Of Eggshells and Thin-skulls: A consideration of racism-related mental illness impacting Black women

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Abstract

Recent research has indicated that the prevalence of mental disorders is estimated to be higher among Blacks than among Whites, most likely due to the nexus of race and socioeconomic disparity. Blacks are under-represented in in-patient populations and more likely than Whites to use the emergency rooms for mental health treatment. Numerous studies confirm that Blacks drop out of mental health services at a significantly higher rate than Whites and use fewer treatment sessions for mental health issues. Furthermore, Blacks enter mental health treatment at a later, more advanced stage than Whites, under-consume community mental health services of all kinds, are misdiagnosed more often than Whites, and are more often diagnosed with a severe mental illness than Whites. People from diverse ethnic backgrounds often are prevented from receiving adequate mental health treatment due to misdiagnoses and lack of access to the services they need. Factors contributing to this disparity include a general mistrust of mental health professionals, cultural barriers, co-occurring disorders, socioeconomic factors, and primary reliance on family and the religious community during times of distress.

Unfortunately, the traditional institutions of racialized research largely ignore the disparate social and political exposures confronting people of color, such as residential and occupational segregation, racial profiling, tokenism, discrimination, racism, and the consequential physiological and psychological effects flowing from the macro and micro effects of such interactions and intersectionalities. This article explores these issues and proposes civil law legal frameworks for addressing these disparities. In particular, it is suggested that renewed consideration be made of the Thin-skull and Eggshell doctrines in the United States and comparable traditional international doctrine. © 2006 Elsevier Inc. All rights reserved.

The liberal/conservative discussion conceals the most basic issue now facing [B]lack America: the nihilistic threat to its very existence. This threat is not simply a matter of relative economic deprivation and political powerlessness—though economic well-being and political clout are requisites for meaningful [B]lack progress. It is primarily a question of speaking to the profound sense of psychological depression, personal worthlessness, and social despair so widespread in [B]lack America. Cornel West.

1. Introduction

Just as the law should permeate society, articulating ethical standards of conduct and advancing remedies for the injured, so too society should permeate the law, informing the standards by which members of society are...
held accountable and by which they are compensated. Such legal osmosis should be the hallmark of a good legal system—one that is not out of touch, nor out of sync, with the reality confronting those subject to the law, seeking the protection of the law, or desirous of a legal remedy. While the legal system should not be vulnerable to every whim, fancy or frivolity found in the contemporary society it serves, so too must the legal system avoid being held slave to the past, especially an ugly past of racialized race-building, raced property, dehumanization and legalized atrocities. A balance must be struck which, recognizing the dirty hands of the law in the injustices of the past, seeks to ensure that the law is no longer used to further inequity and, instead, attempts to unpack and remedy some of the damage effectuated with the complicity of the law. As Chief Justice Lord Coleridge remarked over a century ago, “[t]hough law and morality are not the same, and many things may be immoral which are not necessarily illegal, the absolute divorce of law from morality would be of fatal consequence...”

This “fatal consequence” is far from certain—it is a fate from which the law can be liberated. Many areas of the law remain under-explored as avenues available to achieve the ends of equal protection before and under the law—these lofty equality-enhancing aspirations are not the exclusive domain of constitutional and civil rights laws. Furthermore, the law is capable of incorporating information beyond its ken—the sciences, whether social or biological, have been incorporated into the law in many respects, including, but not limited to expert testimony or judicial notice. The intersection of tort law, outsider scholarship and critical psychology provides an unlikely site for such an exploration. This location for inquiry is not just an interesting academic machination, but may provide accessible practical consideration for a legal system increasingly beleaguered by constitutional claims and overburdened by administrative law articulations.

This article will reference “critical psychology” and outsider scholarship to inform the Thin-skull and Eggshell personality tort law doctrines. I have dubbed critical psychology that sub-category of the discipline that responds to the traditionally assumed universality of experience by recognizing the subjectivity of experience, especially as this psychological experience is impacted and determined by societal factors including race, gender, sexual-orientation, class, culture, religion and the intersection of these identity variables. Hence, critical psychology recognizes and addresses the social and political constructs that impact mental health and disparately affect those relegated to the margins of society.

