would add to efforts to track police killings, such as the

---

146. See Ciara McCarthy, *Loretta Lynch: Government Shouldn't Require Reports of People Killed by Police*, THE GUARDIAN (Oct. 2, 2015), [http://www.theguardian.com/us-news/2015/oct/02/loretta-lynch-reports-killed-by-police?CMP=share\\_btn\\_fb](http://www.theguardian.com/us-news/2015/oct/02/loretta-lynch-reports-killed-by-police?CMP=share_btn_fb) [https://perma.cc/4NMK-4LHK] (showing attorney general's policy change).

147. Ryan J. Reilly, *Eric Holder: Lack of Police Shooting Data 'Unacceptable'*, HUFFINGTON POST (Jan. 15, 2015), [http://www.huffingtonpost.com/2015/01/15/eric-holder-police-shootings\\_n\\_6479114.html](http://www.huffingtonpost.com/2015/01/15/eric-holder-police-shootings_n_6479114.html) [https://perma.cc/ECJ7-FFPZ].

148. *Id.*

149. McCarthy, *supra* note 146.

150. See Oliver Laughland at al., *Justice Department Trials System to Count Killings by US Law Enforcement*, THE GUARDIAN (Oct. 5, 2015, 7:15 PM), <http://www.theguardian.com/us-news/2015/oct/05/justice-department-trials-system-count-killings-us-law-enforcement-the-counted> [https://perma.cc/AG9X-6B32].

*Guardian's The Counted*,<sup>151</sup> the *Fatal Encounters* database,<sup>152</sup> *Stolen Lives*,<sup>153</sup> and the *Washington Post Police Shootings Count*,<sup>154</sup> all of which pushed government responsiveness to the lack of official data collection. While police departments were urged to report the killings by police, actual reporting was entirely discretionary.<sup>155</sup> Unfortunately, the exercise of police discretion in the reporting of killings by police resulted in significant undercounting.<sup>156</sup> For example:

A report issued by Justice Department officials in March said that an average of 545 people killed by local and state law enforcement officers in the US went uncounted in the government's two official records every year for almost a decade. The report estimated that there had been "an average of 928 law enforcement homicides per year," indicating that the FBI's published count of 414 such deaths in 2009, for example, underestimated the total by 124%.<sup>157</sup>

As with the exercise of policing discretion in the felonization process, here too the exercise of police discretion has negative implications for people of color.<sup>158</sup> In 2011, 31% of police reports to

151. *The Counted: People Killed by Police in the US*, *supra* note 134.

152. FATAL ENCOUNTERS SPREADSHEETS, FATAL ENCOUNTERS, <http://www.fatalencounters.org/spreadsheets/> [<https://perma.cc/9Z76-LRYD>].

153. STOLEN LIVES PROJECT, <http://stolenlives.org/> [<https://perma.cc/VY4P-T2NC>]; see also Stolen Lives Project, FACEBOOK, <https://www.facebook.com/StolenLivesProject/> [<https://perma.cc/J77M-NTNZ>] (publishing updates on police killings).

154. See *995 People Shot Dead by Police This Year*, *supra* note 63.

155. Tom McCarthy, *The Counted: Inside the Search for the Real Number of Police Killings in the US*, THE GUARDIAN (Mar. 21, 2015), <http://www.theguardian.com/us-news/2015/mar/21/police-killings-us-government-statistics> [<https://perma.cc/DT6Z-P7CW>] ("A justice department investigation of the FBI's published statistics has already revealed the worst from a data standpoint: more than half the people killed by local and state law enforcement officers in the U.S. went uncounted in the country's most authoritative crime statistics every year, for almost a decade. . . . Any particular department's disposition to transparency is important because police are not required to report to the federal government when they kill someone. As the FBI emphasizes, reporting is voluntary."). See, e.g., *It's Time For Real Criminal Justice Reform*, ACLU.ORG: TAKE ACTION, <https://action.aclu.org/secure/real-criminal-justice-reform> [<https://perma.cc/M8MW-GDP8>] (emphasizing suppressing police misconduct through community supervision/intervention).

156. See Laughland et al., *supra* note 150; Tom McCarthy, *Police Killed More than Twice as Many People as Reported by US Government*, THE GUARDIAN (Mar. 4, 2015), <http://www.theguardian.com/us-news/2015/mar/04/police-killed-people-fbi-data-justifiable-homicides> [<https://perma.cc/NVQ2-JVJA>].

157. Laughland et al., *supra* note 150 (discussing FBI report); see McCarthy, *supra* note 156.

158. McCarthy, *supra* note 155.

the FBI about killings, referred to as supplementary homicide reports, omitted important information such as the age, sex, and race of the person who had been killed by police.<sup>159</sup> It is noteworthy that when the person killed by police was a Black man, basic identifying information was omitted 39.9% of the time.<sup>160</sup> This absence of data undermines the possibility of serious empirical study, and impedes the analysis of police killings. When a life is taken by police officer(s), no matter the reason, police should be mandated to report the killing.

## 2. *Manifestations of Discretion; Racialized Disablement*

The disparate numbers of deaths from police use of force call into question the exercise of police discretion more broadly. From the initial interaction with persons of interest, to the reporting of questionable police actions, the use of policing discretion often has dire consequences for those who are societally marginalized, especially individuals whose SIC is negatively racialized and mentally vulnerable.

Such use of discretion was recently a topic of a *New York Times Magazine* cover story, *A Black Police Officer's Fight Against the N.Y.P.D.*<sup>161</sup> Succinctly highlighting the ways in which the discretionary exercise of police attention and interaction disparately impacts communities of color, it was noted that:

Legally, individual officers have the power to decide how to deal with certain minor offenses. Some officers, trying to increase their totals of summonses and arrests for the month, hide in bathrooms and closets meant for subway employees, peeking out through vents so they can jump out at anyone foolish or desperate enough to vault the turnstiles. If the offender, typically a teenager, lacks an ID or has a criminal record, the officer can make an arrest. According to a recent analysis by the advocacy group the Police Reform Organization Project, 92 percent of those arrested for theft of service in 2015 were black, Hispanic or Asian. Those offenders who aren't arrested are generally summoned to court to pay a \$100 fine. If they fail to pay it or forget the court date or miss an appearance for any reason, the judge signs an arrest warrant.<sup>162</sup>

---

159. *Id.*

160. *Id.*

161. Saki Knafo, *A Black Police Officer's Fight Against the N.Y.P.D.*, N.Y. TIMES (Feb. 18, 2016), [http://www.nytimes.com/2016/02/21/magazine/a-black-police-officers-fight-against-the-nypd.html?\\_r=0](http://www.nytimes.com/2016/02/21/magazine/a-black-police-officers-fight-against-the-nypd.html?_r=0) [<https://perma.cc/R7WX-MKKB>].

162. *Id.* (citing Police Reform Advocacy Organization study and analysis).

Thus, the exercise of discretion by police officers presents an important vantage point from which to operationalize the theory of societal disablement. Even moderate Supreme Court Justice Sandra Day O'Connor noted, in her powerful dissent in *Atwater v. City of Lago Vista*,<sup>163</sup> the troublesome prospect of permitting law enforcement officers unfettered discretion in arresting suspects incident to minor infractions:

Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of “an epidemic of unnecessary minor-offense arrests.” But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After [the decision in *Atwater*], the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest.<sup>164</sup>

And so the site of police and civilian interaction becomes fraught. The physical and mental health of persons stopped by police is often compromised through such contact because these are not benign encounters.<sup>165</sup> For instance, in New York City it was reported that half of these stops involved some physical contact, such as a frisk, and officers themselves indicate that there was “use of force” in 20% of these stops.<sup>166</sup> “The physically invasive, often rough manner in which officers approach citizens raises the risk of injury. Qualitative research suggests that young men are often thrown to the ground or slammed against walls in these encounters.”<sup>167</sup> Individuals stopped by the police may also endure emotional trauma from such treatment in the face of unwarranted accusations of wrongdoing.<sup>168</sup>

In this milieu, those protesting their innocence, accusing the officer of excessive use of force, or disputing their seizure often experience enhanced, meaning forceful, police responses.<sup>169</sup> This is the space in

---

163. 532 U.S. 318 (2001).

164. *Id.* at 372 (O'Connor, J., dissenting) (warning abuse potential from unbounded discretion).

165. Geller et al., *supra* note 16, at 2321 (examining police contact).

166. *Id.*

167. *Id.*

168. *Id.*

169. See, e.g., Braden Goyette, *Ferguson Protests Met with Heavy Police Response, 2 Reporters and Alderman Arrested*, HUFFINGTON POST (Aug. 14, 2014), [http://www.huffingtonpost.com/2014/08/14/ferguson-protests-police-response\\_n\\_5677741.html](http://www.huffingtonpost.com/2014/08/14/ferguson-protests-police-response_n_5677741.html) [<https://perma.cc/P5Y5-25EA>]; *Civil Rights Leaders, Police*

which felonization of those who are “crazy enough”<sup>170</sup> to be disobedient to an armed police officer, or who are perceived as “rascals,”<sup>171</sup> due to their “sass,”<sup>172</sup> back-chat, attitude, or disrespect are felonized. As one commentator remarked, “You disrespect the police officer, the officer has ways of showing you that he has the last word.”<sup>173</sup>

Given the hyper-scrutiny of policing in communities of color, it is not particularly surprising that people whose SIC is negatively racialized and mentally vulnerable are disparately abused, especially given the reinforcing legacies of our medico-legal history. The news reports<sup>174</sup> of racialized incidents bespeak these dangerous interactions where the intersection of mental vulnerability and negative racialization catalyze the felonization process. Unfortunately, there are too many such incidents to fully document in this short paper, their patterns too familiar, and their occurrence too regular.

While the police encounters below unquestioningly track media reports, they raise the specter of police hyper-scrutiny and escalating policing practices, which are not serving the needs of suspects whose SIC<sup>175</sup> is consistently felonized. These brief accounts of recent police killings exemplify policing practices that have increasingly come to

*Spar Over Minneapolis Protest Response*, CBS (Nov. 19, 2015), <http://www.cbsnews.com/news/civil-rights-leaders-police-spar-over-minneapolis-protest-response-jamar-clark/> [<https://perma.cc/C9Q8-QT8F>].

170. See Nelson, *supra* note 1, at 63 n.462 (“By utilizing this terminology, it is not my intention to be disrespectful, but rather to connote the disrespect and stigmatization implicit in such a categorization. This category is an ascribed identity which deviates from professionally identified DSM diagnosis, as it is typically lay people who use such terminology and who feel competent, even in the absence of any medical, psychological or psychiatric training, to label others as such.”).