Outsider jurisprudence makes the personal political by recounting stories and detailing everyday experiences, for the personal is “where our most idealistic and our deadliest politics are lodged.” To illustrate this point, outsider scholars have focused on the racism embodied in ostensibly “personal” and “a-political” encounters. By narrating life, outsider scholarship “preserves reference to the world” of racism encountered in the everyday rituals of life such as shopping, childcare, working and studying. The outsider narratives about racism in everyday life should strike a chord not only with Black readers and people of color, but also with those who have never before contemplated the familiar sites of stores, schools, and workplaces as sites of oppression because everyone has experienced pain, stress, and

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3 The term “racialized” recognizes that “race” is not of scientific origin. Rather race is a manufactured social and cultural construct with structural and personal ramifications and implications. The socio-cultural construction of race highlights that there is no biological reality to these descriptions. Ironically, the necessarily practical adoption of “race-speech” and “racial-identification” creates a tension between denying the validity of race, while at the same time seeking “universal”, or at least “translatable”, conceptions to convey the socio-cultural information. Accordingly, the term “racialized” is used to refer to persons from communities that have been traditionally marginalized due to “racial characteristics.” Such communities are also commonly referred to as “people of color,” “visible minorities” or “racial minorities.” For further information on the construction of race see generally, Tommy L. Lott, The invention of race: Black culture and the politics of representation (Blackwell, 1999).


5 While there are undoubtedly other such doctrines equally capable and deserving of investigation, time permits but a limited consideration here. For further reflection on other areas capable of incorporating critical psychology see Camille A. Nelson, Breaking the camel’s back: A consideration of mitigatory criminal defenses and racism-related mental illness, 9 Mich. J. Race and L. 77 (2003).


8 I use the term Black intentionally, as I find it to be a more inclusive term than African-American, generally. The term Black, to me, allows for inclusion of all those who are racialized as such and who are of African origin. I do, however, use the term African-American where appropriate due to the specifics of the reference.
humiliation on some level in some context. Outsider jurisprudence takes this common reality one step further to reveal the commonality of this experience for people of color, regardless of class, and recognizes the racialized systems at work beneath the surface of these narratives. This common chord, in turn, is not “merely” personal as outsider scholarship “makes political demands” on insiders by requiring them to treat members of subordinated groups as citizens, worthy of respect.

The sub-category of critical psychology devoted to the analysis of racism-related mental illness in the form of depression, stress, and daily hassles causing or exacerbating mental illness will be the focus of this article. Critical psychology reveals the plausibility of legally compensable injury that is either caused by or aggravated by discrimination in general, and racism in particular. Part one of this article will provide a brief overview of the Thin-skull and Eggshell doctrines in the United States and will reference comparable international doctrine. Part two will highlight some of the critical psychology investigating racism-related mental illness, and include insights and conclusions from outsider jurisprudence as corroborative of the psychological findings. The conclusion will analyze the utility of considering tort law as capable of incorporating the information becoming available in critical psychology and will suggest areas in need of further exploration.

2. Part one—an overview of the Thin-skulled and Eggshell doctrines

The word of law, whether statutory or judicial, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to consensus of ideals. When society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust. The result is compliance with the letter of the law, but not the spirit. Patricia J. Williams.

Central to our systems of tort and civil law is the principle that a person is held legally responsible if he or she fails to exercise an appropriate standard of care towards those to whom he or she owes a duty. If a duty of care is indeed owed, the foreseeability rule holds the tortfeasor, the person who is legally responsible for committing a tort, liable if he or she could reasonably foresee the nature of the harm done, regardless of whether the extent of the harm is ultimately unforeseeably large. Accordingly, a tortious wrongdoer must “take the victim as he finds her”. Therefore, despite the unforeseeable extent of the injury, the fact of the foreseeability of the initial harm as a consequence of negligent behavior creates a situation where the tortfeasor is legally responsible for aggravation of preexisting injuries, vulnerabilities or conditions.