171. See Cartwright, *supra* note 100 (defining Dysaesthesia Aethiopica—“Rascality”).

172. See *supra* note 130 and accompanying text (citing Nelson).

173. Clarence Page, *Gates-gate: A Clear Case of ‘Contempt of Cop’*, CHI. TRIB. (July 26, 2009), [http://articles.chicagotribune.com/2009-07-26/news/0907250184\\_1\\_gates-police-officer-james-crowley](http://articles.chicagotribune.com/2009-07-26/news/0907250184_1_gates-police-officer-james-crowley) [<https://perma.cc/FHC2-L9L8>] (detailing police-civilian etiquette which always augers in the police favor analyzing escalation from minor incidents—contempt of cop); see Frank R. Cooper, *Training to Reduce ‘Cop Macho’ and ‘Contempt of Cop’ Could Reduce Police Violence*, THE CONVERSATION (Dec. 18, 2015), <https://theconversation.com/training-to-reduce-cop-macho-and-contempt-of-cop-could-reduce-police-violence-51983> [<https://perma.cc/24GP-P938>] (highlighting “masculine” responses can prove deadly); see also Frank R. Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 4 (2010) (analyzing Gates arrest as “masculinity contest”).

174. See *infra* notes 176-203.

175. Suspect Identity Construction (SIC). See *supra* note 10 and accompanying text.

national attention, even during the writing of this Article.<sup>176</sup> They raise issues of police policies and training for working with mentally vulnerable people, Taser and firearms protocols, the disproportionate and/or disparate use of force, and concern for escalation when police are confronted with situational disobedience, especially from mentally vulnerable suspects.

Some of the police killings of mentally vulnerable people involve police responding to reports of gun brandishing suspects, like Mr. Calvin Smith, a 22-year-old Black man who had recently received treatment at a mental health facility.<sup>177</sup> After responding to a report that someone was destroying property, Baton Rouge police shot and killed Mr. Smith following a car chase and gun battle.<sup>178</sup> So too, Mr. Christopher Kalonji, a 19-year-old Black man with a history of mental illness in Clackamas County, Oregon, was reported to have been armed with an assault rifle and threatening his family.<sup>179</sup> Despite the officers' assessment that Mr. Kalonji was suffering a mental health crisis, for which they called the Behavioral Health Unit,<sup>180</sup> the situation nonetheless escalated, the SWAT team was summoned,<sup>181</sup> and police shot Mr. Kalonji to death.<sup>182</sup>

---

176. See Annie Gilbertson, *Dramatic Increase in Mentally Ill Shot by LAPD Officers*, SCPR.ORG (Mar. 1, 2016), <http://www.scpr.org/news/2016/03/01/58092/dramatic-increase-in-mentally-ill-shot-by-lapd-off/> [<http://perma.cc/A8WR-7K9T>]; see also Justin Ellis, *Media Missing the Story: Half of All Recent High Profile Police-Related Killings are People with Disabilities*, RUDERMAN FAM. FOUND. BLOG (Mar. 8, 2016), <http://www.rudermanfoundation.org/blog/in-the-media/media-missing-the-story-half-of-all-recent-high-profile-police-related-killings-are-people-with-disabilities> [<https://perma.cc/G9MC-YWWQ>] (noting many of the recent high profile police killings involved people with disabilities); *New Study Reveals Half of All Recent High Profile Police-Related Killings Are People With Disabilities!*, WORLD STAR HIP HOP (Mar. 16, 2016), <http://www.worldstarhiphop.com/videos/video.php?v=wshh6IO75225idbvx577> [<http://perma.cc/65VM-JECS>].

177. See Danielle M. Kinchen, *Calvin Smith, Suspect Accused of Shooting 2 Baton Rouge Police Officers Early Saturday Morning, Dies in Hospital*, THE ADVOCATE (Feb. 13, 2016), <http://theadvocate.com/news/police/14865187-172/two-baton-rouge-police-officers-shot-early-saturday-morning-conditions-unknown> [<https://perma.cc/N3Y9-D74H>] (indicating Smith had mental illness).

178. See *id.*

179. Raymond Rendleman, *Could Death of Oak Grove's Christopher Kalonji, 19, Have Been Avoided?*, PORTLAND TRIB. (Feb. 15, 2016), <http://portlandtribune.com/pt/9-news/293460-170514-could-death-of-oak-groves-christopher-kalonji-19-have-been-avoided> [<https://perma.cc/4S4G-YKD8>]. Mr. Kalonji was transported to a hospital, in custody, to receive medical treatment, but died as a result of his injuries post-surgery. *Id.* (highlighting police officers ill equipped to handle mentally ill people).

180. See *id.*

181. See *id.*

182. See *id.*

Other mentally vulnerable people of color who were killed by police are said to have had knives. For instance, in the shooting of 26-year-old Mr. Darin Hutchins,<sup>183</sup> police were initially flagged down to deal with a man alleged to have been threatening to stab people at a child's party.<sup>184</sup> Thereafter, Baltimore police shot Mr. Hutchins when he reportedly refused to obey commands to drop the knife.<sup>185</sup> Similarly, Baltimore County police shot and killed Mr. Edward Donnell Bright Sr., a 54-year-old Black man, after responding to a call about a man wielding a knife outside of a convenience store.<sup>186</sup> Police first tazed Mr. Bright, but claim that, "[t]he Taser didn't have any effect on him, did not cause him to drop the knife, so at that point, our officers removed their service weapons."<sup>187</sup> Thereafter, Mr. Bright was fatally shot after "approaching" the officers.<sup>188</sup>

In some other notable encounters, when contacting police for help, concerned relatives specifically mentioned that their loved ones were suffering from mental health issues. For instance, Mr. Michael Noel, a Black man in Louisiana, was unarmed when he was shot dead by the St. Martin Parish sheriff's department.<sup>189</sup> His family had called the police requesting help with Mr. Noel, who was suffering an acute mental health crisis.<sup>190</sup> In the same way, Ms. Denise Bonilla, the wife of the late Mr. David Garcia, a Latino man, called police for

183. See *Man Dies in Officer-Involved Shooting in West Baltimore*, WBALTV.COM (Jan. 27, 2015), <http://www.wbalTV.com/news/baltimore-police-involved-in-officerinvolved-shooting/30905860> [https://perma.cc/WZ93-B642] (justifying deadly force); *Killed By Police*, SILK, <http://killed-by-police.silk.co/page/Darin-Hutchins> (identifying Hutchins's mental illness indicators); see also Anderson et al., *supra* note 139.

184. See *Man Dies in Officer-Involved Shooting in West Baltimore*, *supra* note 183 (reporting that the responding officer located Mr. Hutchins, who reportedly refused to obey commands to drop the knife).

185. See *id.*

186. See David Pierce, *Baltimore County Officers Shoot, Kill Knife-Wielding Man, Police Say*, WBALTV.COM (Feb. 1, 2015), <http://www.wbalTV.com/news/baltimore-county-officers-shoot-kill-knifewielding-man-police-say/31024372> [https://perma.cc/XM9M-5KLV] (describing confrontation between officers and Bright).

187. See *id.*

188. See *id.* (Reporting that the daughter of Mr. Bright said that her father "had some mental health problems," but was not aggressive).

189. Lanie L. Cook, *State Police Investigate Deputy's Shooting of St. Martin Parish Man Said by Family to Be Suffering 'Breakdown'*, THE ARCADIA ADVOCATE (Dec. 22, 2015), <http://theadvocate.com/news/acadiana/14364550-123/state-police-investigate-deputys-shooting-of-st-martin-parish-man-said-by-family-to-be-suffering-br> [https://perma.cc/56LL-WMPK] (highlighting Noel exhibiting signs of mental unraveling).

190. See *id.* (reporting Mr. Noel "powered through two shocks from a stun gun" before being fatally shot in the chest).

assistance as her husband was threatening to commit suicide, due to financial stress.<sup>191</sup> Wasco, California police, alleging that Mr. Garcia brandished a knife, shot him on his front lawn, in front of his wife and three children.<sup>192</sup> Speaking about her regret in calling police, Ms. Bonilla stated:

Now my thing is if I wouldn't have called 9-1-1, if I would have rushed him to the hospital myself, he might have still been alive. What are we supposed to do if we can't trust the people that we think are there to help us? Are we supposed to tell them go ahead commit suicide because they are going to kill you anyway?<sup>193</sup>

Likewise, Yolanda Dozier, the mother of Mr. Dewayned Deshawn Ward Jr., a 29-year-old Black man who suffered from schizophrenia, called police for assistance with her abusive son, who was ultimately shot to death by the officers.<sup>194</sup> Ms. Dozier has questioned and critiqued the police use of their guns, instead of less lethal methods.<sup>195</sup> “All my son needed was treatment,” she said in an interview.<sup>196</sup> “If the doctors, the hospital and the police would have helped him when I asked for it, none of this would have happened.”<sup>197</sup> According to police, Mr. Ward, who had barricaded himself behind a door, charged at officers with a butcher's knife, after Contra Costa County Sheriff

191. *New Information in Wasco Officer Involved Shooting*, KERN GOLDEN EMPIRE (Feb. 4, 2015), <http://www.kerngoldenempire.com/news/top-stories/new-information-in-wasco-officer-involved-shooting> [<https://perma.cc/GC5P-EWHP>] (quoting widow); *Man Dies After Officer-Involved Shooting in Wasco*, KERN GOLDEN EMPIRE (Feb. 2, 2015), <http://www.kerngoldenempire.com/news/top-stories/man-dies-after-officer-involved-shooting-in-wasco> [<https://perma.cc/T5PT-5234>] (describing shooting scene at arrival).

192. *See New Information in Wasco Officer Involved Shooting*, *supra* note 191.

193. *See id.*

194. *See* Karina Ioffee, *Antioch: Mother Laments Police Shooting Mentally Ill Son*, CONTRA COSTA TIMES (Mar. 4, 2015), [http://www.contracostatimes.com/breaking-news/ci\\_27643187/antioch-mother-laments-police-shooting-that-killed-mentally?source=pkg](http://www.contracostatimes.com/breaking-news/ci_27643187/antioch-mother-laments-police-shooting-that-killed-mentally?source=pkg) [<https://perma.cc/3KDC-RKDT>]; Rick Hurd, *Mother of Antioch Man Fatally Shot by Sheriff's Deputy Feared Her Son*, SAN JOSE MERCURY NEWS, (Feb. 6, 2015), [http://www.mercurynews.com/my-town/ci\\_27468638/antioch-mother-man-fatally-shot-by-sheriffs-deputy](http://www.mercurynews.com/my-town/ci_27468638/antioch-mother-man-fatally-shot-by-sheriffs-deputy) [<https://perma.cc/KYQ8-3F4K>]; Henry K. Lee, *Mother of Antioch Man Killed by Deputy Blasts Response*, SF GATE (Feb. 9, 2015), <http://www.sfgate.com/crime/article/Mother-of-Antioch-man-killed-by-deputy-blasts-6071706.php> [<https://perma.cc/9MFJ-35Q7>]; Rick Hurd & Karina Ioffee, *Antioch Man Fatally Shot by Sheriff's Deputy Identified as 29-Year-Old Resident*, CONTRA COSTA TIMES (Feb. 4, 2015), [http://www.contracostatimes.com/breaking-news/ci\\_27457262/man-fatally-shot-by-sheriffs-deputies-id](http://www.contracostatimes.com/breaking-news/ci_27457262/man-fatally-shot-by-sheriffs-deputies-id) [<https://perma.cc/39EJ-KGAF>].