A tortfeasor is thereby forced to bear the burden of rectifying a situation where the victim might have suffered even disparate and unexpected injury due to his or her particular physical or mental vulnerability. Regardless of the genesis of the vulnerability, the tortfeasor is liable for all injury flowing directly from his or her tortious activity. Indeed, if the tortfeasor knows, or should know, that he or she is dealing with an especially sensitive or vulnerable plaintiff, that is all the more reason for care. Accordingly, in the realm of legal compensation for mental or emotional harm, a defendant may be liable for increased damages, despite the fact that the damage or distress which would have been suffered by a normal person is less than that suffered by the plaintiff with the particular sensitivity.
In many European countries as well, the best known example of the special position of preexisting mental or physical vulnerability is the Eggshell or Thin-skull rule which insists that a tortfeasor must take his victim as he or she finds them. Accordingly, the tortfeasor is liable for the full extent of the victim’s personal injury, despite the fact that he or she did not, and need not, have subjectively known of a predisposition or vulnerability for injury on the part of the victim. However, particularly within the European context, these rules are subject to exceptions, especially where actions normally considered insignificant have extremely serious, and therefore remote, consequences. Perhaps reflecting the systemic bias against mental illness, “psychological predispositions generally receive less compensation than physical predispositions, which have already manifested themselves.” Nonetheless, the proliferation of the Eggshell and Thin-Skull rules throughout Europe is noteworthy.

For example, the French Court of Cassation held that a driver who caused an automobile accident was liable for the consequent death through delirium tremens of his alcoholic victim. Another French case in which an accident victim received an HIV-contaminated blood transfusion was similarly decided, the court emphasizing the victim’s Thin-skull vulnerability as a hemophiliac. Of course, a defendant may escape tort liability if he or she can establish that the cause of the harm was beyond his or her control or was a result of force majeure.

In a note worthy Irish case an employee was subjected to extreme pressure which caused his stomach muscles to tear due to defective protective equipment. Expert witnesses for the defendant claimed that such tearing would only happen to people with innate predispositions to such injury. The Supreme Court overturned the lower court’s finding that the injury had been unforeseeable and held the defendant was obliged to take the victim as he found him. The Thin-skull rule also applies across the continent in Greece. Interestingly, the Areopag employed the doctrine where an illness contracted prior to an accident extended the recovery period.

Similarly, the Austrian OGH rejected a defendant’s argument that the plaintiff who lost his sight in a road accident had a preexisting condition that would inevitably have led to his blindness. In keeping with general European acceptance of the Thin-skull rule, the OGH determined that as long as the fact of the future blindness could not be established, the defendant was obliged to take the victim as he found him.

Given this possibility for extended recovery, even to the unforeseen, it is interesting to consider the exacerbating impact of injury and vulnerability borne not of the physical, but the mental. Furthermore, the manner in which the tort law Thin-skull plaintiff and Eggshell personality doctrines interact with, and accommodate for, racism-related mental vulnerabilities is worthy of examination. While the architects of the tort law system might not have conceptualized such

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19 Smith v. Leech Brain, supra note 13, at 414 (per Lord Parker CJ; “It has always been the law of this country that a tortfeasor takes his victim as he finds him”). Scottish Case, similar cases exist in Germany, France, and Belgium.
22 Id at 485.
23 Id.
27 For example, exoneration from liability would not be available in the case of a hidden defect. See Dennis Campbell, International personal injury compensation 275 (Sweet and Maxwell, 1996).
29 Id.
30 Id.
33 OGH 20 June 1956, JBL 1956 p. 503 as cited in Von Bar, supra note 20, at 486.
34 Id. For further support of European acceptance of the Thin-Skull doctrine see Finnish HD 6 Oct. 1989, NDS 1990 p. 533 as cited in Von Bar, supra note 20, at 486. (The Finnish Supreme Court held that, the fact that the victim’s leg was broken before she slipped did not lessen the liability associated with the dangerous floor, however, the fact that she was 80% incapacitated prior to the slip meant that any lasting effects of the breakage would have been present in any event—and were present beforehand. Therefore, no compensation was payable for such effects).
possibilities as sources of civil liability, there is room within the confines of the tort law system for the legitimate articulation of such extrapolations.