195. *See* Ioffee, *supra* note 194 (reporting that on New Year's Day, 2015, Ward assaulted his mother and locked her out of her home).

196. *See id.*

197. *See id.*

deputies kicked in the door, causing them to fire two shots into his chest and two into his abdomen.<sup>198</sup>

The suspects involved in the above encounters were both negatively racialized and mentally vulnerable, a dynamic which, in the policing context, I have elsewhere referred to as Foundational Intersectionality.<sup>199</sup> In these cases, “[t]he police either received information regarding the mentally disordered status of the suspect or quickly assumed that the suspect had a diagnosable mental illness.”<sup>200</sup>

Surely police, especially, those who attend at the scene with awareness that the suspect is displaying mental illness, should be better equipped to handle the suspect, short of recourse to lethal force. The use of such force when dealing with the mentally ill is particularly problematic when police at the scene have *actual* knowledge of mental vulnerability and, thus, a sense of *why* the suspect may not be compliant. While police are trained to shoot center mass to either stop or kill, depending on semantics,<sup>201</sup> and assert that this is necessary and justifiable in high-stakes encounters,<sup>202</sup> by contrast, the nature of some of these situations involved requests to help an obviously disturbed individual, who was known to be suffering from a mental health crisis.

I would suggest that in such circumstances the police must take a different approach and employ tactics better attuned to a devolving mental health crisis. This is where consideration of the appropriateness of the infusion of an interdisciplinary treatment modality would be preferable to recourse to a disciplinary force modality.<sup>203</sup> Sadly, this is but one of the scenarios in which people of color seem disparately at risk for death at the hands of police. Due to

---

198. *See id.*

199. *See* Nelson, *supra* note 1, at 4 (“I have examined instances in which police encounter an individual with a known or presumed history of mental illness. The police either received information regarding the mentally disordered status of the suspect or quickly assumed that the suspect had a diagnosable mental illness. I label this type of initial interaction “Foundational Intersectionality.” The cases reveal that for people who are negatively racialized, that is people who are perceived as being non-white, and for whom mental illness is either known or assumed, interaction with police is precarious and potentially dangerous.”).

200. *See id.*

201. Roy Bedard, *Shooting Center Mass: Shooting to Kill or to Stop?*, POLICEONE (Apr. 8, 2011), <https://www.policeone.com/use-of-force/articles/3468112-Shooting-center-mass-Shooting-to-kill-or-to-stop/> [<https://perma.cc/A28J-NF3U>].

202. *See Shooting to Wound*, POLICE FIREARMS OFFICERS ASS’N, <https://www.pfoa.co.uk/110/shooting-to-wound> [<https://perma.cc/NQ27-8MMG>].

203. *See* Nelson, *supra* note 1.

SIC, over policing results in an inordinate amount of manufactured contact between police and people of color.<sup>204</sup>

The aforementioned hyper-scrutiny of communities of color, endemic in contemporary policing practices, creates a dangerous duality—with increased police contact, comes the increased likelihood of escalating encounters. Thus, the enhanced risk to people of color is in the increased likelihood of devolving police contact. The risk to the person engaged by police is contingent on SIC, as police perception of situational disobedience triggers the felonization process.

As the *New York Times Magazine* noted, such police contact is intentional and manufactured.<sup>205</sup> It is present in communities of color, just as it is relatively absent in White and affluent neighborhoods.<sup>206</sup> This duality is intentional and deliberately constructed to criminalize communities of color, thereby subjecting common behaviors to discretionary police scrutiny. This is rarely a good thing for anyone.

Most of this [discretionary policing] activity took place in minority neighborhoods. In predominantly black Bedford-Stuyvesant, Brooklyn, for example, officers issued more than 2,000 summonses a year between 2008 and 2011 to people riding their bicycles on the sidewalk, according to the Marijuana Arrest Research Project, a nonprofit that studies police policy. During the same period, officers gave out an average of eight bike tickets a year in predominantly white and notably bike-friendly Park Slope. All told, between 2001 and 2013, black and Hispanic people were more than four times as likely as whites to receive summonses for minor violations, according to an analysis by the New York Civil Liberties Union.<sup>207</sup>

---

204. See, e.g., ALEXANDER, *supra* note 50, at 16 (“The fact that more than half of the young black men in many large American cities are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work.”); Richardson, *supra* note 74, at 1145 (2012); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1028 (2010) (“Even the most cursory engagement with American criminal justice at the start of the twenty-first century drives home the twin points that the United States puts people under the control of the correctional system at an anomalously high rate, and that it shuts behind bars an overwhelmingly disproportionate number of black and brown persons.”).

205. Knafo, *supra* note 161.

206. *Id.*

207. *Id.*

The type of over policing described above leads to the plethora of statistics presented below. They point to the fallacy of a post-racial America and reveal the over-policing and racial profiling faced, and feared, by many Black and Latino/a people in the United States. The very police contact, itself, creates enhanced risk, stress, and potential disablement.

For instance, Black people (including adults, children and those identifying as multiracial Black) make up only 14% of the total U.S. population.<sup>208</sup> Within this population, 14% of Black adults<sup>209</sup> have had contact with police, compared with 15% of Latino/a adults, and 18% of White adults, who represent the largest population in the United States.<sup>210</sup> Yet Black motorists are nearly twice as likely to be arrested in the ensuing encounter, and approximately three times as likely as White motorists, to have force used on them during interactions with police.<sup>211</sup> So, while Black motorists are stopped at approximately the same rate as White and Latino/a drivers, Black motorists are three times more likely (12%) than White motorists (4%), and twice as likely as Latino/a motorists (6%), to be searched during a traffic stop.<sup>212</sup> Given these disparate numbers, it is not surprising that Black people account for 20% of total arrests in the United States.<sup>213</sup>

Unfortunately, these systemic practices start early; social discrimination commences as soon as Black children attend school and quickly punctures any assumptions of lived equality.<sup>214</sup> For example, 16% of people under the age of eighteen are Black, yet 32% of total juvenile arrests in the U.S. are of Black youth.<sup>215</sup> Similarly, the criminalization of urban, predominantly of color schools has resulted in Black youth representing 24% of enrollment in school

---

208. See *Black Demographics 2014*, BLACK DEMOGRAPHICS, <http://blackdemographics.com/population/> [<https://perma.cc/X4F8-DUN4>].

209. See Swaine et al., *supra* note 133 (“Despite making up only 2% of the total US population, African American males between the ages of 15 and 34 comprised more than 15% of all deaths logged this year by an ongoing investigation into the use of deadly force by police. Their rate of police-involved deaths was five times higher than for white men of the same age.”).

210. MORRIS, *supra* note 91; see also Monique W. Morris, *25 Things Everyone Needs to Know About the Lives of Black People in America*, ALTERNET (Feb. 25, 2014), <http://www.alternet.org/books/25-statistics-paint-picture-black-america> [<https://perma.cc/VN4V-XVEQ>] (summarizing critical facts of Morris’s book).

211. MORRIS, *supra* note 91.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

systems with an enrollment of 50,000 or more students, but roughly 35% of school arrests.<sup>216</sup>

Adding another intersectional layer of concern, 38% of Black transgender people who have encountered police report that they have been harassed.<sup>217</sup> Of Black transgender people who have so encountered police, 15% report having experienced a physical assault.<sup>218</sup>

Many people of color have had such experiences. Even before Eric Garner ushered his now famous last gasps, “I can’t breathe. I can’t breathe,”<sup>219</sup> he poignantly captured a sentiment about racial profiling. As he was engaged by the police officer, he commented on the debilitating and exasperating experience of being hyper-scrutinized by law enforcement.<sup>220</sup> Criticizing the street level harassment encountered by many people of color, he said:<sup>221</sup>

Get away [garbled] . . . for what? Every time you see me, you want to mess with me. I’m tired of it. It stops today. Why would you . . . ? Everyone standing here will tell you I didn’t do nothing. I did not sell nothing. Because every time you see me, you want to harass me. You want to stop me (garbled) Selling cigarettes. I’m minding my business, officer, I’m minding my business. Please just leave me alone. I told you the last time, please just leave me alone. Please please, don’t touch me. Do not touch me.<sup>222</sup>

Instead of defusing these situations of perceived or real situational disobedience, frustrated, annoyed, or enraged police officers utilize techniques that escalate the situation, and all too often the result is injury, or death, of the suspect. Thus, these encounters are often precarious for the people of color involved in, and vicariously witnessing, the encounter. These are some of the contested sites within which people of color who are felonized experience impactful, and often debilitating stress, and through which unhealthy coping

---

216. *Id.*

217. *Id.*

218. *Id.*; see Cave & Oliver, *supra* note 135 (highlighting reactions from white people and African-Americans).

219. Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014), <http://www.cnn.com/2014/12/04/us/garner-last-words/> [<https://perma.cc/HY3A-W6GH>] (providing Garner’s last words).

220. *See id.*

221. *Id.*

222. *Id.*

methods are generated.<sup>223</sup> The stress dynamic is particularly problematic as it operates in compounding ways, both as an originator of ailment, and as an inhibitor of recovery. Specifically, it is understood that being a racial minority leads to greater stress. As Jason Silverstein, writing for *The Atlantic*, noted:

[B]eing a racial minority leads to greater stress . . . this stress leads to poorer mental and physical health. But this is not only because stress breaks the body down. It is also because stress pushes people to cope in unhealthy ways. When we feel stressed, we may want a drink and, if we want a drink, we may also want a cigarette. But discrimination is not just any form of stress. It is a type of stress that disproportionately affects minorities.<sup>224</sup>

Harkening to intersectionality theory,<sup>225</sup> we understand the exponential implications of this cycle. Not only are societally marginalized people (i.e., those whose SIC is negatively racialized and mentally vulnerable) socially disabled and disadvantaged, but they are often structurally under-resourced, and disparately ill-equipped to cope with, or mitigate, this stress in healthy ways.<sup>226</sup> Moreover, recognizing the prevalence and possible implications of individual and structural racism leads to a hyper-vigilance and fear of encountering

223. See James S. Jackson et al., *Race and Unhealthy Behaviors: Chronic Stress, the HPA Axis, and Physical and Mental Health Disparities Over the Life Course*, 100 *AM. J. PUB. HEALTH* 933, 933–35 (2010) (“Those who live in chronically stressful environments often cope with stressors by engaging in unhealthy behaviors that may have protective mental-health effects. However, such unhealthy behaviors can combine with negative environmental conditions to eventually contribute to morbidity and mortality disparities among social groups.”); see also Renee J. Thompson et al., *Maladaptive Coping, Adaptive Coping, and Depressive Symptoms: Variations Across Age and Depressive State*, 48 *BEHAV. RES. THERAPY* 459, 459–66 (2010); *Common Maladaptive Coping Responses*, SCHEMA THERAPY, <http://www.schematherapy.com/id71.htm> [<https://perma.cc/P7H6-HN7N>].

224. Silverstein, *supra* note 21.

225. See Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1369–70 (1988) (defining how racism helps establish privilege membership in white community); Kimberle W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1245–51 (1991) (highlighting various systematic intersectionality issues faced by women of color); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.–C.L. L. REV.* 323, 325 (1987) (suggesting actual experiences and history should overshadow legal abstract theory).

226. Silverstein, *supra* note 21. (“Here we see how racism works in a cycle to damage health. People at a social disadvantage are more likely to experience stress from racism. And they are less likely to have the resources to extinguish this stress, because they are at a social disadvantage.”).

racists or racism.<sup>227</sup> Specifically, “merely anticipating prejudice” may lead to stress responses, including cardiovascular and psychological reactions.<sup>228</sup> Thus, the more one can predict that one’s day-to-day activities will be interrupted by encounters with police, the more stressed, and potentially debilitated, one is likely to become.<sup>229</sup> Such contact is spatially predictable—the amount of regular contact one has with law enforcement is contingent on SIC, and is infused with subjective police notions of where one does,<sup>230</sup> and does not belong. This too is constructed.<sup>231</sup>

### C. Guaranteeing Inequality: Marginalizing Structures and Systems by Design

In terms of policing, residential segregation ensures two things and presents a catch-22.<sup>232</sup> First, people of color are clustered in discernable areas, deemed “high-crime areas,” and thus over-

---

227. See Silverstein, *supra* note 21 (“Just the fear of racism alone should switch on the body’s stress-response systems. This makes sense—if we think our environment contains threats, then we will be on guard. But it raises a question that is prevalent in the study of the impact of discrimination on health . . . . What if someone feels she lives under the constant threat of racism? This is the implication for racial profiling. Stop-and-frisk policies do not only affect the people who come into contact with law enforcement. They also affect the people who fear they could be next.”); see also Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020 (2012); *Stop and Frisk: The Human Impact: The Stories Behind the Numbers, the Effects on Our Communities*, CTR. FOR CONSTITUTIONAL RIGHTS (July 2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

228. Sawyer et al., *supra* note 227, at 1020 (“These results are consistent with the conceptualization of anticipated discrimination as a stressor and suggest that vigilance for prejudice may be a contributing factor to racial/ethnic health disparities in the United States.”).

229. *Id.*

230. See, e.g., ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960* (1983) (detailing the ways in which communities in Chicago were constructed, maintained, and altered to further segregation); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996) (analyzing the compounding effects of employment discrimination, capital flight and lending practices upon segregation in Detroit).

231. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (outlawing ordinance based on race). *Warley* was the first case to address race-based ordinances in real estate, whereby cities outlawed the purchase of property to people of color to “promote the public peace.” *Id.* at 73–74. “The restrictions of these agreements . . . are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color.” *McGhee v. Sipes*, 334 U.S. 1, 10 (1948).

232. See *supra* note 202 and accompanying text.

policed.<sup>233</sup> Second, the presence of people of color in predominantly White areas, or at least not in “high-crime areas” is, in turn, regarded with suspicion, and often leads to police contact.<sup>234</sup> Thus, identity is both constructed and policed within places and spaces.

It should not be entirely surprising, then, that there are many negative health consequences associated with residential segregation as well. Indeed, it has been noted that segregation is a particularly noxious form of racism that directly impacts both mental and physical health:

One of the most significant examples of a form of structural racism that harms the health of people of color is residential segregation: many racial and ethnic minorities live in majority-minority communities that, on average, suffer from a disproportionate concentration of health risks (e.g., environmental degradation, an abundance of unhealthy foods, tobacco and alcohol products) and a relative lack of health-enhancing resources (e.g., geographic access to health care providers, full-service grocery stores, safe parks and recreational facilities). *These neighborhood factors influence health in several ways. They exert effects on both physical and mental health through conditions such as levels of crime and violence, overcrowding, and environmental exposures.*<sup>235</sup>

Revealing the compounding concerns surfaced by intersectional analysis, proactive policing policies and practices disparately target socially disadvantaged communities, thereby exacerbating the

233. See *United States v. Black*, 525 F.3d 359, 361, 367, 370 (4th Cir. 2008) (Gregory, J., dissenting) (highlighting that the majority, in “creating zones of lower constitutional protections in poor neighborhoods,” engaged in discrimination); see also *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (holding stop in “high crime area” relevant in *Terry* analysis); Andrew G. Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 181, 183 (2011) (indicating everyone in a Brooklyn neighborhood has been stopped by police and stating that “high-crime area” is not consistently defined among courts, legislatures, or police administrators).

234. See *Warley*, 245 U.S. at 82 (outlawing ordinance based on race).

235. Smedley, *supra* note 95, at 934 (enunciating how racism operates at institutional and structural levels) (emphasis added); see also David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 404–06 (2001) (“The authors conclude that effective efforts to eliminate racial disparities in health must seriously confront segregation and its pervasive consequences . . . . Researchers have identified socioeconomic status (SES) as a fundamental cause of the observed social inequalities in health and in particular of racial differences in health . . . . Racial differences in SES are the predictable results of the successful implementation of institutional policies and arrangements, with residential segregation being a prominent one in the US context.”). See generally, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993).

challenges already faced by people who are socio-economically marginalized.<sup>236</sup> Additionally, such policies also focus on young men suffering from mental vulnerabilities.<sup>237</sup> Unsurprisingly, young men of color who report police encounters, especially those subjected to more intrusive types of contact, exhibited higher levels of anxiety and trauma in relation to these experiences.<sup>238</sup> Therefore, it is now understood that policies, through which policing practices target and profile people of color for minor offenses, have disabling consequences for those so scrutinized.<sup>239</sup> Specifically, imbedded in the statistics cited below are real health consequences for “felonized” people of color. The cascading consequences for communities of color should be obvious:

During the 1990s, the New York Police Department (NYPD) instituted a policy of arresting and detaining people for minor offenses that occur in public as part of their quality-of-life . . . policing initiative . . . . The number of NYPD arrests for smoking marijuana in public view (MPV) . . . increased from 3,000 in 1994 to over 50,000 in 2000, and have been about 30,000 in the mid-2000s. Most of these arrestees (84 percent) were minority; Blacks were 2.7 more likely and Hispanics 1.8 times more likely to be detained than Whites for an MPV arrest. Minorities received more severe dispositions, even controlling for demographics and prior arrest histories.<sup>240</sup>

---

236. Geller et al., *supra* note 16, at 2324 (analyzing effect on disadvantaged neighborhoods).

237. *Id.*

238. *Id.* (“Observed health implications are strongest in the most intrusive encounters . . .”).

239. See Jeffrey Fagan & Garth Davis, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000) (“Racially disparate policing reinforces perception by citizens in minority neighborhoods that they are under non-particularized suspicion and are therefore targeted for aggressive stop and frisk policing.”); see, e.g., *United States v. Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994) (recognizing racial policing); Mitch Smith, *Grand Jury Declines to Indict Anyone in Death of Sandra Bland*, N.Y. TIMES (Dec. 21, 2015), <http://www.nytimes.com/2015/12/22/us/grand-jury-finds-no-felony-committed-by-jailers-in-death-of-sandra-bland.html> [<https://perma.cc/YQD6-D5LX>] (addressing racial law enforcement policies). See generally BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY (Andrea McArdle & Tanya Erzen eds., 2001).

240. Bruce D. Johnson et al., *An Analysis of Alternatives to New York City’s Current Marijuana Arrest and Detention Policy*, 31 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 226, 226–28 (2008) (providing historical background for Broken Windows Theory).

Young Black and Brown people are particularly vulnerable to such law enforcement scrutiny given policing protocols that focus attention on communities of color. Specifically, “[i]n the past 20 years, many cities have shifted to a proactive policing model in which officers actively engage citizens in high-crime areas to detect imminent criminal activity or disrupt circumstances interpreted as indicia that ‘crime is afoot.’”<sup>241</sup> Yet, despite the consistent prevalence of such policing statistics, we know that risky or anti-social behavior is not particular to any race and may be a common adolescent trait.<sup>242</sup> Nonetheless, these tactics continue, especially in cities across the United States.

During the span of time between 2004 and 2012, the NYPD reported over four million proactive stops.<sup>243</sup> Such phenomena also pervade cities such as Los Angeles and Philadelphia.<sup>244</sup> Perhaps even more troubling is the impact of these policing practices on youth. For instance, half of Chicago school students report having been stopped by the police, and having been verbally mistreated, or told to “move on.”<sup>245</sup> Moreover, a quarter to a third of these students reported having been searched by police.<sup>246</sup> Overall, the burden of these policies, and the corollary disparate consequences of these tactics, is predominantly experienced by people whose SIC is young, Black and/or Latino, and male.<sup>247</sup>

Similarly, it is also commonly known that, relative to their White counterparts, motorists of color are neither particularly bad, nor speedy drivers. As such, the number of police stops of motorists of color reveals another troubling policing practice. For instance, a class action lawsuit against the Maryland State Police found that 98.3% of drivers on an interstate highway violated the rules by driving at speeds above the limit.<sup>248</sup> Of those, 17.5% of the drivers were Black and 74.5% were White.<sup>249</sup> However, over an 18-month period, a clear racialized pattern was found—72.9% of the motorists stopped, and

---

241. Geller et al., *supra* note 16, at 2321.

242. See Theresa Glennon, *The Stuart Rome Lecture Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL’Y 10, 28 (2002).

243. Geller et al., *supra* note 16, at 2321.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* (explaining *Terry* stops).

248. See Md. State Conference of NAACP Branches v. Dep’t of Md. State Police, 72 F. Supp. 2d 560, 564 (D. Md. 1999).

249. *Id.*

80.3% of the motorists searched, were Black as opposed to only 19.7% of White motorists.<sup>250</sup>

These statistics betray a stark reality. Police tend to perceive risky, inappropriate, dangerous, or disruptive behavior as more pernicious and problematic when it is undertaken by a person of color.<sup>251</sup> It does not matter that data shows that young White men tend to engage in more of this type of behavior; this fact has not resulted in their heightened scrutiny by police.<sup>252</sup> Interestingly, police officers tend to demonstrate remarkable restraint in such circumstances, even when confronted by an armed White suspect.<sup>253</sup>

Race is an important lens through which behavior, be that compliance, obedience, or respect, is assessed.<sup>254</sup> Indeed, while race *alone* cannot establish reasonable suspicion or probable cause, police officers may use race as a factor in deciding to detain suspects.<sup>255</sup> This has been the law of the land for some time, even in the “cimmigration” context.<sup>256</sup> The Supreme Court, in *United States v.*

---

250. *See id.*

251. *See* Glennon, *supra* note 242, at 28 (“A recent household survey conducted by the Centers for Disease Control shows that, as a percentage of their demographic group, white male adolescents were more likely than black male adolescents to engage in risky and/or illegal conduct. White males were more likely to drive after drinking, carry a weapon, and bring a weapon to school, and they engaged in physical fights in approximately the same percentages as their black male peers.”); *see also* Jacqueline Howard, *New Study Confirms Depressing Truth About Names and Racial Bias: Scientist Has “Never Been So Disgusted” by His Own Data*, HUFFINGTON POST (Oct. 8, 2015), [http://www.huffingtonpost.com/entry/black-sounding-names-study\\_561697a5e4b0dbb8000d687f?utm\\_hp\\_ref=tw](http://www.huffingtonpost.com/entry/black-sounding-names-study_561697a5e4b0dbb8000d687f?utm_hp_ref=tw) [<https://perma.cc/V9ZP-DN6L>] (“The study of mostly white participants shows that men with black-sounding names are more likely to be imagined as physically large, dangerous and violent than those with stereotypically white-sounding names.”).