2.1. An introduction to the “Thin-skull” doctrine

The “Thin-skull” rule dictates that a tortfeasor is liable for injuries which she causes, even when those injuries are exacerbated by an unforeseeable, preexisting, physical condition of the victim. “Thus, ‘wer einen gesundheitlich schon geschwächten Menschen verletzt, kann nicht verlangen, so gestellt zu werden, als wenn der Betroffene gesund gewesen wäre’.”35 The Restatement (Second) of Torts § 461 formulates the rule as follows:

The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.36

The label “Thin-skull”, has its origins in a hypothetical case in which the plaintiff has an unusually vulnerable skull, a thin skull.37 The hypothetical continues with the tortfeasor, who has no reason to know of the victim’s particular susceptibility, negligently injuring the victim’s head. While this blow to the head of an “average” or so-called “normal” person would be uncomfortable, the vulnerable victim suffers the heightened injury of a fractured skull.38 Given this scenario, the Thin-skull rule entitles the plaintiff to recovery for the full extent of harm done, even though a fractured skull was not foreseeable and indeed was partially due to their physical predisposition.39 Thus, for example, “a tort-feasor is liable for the full damages that result when her victim’s hemophilia turns what might otherwise have been a minor accident into a major medical emergency.”40 Similarly, a tortfeasor is liable for the full amount of the damages incurred by a plaintiff with a weak or “rotten” disc, if his negligence “aggravates or brings into activity a dormant or diseased condition or one to which a person is predisposed.”41–43

It is conceivable that this rule, which holds the defendant liable for foreseeable harms, even when the amount or extent of such harm is not foreseeable, might be particularly important for racialized persons suffering from racism-related mental illness. Doctrinally, such underlying vulnerability does not conceptually preclude recovery. Rather, just as in the case of the hemophiliacs, recovery should be extended to compensate for the full extent of the exacerbated injury.44 While the defendant’s negligence does not make the defendant liable for the existence of the plaintiff’s pre-existing condition, the Thin-skull doctrine does provide that the defendant is liable for the unforeseeable aggravation or exacerbation of such preexisting conditions.45 Causation, however, is crucial as unless it is established that the defendant’s conduct actually caused the aggravated harm, no liability will be imposed.46 As to the aggravation or exacerbation, however, a lack of foreseeability is not a limiting factor.47

2.1.1. Rationalizing the Thin-skull rule

The policy rational behind the Thin-skull rule is that judges generally believe it would be unjust to deny compensation in such circumstances.\(^{48}\) Specifically, such aggravated injury can be seen as falling within the foresight doctrine—it is foreseeable that anything can happen to a fragile or vulnerable person who is negligently injured.\(^{49}\) Further, such person should not have to bear the cost of another’s negligence exacerbating her condition.\(^{50}\)

As rationalized in Sweden, policy underpinnings lead to personal injury standing in a class of its own. The Swedish rules are, in some regard, more advantageous for the victim of a personal injury than for other victims.\(^{51}\) From a social utility point of view, it is considered more important to compensate victims of personal injury than victims of personal property damage, or pure economic loss.\(^{52}\)

Therefore, aside from the foreseeability and risk-bearing rationale, it is conceivable that what drives these doctrine is the policy rationale. Madam Justice Wilson\(^ {53}\) found public policy support for the doctrine by examining which party most properly should bear the brunt of extended injury when, for reasons of peculiar vulnerability, the victim of the defendant’s negligence suffers greater injury, or a different type of injury, than would an “average” or “normal” victim.\(^ {54}\) As such, the Thin-skull doctrine premises a norm of susceptibility of the average person by making the tortious wrongdoer bear legal responsibility for the harm suffered by a victim falling short of the norm.\(^ {55}\) As a matter of policy, therefore, the wrongdoer should bear the costs, whether or not the full consequences of the injury are foreseeable.

A further policy perspective relates to the difficulty of distinguishing between injuries that are foreseeable and those that are not. Efficient and predictable administration of the tort and civil law systems requires that the plaintiff be reimbursed for all physical and mental consequences of the injury.\(^ {56}\) Thus, as the costs must be borne by one of the two parties, this logic may be tied to notions of corrective justice—it would be inequitable to force the innocent, yet vulnerable or peculiar, victim to bear the cost of their susceptibility.\(^ {57}\) Accordingly, some scholars believe the Thin-skull rule is expressly moral.\(^ {58}\) This rationale is in keeping with the dovetailing, of law and morality, envisioned by Chief Justice Lord Coleridge. It holds that the innocent victim, however unforeseeably vulnerable or peculiar, should not bear the costs of the other party’s negligent behavior.\(^ {59}\)

An early formulation of the Thin-skull rule is found in Smith v. Leech Brain and Co. Ltd.\(^ {60}\) where spattering molten metal burned a workman’s lip. The burn triggered the development of cancer as the workman had pre-malignant cancerous tissues at the precise place where he was negligently burned.\(^ {61}\) The workman died from this cancer three years later and his widow sued his employer.\(^ {62}\) Lord Chief Justice Parker stated that the test is not

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\(^{48}\) Id. at 293.


\(^{50}\) Id.


\(^{53}\) Justice Wilson was the first woman appointed to the Supreme Court of Canada.

\(^{54}\) Cotic v. Gray (1981), 17 C.C. L.T. 138, 178; aff’d (1984), 26 C.C.L.T. 163 (S.C.C.). Justice Wilson’s interpretation of the Thin-Skull doctrine is analogous to the doctrine of assumption of risk but instead is in favor of the plaintiff. Assumption of risk is an affirmative defense that defendant must bear the burden of proving. Donald H. Henderson et al., The use of exculpatory clauses and consent forms by educational institutions, 67 Ed. Law Rep. 13, 16 (West, 1991). To succeed, the defendant must prove the plaintiff: “(1) knew of the risk; (2) had full subjective understanding of its nature; (3) voluntarily chose to encounter that risk; and (4) agreed in advance not to hold the defendant liable for the consequences of conduct that would ordinarily amount to negligence.” Id. at 17. The majority of jurisdictions allow express assumption of the risk to serve as a complete bar to recovery by the plaintiff. Id. However, in some jurisdictions the application of this defense has been either limited or completely abolished. Id.

\(^{55}\) Cotic, supra note 53, at 178.

\(^{56}\) Linden, supra note 45, at 333.

\(^{57}\) Id. at 333.


\(^{59}\) Id.

\(^{60}\) Smith v. Leech Brain, supra note 13.

\(^{61}\) Id. at 1160.

\(^{62}\) Id.
whether the employer could reasonably have foreseen that a burn would cause cancer leading to the death of the workman. Rather, the appropriate inquiry was whether the employer could reasonably foresee the type of injury suffered by the workman, namely the burn. Importantly, the amount of compensable damage, which the workman suffered as a result of the burn, depends on the qualities and internal makeup of the victim of the negligence. Therefore, the plaintiff with a thin skull “sustains a different degree of harm, not a different kind of harm”, than a victim with a “normal” skull.

Some legal scholars have stated that Lord Justice Kennedy in Dulieu v. White and Sons enunciated the Eggshell doctrine. This case considered the issues of nervous shock occasioned by fright and remoteness of damages. Dulieu involved a pregnant victim who was involved in an accident when the defendant driver of a “pair-horse van” negligently drove into the “public house” where she was working. The defendant driver obviously did not anticipate her condition. As a consequence of the accident, the plaintiff sustained severe shock, became seriously ill and prematurely delivered her baby. Employing the indelicate characterization of the time, the decision states, “[i]n consequence of the shock sustained by the plaintiff the said child was born an idiot.” The defendant argued that the damages sought were too remote and therefore incompensable. In order to be successful, the plaintiff had to establish, “a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect.” In ruling for the plaintiff the court said:

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

Therefore, one cannot defend against tortious liability by pointing to the weakness or peculiarities of the victim in answer. The reasonable foreseeability test requires only that there be foreseeability of the type of injury (mental or physical), not its extent, nor the manner of its occurrence. The following case introduces the nexus between physical and mental injury.

In Malcolm v. Broadhurst, a married couple injured in an automobile accident suffered mental and nervous repercussions. Due to the wife’s vulnerable personality, she experienced additional nervous symptoms due to her husband’s changed behavior. In awarding compensation for all injuries, the court stated:

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

This ruling was made despite the intervening decision of the court in Wagon Mound (No. 1). Following that decision “there was cause for concern that the thin-skull rule would be jettisoned on the ground that unusual susceptibility is not reasonably foreseeable.” See Linden, supra note 45, at 325.

Smith v. Leech Brain, supra note 13.

Linden, supra note 45, at 414.


Linden, supra note 45, at 324.

Dulieu v. White and Sons 2 K.B. 669, 679 (1901).

Id. at 670.

Id.

Id. at 670.

Id. at 671.

Id. at 679.


Id. at 510–511.