252. *See* Glennon, *supra* note 242, at 28; Howard, *supra* note 251.

253. *See* Harmon Leon, *8 White People Who Pointed Guns at Police Officers and Managed Not to Get Killed*, ALTERNET (Jan. 12, 2015), <http://www.alternet.org/civil-liberties/8-white-people-who-pointed-guns-police-officers-and-managed-not-get-killed> [<https://perma.cc/2HEC-6KEN>] (juxtaposing white and black gun-related encounters); *see also* Nelson, *supra* note 1, at 6 (begging the question of whether people of color are subject to excessive force).

254. *See* TONI MORRISON ET AL., *THE HOUSE THAT RACE BUILT* 264 (Wahneema Lubiano ed., 1997), <https://macaulay.cuny.edu/eportfolios/scott12sem2courseblog/files/2012/04/Race-and-Criminalization-Angela-Davis.pdf>.

255. *See* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 225–37 (1983).

256. For insight and analysis of the intersection of criminal law and immigration, see the work of Prof. César Cuauhtémoc García Hernández, CRIMMIGRATION.COM, <http://cimmigration.com/> [<https://perma.cc/LS7H-4DKE>]; *see also* Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–78 (2006).

*Brignoni-Ponce*,<sup>257</sup> held, in the context of Border Patrol, that race is a relevant factor in determining probable cause to detain a vehicle, which was suspected of transporting illegal migrants; however, it cannot be the only factor.<sup>258</sup>

It does not matter whether a person of color is engaged in any criminal activity—the racially skewed exercise of police discretion ensures that the net of criminality is cast broadly for people of color, and is, alternatively, rather narrow for White Americans. This overbreath, in turn ensures that “checks” for criminality structurally disadvantage people of color, who are often further jeopardized by escalating police interactions.<sup>259</sup>

In 2011, there were 685,724 stops. In 70 of 76 precincts, greater than 50 percent of stops targeted blacks and Latinos. In 33 precincts, that number skyrockets to over 90 percent. Perhaps most shockingly, the number of stops of young black men (168,126) actually exceeded the number of young black men in New York City (158,406) . . . . The problem is that 90 percent of black and Latino men stopped were innocent. *What might this mean in terms of heightened vigilance and stress?* Not only must black and Latino people in New York anticipate acts of prejudice from the police, but they also must know innocence does not reduce the risk of harassment.<sup>260</sup>

To walk through life with the myriad emotions and fears that this reality invokes can be overwhelming, stressful, and eventually

---

257. 422 U.S. 873, 886–87 (1975). For similar rulings, see *United States v. Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994); *United States v. Anderson*, 923 F.2d 450, 455 (6th Cir. 1991); *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975).

258. See *Brignoni-Ponce*, 422 U.S. at 887.

In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer’s observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

*Id.* at 881. The Court stated that an officer may stop a vehicle (generally) when the officer’s observations lead him to “reasonably” suspect that the vehicle contains an illegal alien. *Id.*

259. See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 227 (Based on a series of interviews with people who have been stopped and frisked by police, this report “provide[s] evidence of how deeply this practice impacts individuals and . . . document[s] widespread civil and human rights abuses, including illegal profiling, improper arrests, inappropriate touching, sexual harassment, humiliation and violence at the hands of police officers. The effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm.”).

260. Silverstein, *supra* note 21 (citing CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 227) (emphasis added).

debilitating, or disabling. Innocence for kids of color is fleeting, as hyper-scrutiny begins when the cuteness of infancy is past.<sup>261</sup> Thus, it is noteworthy that, “[s]everal studies have linked depressive symptoms and other adverse mental health outcomes to experiences of discrimination. Specifically, research suggests that perceived discrimination, a psychosocial stressor, is a significant risk factor for the onset of depression among Blacks.”<sup>262</sup>

The knowledge of recent events in which police have killed Black men,<sup>263</sup> plus the knowledge that seemingly innocuous interactions with police rapidly degenerate into tazing or killing, equals a situation of vicarious debilitation for many people of color.<sup>264</sup> Certainly, healthy coping strategies are beneficial, but maladaptive coping strategies for societal stresses abound.<sup>265</sup> Not everyone is well-situated to have the resources, nor the time, let alone ability or money, to go for a walk in nature, ride a bike through a park,

---

261. See Press Release, Am. Psychological Ass’n, *supra* note 80 (stating that black children are perceived as four years older than their real age).

262. Britt-Spells et al., *supra* note 79, at 1–2.

Depression is one of the leading causes of disability, leading to lost years of healthy life. It is expected to be the second leading cause of disease burden. . . . [T]he economic burden of depression in the United States due to medical expenses and lost productivity was approximately \$83 billion. . . . Compared to non-Hispanic White Americans, Black Americans report higher levels of depressive symptoms, with prevalence rates of approximately 8% and 13%, respectively (CDC, 2010). Research suggests that Blacks residing in the United States may be experiencing greater severity of depression than other racial or ethnic groups. African Americans have been identified to be more likely to report a greater disability secondary to major depressive disorder and more chronic and severe major depressive disorder than Whites and Black Caribbeans.

*Id.*

263. See Melissa Harris-Perry, *No Rights Which the White Man Was Bound to Respect* (MSNBC television broadcast Aug. 16, 2014), <http://www.msnbc.com/melissa-harris-perry/no-rights-which-the-white-man-was-bound-respect> [<https://perma.cc/AN3G-32EW>]; Kate Abbey-Lambertz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFINGTON POST (Feb. 13, 2015), [http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings\\_n\\_6644276.html](http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html) [<https://perma.cc/T7TV-BVQ2>]; Jay Caspian Kang, ‘Our Demand Is Simple: Stop Killing Us,’ N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> [<https://perma.cc/C2RA-KLTX>].

264. See Walters et al., *supra* note 57, at 180 (“The purpose of this article is to explicate the link between historical trauma and the concept of embodiment. After an interdisciplinary review of the ‘state of the discipline,’ we utilize ecosocial theory and the indigenist stress-coping model to argue that contemporary physical health reflects, in part, the embodiment of historical trauma.” The article also explores mental health sequel, particularly post-traumatic stress syndrome).

265. See *supra* note 223 and accompanying text.

meditate in a quiet pleasing setting, take a yoga class, go for a calming swim, or take a short nap, to re-center in this racialized quagmire.

In light of the recent killings of Black people by police in the United States, numerous commentators have shared their consequent personal trauma, depression, anxiety, and other forms of mental vulnerability.<sup>266</sup> Indeed, psychologists and therapists are starting to speak about what they are seeing in their counseling sessions:

Racism, in all of its forms, takes a heavy toll on black people's mental health, according to practicing therapists and psychologists . . . . "Research has shown that racism has negative psychological consequences for African Americans such as increased symptoms of anxiety, depression and post-traumatic stress," . . . "Living in a society where there is constant portrayal of racial injustice (forms of microaggressions, ongoing discrimination, unarmed black people killed by law enforcement) can lead to chronic feelings of despair. . . . Such negative and consistent thoughts can trigger severe depressive symptoms."<sup>267</sup>

In a world that truly prioritized inclusivity, and which sought to seriously eradicate discrimination, such debilitating and disabling societal occurrences would be mitigated. Similarly, in a society where racial differences carried no currency, consequential marginalization, or disablement, race would be innocuous and devoid of negative societal impact. Unfortunately, that is not, yet, our world. So, while Black and Brown men do not engage in criminality at disproportionate rates, they are nonetheless subject to arrest at disproportionate rates.<sup>268</sup> Race remains central in how disability is constructed and perceived; it disparately impacts one's life

266. See Starr, *supra* note 15; German Lopez, *This Chart Explains Why Black People Fear Being Killed by the Police*, VOX (July 29, 2015), <https://www.vox.com/2015/4/10/8382457/police-shootings-racism> [<https://perma.cc/G7ZN-LM8J>]; see, e.g., *I Hate Being a Black Man*, REDDIT BLOG (Sept. 10, 2014) [https://www.reddit.com/r/depression/comments/2fzc3c/i\\_hate\\_being\\_a\\_black\\_man/](https://www.reddit.com/r/depression/comments/2fzc3c/i_hate_being_a_black_man/) [<https://perma.cc/T7P6-2CMC>] (listing why the author hates being black man); Nia Hamm, *High Rates of Depression Among African-American Women, Low Rates of Treatment*, HUFFINGTON POST (Sept. 25, 2014), [http://www.huffingtonpost.com/nia-hamm/depression-african-american-women\\_b\\_5836320.html](http://www.huffingtonpost.com/nia-hamm/depression-african-american-women_b_5836320.html) [<https://perma.cc/3VW8-2TLZ>] (proposing factors why African-Americans suffer from mental health).

267. See Starr, *supra* note 15.

268. See Kimberly J. Winbush, *Racial Profiling by Law Enforcement Officers in Connection with Traffic Stops as Infringement of Federal Constitutional Rights or Federal Civil Rights Statutes*, 91 A.L.R. FED. 2d 1, 1 (2015); Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 326–27 (1996).

opportunities.<sup>269</sup> Thus, our “raced ways of seeing”<sup>270</sup> lead to the ascription of different motives and conclusions when the same or similar behavior or conduct is assessed.<sup>271</sup> It is no wonder that many people of color want to escape this predicament.

Nonetheless, with respect to the phenomenon of running away from the police, the Supreme Court ruled in *Illinois v. Wardlow*,<sup>272</sup> that flight in a high crime area passed Fourth Amendment scrutiny to justify a detention, even when the police lacked probable cause, or even reasonable suspicion, for the stop.<sup>273</sup> The Court further stated that even “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”<sup>274</sup>

*Wardlow* is both a-historical and a-contextual for people of color.<sup>275</sup> As has been discussed above, for people of color, interaction with law enforcement, and the criminal justice system more generally, often has disabling consequences.<sup>276</sup> Especially for people whose SIC is negatively racialized and mentally vulnerable, interactions with police are often physically and mentally abusive.<sup>277</sup> Over the last several decades, policing practices, particularly focused upon negatively racialized inner city communities, have wrought havoc,

269. For instance, research has established that:

African American boys are much more likely to be identified as disabled or delinquent than other children, including African American girls. Second, they are more likely than other children to be placed in educational, mental health, and juvenile justice programs that exert greater external control and deliver fewer services despite identified needs. Third, these negative experiences lead African American boys to stay away from or exit these institutional settings. These statistics are stark and disturbing. Unexplained by family structure, poverty, or culture, they reveal widespread institutional and personal racism.

Glennon, *supra* note 242, at 11. For an example of reluctantly accepted de-escalation training, see Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-Escalate*, N.Y. TIMES (June 27, 2015), [http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?\\_r=0](http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0) [https://perma.cc/M69B-2FTH].

270. Camille A. Nelson, Batson, O.J., and Snyder: *Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1709 (2008) (discussing racial salience in America).

271. *See id.*

272. 528 U.S. 119, 124 (2000) (“[I]t was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police.”).

273. *See id.* at 124–25.

274. *See id.* at 124.

275. It is also important to recognize that many women of color have also been killed by police in recent years. *See #SayHerName*, AAPF, <http://www.aapf.org/sayhername/> [https://perma.cc/A47B-D32L].

276. Geller et al., *supra* note 16, at 2321; *see supra* note 177.

277. Geller et al., *supra* note 16, at 2321–26.

making avoidance of police reasonable in many cases, and certainly understandable, given the often fatal consequences.<sup>278</sup> Thus, it is no wonder that some people would wish to run.

When seemingly mundane interactions between police and people of color result in the death of the suspect, it is especially disconcerting.<sup>279</sup> Death is the ultimate disabling consequence. In such interactions, police officers often escalate encounters precipitated by hyper-scrutiny, minor infractions, and help-seeking requests, when they are purportedly trained to deescalate and defuse such situations.<sup>280</sup> The deaths of Mr. Christopher Kalonji, Mr. Michael Noel, Mr. David Garcia, and Mr. Dewayned Deshawn Ward, described above, surface these concerns.<sup>281</sup>

Suspect Identity Construction (SIC) again helps to explain the refusal of police to better manage what they regard as situational disobedience. Instead of deescalating these situations, police seem to be invoking the logic of *Dysaesthesia Aethiopica* or *Drapetomania* to felonize suspects and justify enhanced disciplinary tactics. Seemingly responding as much to SIC as to ostensible criminal activity, police overreaction seems to track SIC, with particularly disabling consequences.

While clearly there are more dramatic instances of conflict behavior in police-citizen encounters—the high speed chase, the standoff—the more mundane conflict interactions are what are undermining police legitimacy. When conflict behavior manifests as noncompliance, when citizens refuse to cooperate, as was the case with Eric Garner, Mike Brown, Freddie Gray and [ ] Sandra Bland,

---

278. *See id.*

279. *See, e.g.,* Capelouto, *supra* note 219 (quoting Eric Garner's request to be left alone before dying in police custody); Smith, *supra* note 239 (detailing Bland's traffic stop and subsequent events); *see also* Lopez, *supra* note 266 (finding, per study of FBI data, Black teens twenty-one times more likely than White to be shot and killed by police between 2010 and 2012); *supra* note 218 and accompanying text (citing critical facts of encounters between police and people of color); *supra* Part II.B (discussing deadly encounters between police and people of color).

280. *See* Janet R. Oliva et al., *A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury*, 10 J. POLICE CRISIS NEGOTIATIONS 15, 15–27 (2010); Williams, *supra* note 269; Kimberly Kindy, *Creative Guardians, Calming Warriors: A New Style of Training for Police Recruits Emphasizes Techniques to Better De-Escalate Conflict Situations*, WASH. POST (Dec. 10, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/10/new-style-of-police-training-aims-to-produce-guardians-not-warriors/> [<https://perma.cc/9DQY-Q5A2>].

281. *See supra* Part II.B; *see also* Cave & Oliver, *supra* note 135.

what begins as mundane can become lethal when conflict behavior escalates.<sup>282</sup>

Recognizing the layered phenomenon that may cause people of color to flee from police, Justice Stevens issued a thoughtful partial dissent and partial concurrence in *Wardlow*.<sup>283</sup> Contextualizing the racial undercurrent of this case, which involved a young Black man, he opined:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, *believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal."* Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices.<sup>284</sup>

Especially given the heightened racial tensions in the United States following the killings of Trayvon Martin, Walter Scott, Eric Garner, Tamir Rice, and Freddie Gray,<sup>285</sup> it would not be surprising, nor unreasonable, for Black people to be weary, or fearful, of interactions with police and security forces, which have been increasing in the last

---

282. Megan Price, *Could 'Insight Policing' Have Saved Sandra Bland, Freddie Gray and Others?*, THE CONVERSATION (July 22, 2015), <https://theconversation.com/could-insight-policing-have-saved-sandra-bland-freddie-gray-and-others-44065> [https://perma.cc/59G8-K7TQ] (discussing insight policing).

283. *See* Illinois v. Wardlow, 528 U.S. 119, 126–40 (2000) (Stevens, J., concurring in part and dissenting in part).

284. *Id.* at 132–33 (emphasis added). Justice Stevens also cited investigations of racial profiling, in which “43% of African-Americans consider ‘police brutality and harassment of African-Americans a serious problem.’” *Id.* at 132 n.7. One survey found that eighty-one out of one-hundred young Black and Hispanic men in New York City had been frisked by police, though none arrested. *Id.*; *see also* Leslie Casimir et al., *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS (Mar. 26, 1999), <http://www.nydailynews.com/archives/news/minority-men-frisk-targets-news-poll-finds-81-100-stopped-cops-article-1.829704> (providing the results of a survey of 100 young black and Latino men in New York City; 81 reported having been stopped and frisked once; none were arrested).

285. *See The Counted: People Killed by Police in the US*, *supra* note 134 (listing people killed by police in United States). For instance, in 2015, 304 of 1145 people killed by police were black and 195 were Hispanic/Latino—that is 26.5% and 17%, respectively, and a total of 43.5% of all people killed by police. *Id.* Further, in the first month and a half of 2016, 27 of 133 of (20%) people killed by police were black and 12 of 133 (9%) were Hispanic/Latino. *See id.* These individuals include Henry Bennett of Florida, 19; Rodney Turner from Oklahoma, 22; Dyzhawn Perkins of Virginia, 19; Jose Mendez from California, 16; Edgar Alvarado of New Mexico, 21; and Efrain Herrera, Jr. from California, 24. *See id.*

several decades.<sup>286</sup> There have been numerous occasions when minor infractions, officer mistakes, misidentifications, and police overreaction have resulted in the injury or death of people of color.<sup>287</sup>

Such abuses are not surprising given the disparate presence and hyper-focus of law enforcement in communities of color.<sup>288</sup> Even from a pure efficacy perspective, the effectiveness of these policies is dubious as “[p]roactive police stops are predicated on low levels of suspicion and rarely result in arrest, summons, or seizure of contraband, suggesting that the vast majority of individuals stopped have done nothing wrong.”<sup>289</sup> Unless the goal is to terrorize and abuse communities of color, it is not clear that the objectives of these policies are being met.<sup>290</sup> What is being achieved, however, is the systematic, structurally fortified devastation of minority communities. These practices are durable. They are abusive, corrosive, and societally disabling:

Contacts of this nature may trigger stigma and stress responses and depressive symptoms. These stresses can be compounded when police use harsh language, such as racial invective or taunts about sexuality. Finally, to the extent that individuals stopped believe that they were targeted because of their race or ethnicity or may be targeted again, they may experience symptoms tied to the stresses of perceived or anticipated racism.<sup>291</sup>

And despite the so-called “Ferguson Effect,”<sup>292</sup> there have been several more killings, or deaths, of Black people either by police, or

---

286. See *The Deaths of Black Men in America* (MSNBC television broadcast Aug. 16, 2014), <http://www.msnbc.com/melissa-harris-perry/watch/the-deaths-of-black-men-in-america-318795331819> (recounting deaths of black men at hands of police and connecting these facts to the *Dred Scott* holding and ruling of *C.J. Taney* that black men “had no rights with the white man was bound to respect.” (*quoting* *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856))).

287. See Ralph Ellis et al., *James Blake Mistake: NYPD Chief Apologizes to Ex-Tennis Star*, CNN (Sept. 11, 2015), <http://edition.cnn.com/2015/09/10/us/tennis-james-blake-tackled-by-nypd/> [<https://perma.cc/QT4Y-VPU4>]; see also Mitch Smith, *Two Reviews of Tamir Rice Shooting in Cleveland Are Seen as Shielding Police*, N.Y. TIMES (Oct. 11, 2015), <http://www.nytimes.com/2015/10/12/us/tamir-rice-outside-reviews-cleveland-police-charges.html?ref=topics> [<https://perma.cc/2QAQ-HQ3K>].

288. See *supra* Part II.C.

289. Geller et al., *supra* note 16, at 2321.

290. See, e.g., *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014); Richardson, *supra* note 74; *Discriminatory Policing*, CCRJUSTICE.ORG, <http://ccrjustice.org/home/what-we-do/issues/discriminatory-policing> [<https://perma.cc/X3AY-89ZX>]; *Floyd v. New York City Trial Updates*, CCRJUSTICE.ORG, <http://ccrjustice.org/floyd-v-new-york-city-trial-updates> [<https://perma.cc/7G2M-7J7P>].

291. Geller et al., *supra* note 16, at 2321.

292. Monica Davey & Mitch Smith, *Murder Rates Rising Sharply in Many U.S. Cities*, N.Y. TIMES (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/us/murder->

while in police custody, since the death of Michael Brown.<sup>293</sup> These cases reveal the ways in which “racial disablement and ableist racism,”<sup>294</sup> what I have elsewhere referred to as racialized disability and disabled race,<sup>295</sup> presage and structure disparate dynamics for people of color, particularly those who are already mentally vulnerable.<sup>296</sup>

### III. PROVOKING MENTAL VULNERABILITY: SIC AT THE INTERSECTION OF RACE, GENDER, AND MENTAL HEALTH

*“I gotta be honest with you guys. I am suffering from something that some of you all might be dealing with right now . . . . It’s a little bit of depression as well as PTSD. I’ve been real stressed out over the past couple of weeks.”*

*- Sandra Bland, March 2015<sup>297</sup>*

---

rates-rising-sharply-in-many-us-cities.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news [https://perma.cc/Y7LP-HVPP]; see also *The Rachel Maddow Show* (MSNBC television broadcast Oct. 12, 2015), <http://www.msnbc.com/rachel-maddow/watch/facts-dispute-ferguson-effect-on-crime-rate-543329859503> (Melissa Harris Perry comments with respect to “community trauma”); Bernard Harcourt, *Don’t Believe the Fictitious Crime Trends Used to Undermine Police Reform*, THE GUARDIAN (June 6, 2015), <http://www.theguardian.com/commentisfree/2015/jun/06/dont-believe-ferguson-effect-fictitious-undermine-police-reform> [https://perma.cc/P8WF-KAZ9]; Ta-Nehisi Coates, *There is No Ferguson Effect*, THE ATLANTIC (Sept. 1, 2015), <http://www.theatlantic.com/notes/2015/09/there-is-no-ferguson-effect/403132/> [https://perma.cc/Z3DW-BPVE]; Brentin Mock, *Busting the Myth of the Ferguson Effect*, CITY LAB (June 17, 2015), <http://www.citylab.com/crime/2015/06/busting-the-myth-of-the-ferguson-effect/396068/> [https://perma.cc/WXS8-4JRR].

293. See *supra* note 285 and accompanying text. For an exhaustive list of people killed by police in the United States, see *The Counted: People Killed by Police in the US*, *supra* note 134.

294. Claudia Pena, *A Reaction to Beth Ribet’s Surfacing Disability through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 253, 254 (2010); see also Glennon, *supra* note 242, at 17–18 (“African American male students are also grossly overrepresented in special education, which is often viewed as ‘below’ the lowest regular academic track. They are particularly disproportionately represented in the categories of mental retardation, serious emotional disturbance, and specific learning disabilities.”).

295. See Nelson, *supra* note 1, at 12–20.

296. See *id.*

297. See David Montgomery & Michael Wines, *Dispute Over Sandra Bland’s Mental State Follows Death in a Texas Jail*, N.Y. TIMES (July 22, 2015), [http://www.nytimes.com/2015/07/23/us/sandra-blands-family-says-video-sheds-no-light-on-reason-for-her-arrest.html?\\_r=0/](http://www.nytimes.com/2015/07/23/us/sandra-blands-family-says-video-sheds-no-light-on-reason-for-her-arrest.html?_r=0/) [https://perma.cc/AZE9-4TRU] (quoting Bland in a video she posted to Facebook).

On July 13, 2015, Ms. Sandra Bland was found dead from what the Waller County Sheriff's Department officials concluded was "self-inflicted asphyxiation."<sup>298</sup> Her treatment during arrest and subsequent unexpected death in custody was met by disbelief on the part of Ms. Bland's family, friends, and many observers in the United States.<sup>299</sup> They doubted that she would have taken her own life as she was embarking on an exciting professional opportunity.<sup>300</sup> Ms. Bland's friends and family suspected foul play.<sup>301</sup> Indeed, Ms. Bland had recently moved to the area, about fifty miles from Houston, Texas, and was preparing to start a new job at her *alma mater*, Prairie View A&M University, later that week.<sup>302</sup>

However, three days before her death, Ms. Bland was pulled over by state trooper Brian Encinia for failing to signal a lane change.<sup>303</sup> The stop was thankfully captured on Mr. Encinia's dash-cam, which recorded the exchange between Mr. Encinia and Ms. Bland.<sup>304</sup> Both the officer and Ms. Bland became increasingly irritated as the officer's requests continued.<sup>305</sup> Ms. Bland questioned the rationale for the stop, refused to exit her vehicle, and declined to extinguish her cigarette.<sup>306</sup> No doubt, Officer Encinia viewed this interaction as

---

298. See Alastair Jamieson, *#JusticeForSandy: Sandy Bland Death in Texas Jail Sparks Questions*, NBC NEWS (July 16, 2015), <http://www.nbcnews.com/news/us-news/whathappenedtosandybland-womans-texas-jail-death-questioned-n393001> [<https://perma.cc/54Z8-TRX8>]; see also Jon Schuppe, *The Death of Sandra Bland: What We Know So Far*, NBC NEWS (July 23, 2015), <http://www.nbcnews.com/news/us-news/death-sandra-bland-what-we-know-so-far-n396036> [<https://perma.cc/FXE2-K6DZ>].

299. See Chris Tognotti, *Friends and Family Of Sandra Bland React to Her Death & They're Not Buying the Official Explanation*, BUSTLE (July 18, 2015), <http://www.bustle.com/articles/98185-friends-and-family-of-sandra-bland-react-to-her-death-theyre-not-buying-the-official> [<https://perma.cc/24XS-4DCM>] (detailing disbelief of friends and family members); Kim Bellware, *Jail Defends Procedures Amid Scrutiny of Sandra Bland's Death*, HUFFINGTON POST (July 23, 2015), [http://www.huffingtonpost.com/entry/waller-county-jail-procedures\\_us\\_55b16362e4b0a13f9d17eded](http://www.huffingtonpost.com/entry/waller-county-jail-procedures_us_55b16362e4b0a13f9d17eded) [<https://perma.cc/TZ3F-XGAJ>] (articulating that the "family vigorously disputes" autopsy suicide findings); David A. Graham, *A Perjury Charge for the Cop Who Pulled Over Sandra Bland*, THE ATLANTIC (Jan. 6, 2016), <http://www.theatlantic.com/national/archive/2016/01/sandra-bland-trooper-indicted-for-perjury/422976/> [<https://perma.cc/8FK9-3MZ6>].

300. See Tognotti, *supra* note 299.

301. See *id.*

302. See Jamieson, *supra* note 298.

303. See Schuppe, *supra* note 298.

304. See *id.*

305. See *id.*

306. See *id.*

situational disobedience.<sup>307</sup> Indeed, his written report notes the lack of deference and seeming insolence of Ms. Bland—she failed the attitude test for the behavior expected when interacting with police officers.<sup>308</sup> In this respect, Officer Encinia wrote, “I had Bland exit the vehicle to further conduct a safe traffic investigation. Bland became combative and uncooperative.”<sup>309</sup>

Thereafter, Mr. Encinia responded by threatening to forcibly remove Ms. Bland from her car and telling her that she was under arrest.<sup>310</sup> Ms. Bland questioned the charge, to which Mr. Encinia responded by drawing his taser, pointing it at her, and screaming: “Get out of the car! I will light you up! Get out! Now!”<sup>311</sup> Mr. Encinia’s notes record this part of the encounter as follows: “Numerous commands were given to Bland ordering her to exit the vehicle. Bland was removed from the car but became more combative. Bland was placed in handcuffs for officer safety.”<sup>312</sup>

The encounter continued, with Ms. Bland remarking, “Wow, really, for a failure to signal? You’re doing all of this for a failure to signal?”<sup>313</sup> After Ms. Bland exited her car, neither she nor Officer Encinia are visible as they are both beyond the purview of the dashcam.<sup>314</sup> Apparently, Ms. Bland attempted to record the encounter with her cellphone, but Mr. Encinia ordered that she put it away.<sup>315</sup> In his notes, Officer Encinia describes the situation in this way:

Bland began swinging her elbows at me and then kicked my right leg in the shin. I had a pain in my right leg and suffered small cuts on

---

307. See Tom Mullen, *Sandra Bland’s Arrest Wasn’t Racism; It Was Something Worse*, HUFFINGTON POST (July 23, 2015) [http://www.huffingtonpost.com/tom-mullen/sandra-bland-arrest-wasnt\\_b\\_7849052.html](http://www.huffingtonpost.com/tom-mullen/sandra-bland-arrest-wasnt_b_7849052.html) [https://perma.cc/JJ7X-Y5N5] (“Encinia may have treated Bland differently because she was black. We can’t read his mind. But it’s much more likely he treated her the way he did because she didn’t exhibit blind obedience to his every whim, something he was trained not to tolerate and Americans of all political persuasions seem to have acquiesced to without question.”).

308. See Schuppe, *supra* note 298.

309. Graham, *supra* note 299 (citing an excerpt of Officer Encinia’s probable cause statement).

310. See Schuppe, *supra* note 298.

311. Holly Yan et al., *Sandra Bland’s Family ‘Infuriated’ at Video of Her Arrest*, CNN (July 23, 2015), <http://www.cnn.com/2015/07/22/us/texas-sandra-bland-arrest/> [https://perma.cc/5TW8-6NLB] (quoting the police officer).

312. Graham, *supra* note 299 (citing an excerpt of Officer Encinia’s probable cause statement).

313. See Yan, *supra* note 311.

314. See Schuppe, *supra* note 298.

315. See *id.*

my right hand. Force was used to subdue Bland to the ground to which Bland continued to fight back. Bland was placed under arrest for Assault on Public Servant.<sup>316</sup>

Still out of view of the camera, the audio continued to record, with Officer Encinia remarking, “When you pull away from me, you’re resisting arrest.”<sup>317</sup> To which Ms. Bland can be heard saying: “You’re a real man now. You just slammed me, knocked my head in the ground. I got epilepsy you mother\*\*\*\*\*.”<sup>318</sup> To this, Officer Encina replied, “Good.”<sup>319</sup> Adding another layer to this exchange, a female officer also attended the scene to assist Officer Encinia.<sup>320</sup> Her remarks were recorded as well. She told Ms. Bland that she should have thought before “resisting.”<sup>321</sup>

At her booking, Ms. Bland informed her jailors that she suffered from depression, and had previously attempted suicide.<sup>322</sup> Additionally, she mentioned a suicide attempt during interviews with two officials who processed her entry into jail.<sup>323</sup> Nonetheless, the Sheriff’s Office did not place Ms. Bland in a suicide watch cell because she was not depressed at the time of the booking.<sup>324</sup> Three days later, Ms. Bland was found dead in her cell.<sup>325</sup>

However, the statement made by Ms. Bland in March 2015 may provide insight into her mental state at the time of her arrest: “*I am suffering from something that some of you all might be dealing with right now . . . . It’s a little bit of depression as well as PTSD.*”<sup>326</sup> As discussed at length in the preceding parts, this reality of disparate mental vulnerability is neither unknown, nor uncommon. Instead, such latent or episodic mental vulnerability can be triggered or exacerbated by racialized policing, or other such racialized incidents.<sup>327</sup>

316. Graham, *supra* note 299 (citing an excerpt of Officer Encinia’s probable cause statement).

317. Yan, *supra* note 311.

318. *Id.*

319. *Id.*

320. *Id.*

321. *See id.*

322. *See* Montgomery & Wines, *supra* note 297.

323. *See id.*

324. *See id.*

325. *Id.*

326. *See* Montgomery & Wines, *supra* note 297 (emphasis added).

327. As Ribet notes:

For People of Color with (“hidden”) emergent disabilities, the consequence of experiencing racism, sexism, classism, child abuse, or interrelated traumas is some variation of medical or psychological damage, which (a) becomes a

Moreover, people of color who are aware of racism and attempt to resist being marginalized by these constructs often face disparate psychosocial consequences, including activation of the cardiac sympathetic nervous system and disruption of autonomic balance.<sup>328</sup> Therefore, those who recognize racism and seek to minimize its effects may be even more precariously situated as more vulnerable to its abusive psychological consequences.<sup>329</sup>

As indicated on her Facebook page, Ms. Sandra Bland was clearly aware of, and concerned about, the state of race relations in the United States.<sup>330</sup> Not only did she refer to race and race relations in the U.S. as, “all of this mess going on in America,” but she also, presciently, critiqued recent policing practices, whereby “the police don’t even [have to] suspect you for doing anything wrong.”<sup>331</sup> Thus, while ignorance might truly be bliss, or at least decrease stress and, thereby, increase longevity, Ms. Bland was well aware of our nation’s enduring racial problems.<sup>332</sup>

At the time of writing this Article, Officer Encinia had been indicted for perjury.<sup>333</sup> While the grand jury decided in December 2015 not to bring any charges in connection with Ms. Sandra Bland’s death in custody, in January 2016 a grand jury issued an indictment against Brian Encinia for perjury related to his purported “safety” rationale for removing Ms. Bland from her

secret embarrassment, (b) makes it more difficult to succeed, function, or navigate the world, and (c) “proves” various mythologies of inferiority. In other words, racism creates damage, which then must be hidden, for fear that it will be held up as inherent/personal proof of racial inferiority or unworthiness.

Ribet, *supra* note 13, at 239.

328. Harrell et al., *supra* note 17, at 145.

329. *Id.*

330. Sandra Bland, *HAPPY FRIDAY KINGS & QUEENS #SandySpeaks*, FACEBOOK (Apr. 10, 2015), <https://www.facebook.com/sandra.bland.5070/videos/vb.73304051/10100618184266304/?type=2&theater>; see also Montgomery & Wines, *supra* note 297 (stating Ms. Bland was described by her sister “as a fighter for social justice who had posted a video statement on police brutality on Facebook in April.”).

331. See Sandra Bland, *supra* note 330.

332. See *id.*

333. Graham, *supra* note 299; David Montgomery, *Texas Trooper Who Arrested Sandra Bland is Charged with Perjury*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html> [<https://perma.cc/J7XT-RQAR>] (“The charge stemmed from a one-page affidavit that Trooper Encinia filed with jail officials justifying the arrest of Ms. Bland, who was pulled over July 10 in a routine traffic stop . . . . The trooper wrote that he removed Ms. Bland from her car to more safely conduct a traffic investigation, but ‘the grand jury found that statement to be false.’ . . .”).

vehicle.<sup>334</sup> Moreover, with respect to the Waller County Jail, this is not the first time that the jail has been investigated.<sup>335</sup>

### CONCLUSION

*“[T]he aggressive nature of proactive policing may have implications not only for police-community relations but also for local public health. In fact, the significant associations between both health outcomes and respondent perceptions of procedural justice suggest that police-community relations and local public health are inextricably linked.”*<sup>336</sup>

Based upon the aforementioned historical, medico-legal, and social milieu, I conclude that racial discrimination is abusive. Its dire consequences are significant, debilitating, destructive, and disabling. “In considering racism’s impact on health, the most straightforward case is that racism makes the lives of the disadvantaged more stressful and thus leads to negative mental and physical health consequences.”<sup>337</sup> From education<sup>338</sup> to traffic stops,<sup>339</sup> to searches

334. Graham, *supra* note 299 (“In the only indictment tied to the black woman’s death, a grand jury said Brian Encinia lied about why he ordered her out of her car.”).

335. See Sharon LaFraniere et al., *Texas County’s Racial Past Is Seen as Prelude to Sandra Bland’s Death*, N.Y. TIMES (July 26, 2015), <http://www.nytimes.com/2015/07/27/us/racial-divide-persists-in-texas-county-where-sandra-bland-died.html> [<https://perma.cc/EKW7-XXZB>] (citing a 2012 event where a white male inmate hanged himself with bed sheets).

336. Geller et al., *supra* note 16, at 2325.

337. Harrell et al., *supra* note 17, at 145; Sharon B. Wyatt et al., *Racism and Cardiovascular Disease in African Americans*, 325 AM. J. MED. SCI. 315, 315 (2003) (“[P]erceived/personally mediated racism acts as a stressor and can induce psychophysiological reactions that negatively affect cardiovascular health.”).

338. See Glennon, *supra* note 242, at 19 (“Congress recognized the severity of the disproportionate representation of minority students in special education in the passage of the 1997 Amendments to the Individuals with Disabilities Education Act, noting, ‘greater efforts are needed to prevent the intensification of problems connected with mislabeling...among minority children with disabilities.’” (referencing 20 U.S.C. § 1400(c)(8)(A) (1999))).

It is no surprise to learn that “[c]hildren of color are vastly over represented in both the juvenile justice and special education systems,” and that studies unanimously reveal that “race plays a powerful role in the placement of children in special education” and exerts a “disparate impact” on such placements. In 1992, by way of example, “blacks made up sixteen percent of public school students, but represented nearly forty percent of those in ‘special’ education classes”—classes for students with mental disabilities or other special needs. And there are confounding interstate rate differentials. “[I]n thirteen states, African-American students are at least three times more likely than white students to be identified as having mild mental

and seizures,<sup>340</sup> behaviors are assessed in disparate and disproportional ways, depending on the race of the actor.<sup>341</sup> SIC is a weighty variable around which the assessment of both behavior and physical appearance revolves, with significant life (or death) consequences.<sup>342</sup> Our continued inability to address misdiagnoses,<sup>343</sup> disciplinary punishment, and (implicit) bias furthers “societal disablement.”<sup>344</sup>

---

retardation,” but “[i]n other states . . . African-American students are identified as having mild mental retardation at rates much closer to their presence in the student population.” To this end, we must also recall the description of some special education classes as being the end product of “classification plea bargaining.” Again, considerations of race cannot be avoided.

Michael L. Perlin, *“Simplify You, Classify You”: Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 622–23 (2009) (footnotes omitted).

339. See Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (1999), <http://thomas.loc.gov/cgi-bin/query/z?c106:S.821>: [<https://perma.cc/2LS2-987K>].

340. See David Harris, *Profiling Unmasked: From Criminal Profiling to Racial Profiling*, in *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 48 (2003); Richardson, *supra* note 74 (“Powerful new research in the behavioral sciences indicates that implicit, nonconscious biases affect the perceptions and judgments that are integral to our understanding of core Fourth Amendment principles. Studies reveal, for example, that many people regard ambiguous actions performed by non-Whites as suspicious, but regard Whites’ performance of those same actions as innocuous. Empirical evidence also demonstrates that officers vary in their ability to overcome implicit biases.”); Devon W. Carbado, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011) (analyzing cases that expand racial profiling and noting, “the cases constitutionalize racial profiling against Latinos and unduly expand governmental power and discretion beyond the borders of immigration enforcement.”); see also Eric J. Miller, *Detective Fiction: Race, Authority and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213 (2012).

341. See Ashley Fants et al., *Muslim Teen Ahmed Mohammed Creates Clock, Shows Teachers, Gets Arrested*, CNN (Sept. 16, 2015), <http://www.cnn.com/2015/09/16/us/texas-student-ahmed-muslim-clock-bomb/> [<https://perma.cc/VM9V-ET7Y>].

Studies have shown over and over again that the same behavior exhibited by children from different races will be treated differently. For example, a White child who asks a lot of questions will be considered curious and a Black child who does the same will be marked as disruptive. When a Black child is showing signs of socially awkward behavior, he is punished and medicated. When a White child shows the same signs, he is brought to a specialist who determines what ‘gifts’ the child has and what some of his needs may be.

Pena, *supra* note 294, at 254.

342. Pena, *supra* note 294, at 254.

343. See Mary-Jo DelVecchio Good et al., *The Culture of Medicine and Racial, Ethnic and Class Disparities in Health Care*, in *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 594 (Brian D. Smedley et al. eds., 2003); see also DAYNA MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* (2015).

344. See MATTHEW, *supra* note 343.

Such assessments take on added salience given the consequences that frequently follow these ascriptions. In policing, it is all the more troubling given the heightened stakes. As Ruth Wilson Gilmore's definition of racism as "group-differentiated vulnerability to premature death" attests, the continuum of disparate consequences range from disciplinary to lethal punishment.<sup>345</sup> Thus, "[t]hese power dynamics reveal[] a sliding scale of restraint, coercion, force and violence unequally deployed against . . . negatively racialized individuals with mental illness."<sup>346</sup>

The matters discussed in this article are increasingly important. Recent police shootings, as well as acts of gun violence, have again called into question concerns about mental health, both of victims and perpetrators. "[As we know], deinstitutionalization and the growing wealth gap have produced significant homeless populations in many urban areas."<sup>347</sup> As I suggested in *Racializing Disability, Disabling Race*, "If racialization constructs impairment, should the gaze of rights discourse not be refocused on its effects? If so, discrimination is a methodology of social disability that should be studied in this broader sense."<sup>348</sup>

In this Article, I have attempted to reveal and analyze some of the ways in which race and disability are mutually constitutive, both historically and in contemporary society. To advance the actualization of inclusive justice, these reinforcing dynamics must first be surfaced. We must be aware and critically conscious of the intersecting dynamics of racialization and disablement in order to

---

345. Ribet, *supra* note 13, at 218 (referencing RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007)); see also Nelson, *supra* note 1, at 8 ("[D]epending upon the racial identity of the suspect, and irrespective of police awareness or suspicion of mental illness, police appear to forgo the medical modality in favor of criminal or disciplinary force modalities.").

346. Nelson, *supra* note 1, at 62–63.

347. For an appreciation of the ways in which the policing of mental illness pipelines to prisons, see the preamble to the Prison Rape Elimination Act 42 U.S.C. §§ 15601 (2009) ("Inmates with mental illness are at increased risk of sexual victimization. America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness."). See TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* (1999); Ribet, *supra* note 13, at 239 ("The consequence is that People of Color with disabilities are unavoidably socially 'visible' in contexts that indicate extreme marginality and subordination—in homeless populations, for instance—while remaining 'invisible' in contexts that are indicative of success or institutional access.").

348. See Nelson, *supra* note 1, at 64.

“advance[ ] . . . a race conscious challenge to ableism,”<sup>349</sup> and a (dis)ability informed challenge to racism, in order to further a more holistic notion of justice,<sup>350</sup> especially in the policing context.

---

349. Ribet, *supra* note 13, at 215; *see also* Ryan Gorman, ‘*Why Did You Have to Shoot Him?*’, *Devastated Girl, 9, Writes Letter to Phoenix Cop Who Killed Her Father*, AOL (Dec. 4, 2014), <http://www.aol.com/article/2014/12/04/unarmed-black-male-gunned-down-by-white-phoenix-police-officer-rumain-brisbon-pill-vial/21003116/> [https://perma.cc/R7JK-MN78]; M. Alex Johnson, *Phoenix Officer Who Killed Unarmed Rumain Brisbon Identified*, NBC NEWS (Dec. 9, 2014), <http://www.nbcnews.com/news/us-news/phoenix-officer-who-killed-unarmed-rumain-brisbon-identified-n265171> [https://perma.cc/VG64-6H9K]; Pearson et al., *supra* note 139 (ascertain race); Lisa J. Huriash, *Suit Filed Against Cops Who Stunned Man Who Later Died*, SUN SENTINEL (Sept. 4, 2015), <http://www.sun-sentinel.com/local/broward/fl-taser-calvon-reid-lawsuit-20150723-story.html> [https://perma.cc/26BT-WCJE]; Ernie Smith, *New Mexico Police Shooting Shows Void in Mental Health Care, Groups Say*, ASS’NS NOW (Apr. 7, 2014), <http://associationsnow.com/2014/04/new-mexico-police-shooting-shows-void-in-mental-health-care-groups-say/> [https://perma.cc/GG6N-T23M].

350. Ribet, *supra* note 13, at 215.