Id. at 510.
2.1.2. An introduction to the “Eggshell” personality

As long as there is a direct link between the cause of the injury and the damages actually sustained, there exists ample jurisprudential support for the position that pre-existing mental disorders, or vulnerabilities, are equally appropriate for consideration within the confines of the Thin-skull or Eggshell doctrines. Accordingly, one who is liable for negligence to another must contend with any pre-existing physical or mental vulnerabilities of the victim that increase the likelihood or extent of injury—again, it is not a defense to a claim for a fractured skull that the victim had an unusually fragile head.

Returning to Europe, it is interesting to note that in Belgium, no statutory definition of recoverable pecuniary or non-pecuniary loss is stipulated under Law. Instead, damage is defined almost as a negative expectancy—it is the negative difference between the actual situation of a victim and the position the victim would have occupied but for the tort. It is generally accepted that once tortious liability has been established, a victim is entitled to full compensation, *restitutio in integrum*. Accordingly, a victim is entitled to compensation for his or her entire damage. The aim of the Belgian law of damages is to restore the victim by returning them, as much as possible, to their pre-tort position.

Accordingly, the Belgian Court of Cassation held an impatient and abusive creditor civilly responsible for the death of his debtor. The debtor suffered a heart attack while running away from the creditor who had hit him. Furthermore, the Thin-skull rule may apply even to the mere threat of physical violence. Connecting the psychological to the psychical, the Belgian court in VLD 12 February 1963, considered the case of “drunken defendants who tried to extort a ‘parking fee’ from a relative of the plaintiff.” As a consequence of the extortion, the plaintiff became so distressed that he died of a heart attack. The heart attack was partly the result of the victim’s arteriosclerosis, but that particular vulnerability was irrelevant as regards the requirement for compensation. Again, recovery was not limited by a lack of foreseeability.

Similarly, in Sweden, personal injury is understood as psychical, as well as physical. “Psychical deficiencies might be the result of a shock or of subsequent traumatic neurosis.” For psychical injuries to be regarded as personal injury there must be a medically verifiable effect.

Thus, if one were to apply these principles to a tortious injury inflicted upon a racialized person, who is particularly vulnerable due to the ravages of racism, the fact that the effect of the tort is more serious than the tortfeasor might have expected ought to be of no particular consequence in the formulation of an appropriate legal remedy. The essential issue is the foreseeability of the initial harm, not the extent of the subsequent injury. Recall Smith v. Leech Brain and Co. Ltd., in which Lord Chief Justice Parker emphasized that the Thin-skull doctrine was necessarily subjectively focused.

The test is not whether these defendants could reasonably have foreseen that a burn would cause cancer and that Mr. Smith would die. The question is whether these defendants could reasonably foresee the type of injury he

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77 See Negretto v. Sayers, supra note 48, at 317, 319 (a women whose pelvis was fractured suffered post-concussional psychosis as a result of a “pre-existing tendency to mental disorder.” The court reasoned that the Thin-Skull rule was applicable since foresight demands that one foresee any consequences “between negligible abrasion and permanent incapacity or death”). Similarly, in Leonard v. B.C. Hydro, (1965) 50 W.W.R. 546, 553 (after falling on a bus and injuring her buttocks, a woman suffered a psychotic condition. While ultimately denying recovery on the basis that the plaintiff was not really suffering but was feigning pain, the judge remarked that the defendants must accept the risk of a “frail skull or a weak heart...” as well as the risk of “aggravating the condition of a psychotic”). See Holian v. United Grain Growers (1980), 11 C.C.L.T. 184 (the court held that the plaintiff’s chronic depression, resulting from exposure to a poisonous chemical substance, was reasonably foreseeable and within the thin-skull principle, despite the fact that it was due to his “particular susceptibility to emotional injury”). See Duwyn v. Kapielian (1978), 7 C.C.L.T. 121.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 If possible – and if claimed by the victim – damage should be repaired in natura. Otherwise, a pecuniary compensation will be given. It is evident that damage, which has already been suffered preceding a judgment, can never be compensated in natura, because it has already been actualised.
86 Id.
87 Koch and Helmut, supra note 50, at 309.
88 Id.
89 Such an effect might even appear from the constitution of the victim on sick leave. Id.
90 Smith, supra note 13.
suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that
burn, depends on the characteristics and constitution of the victim.91 (emphasis added).

In Dutch law, Art. 6:98 BW codifies the relevant stage of causation. Dutch case law applying the article indicates,
“the tortfeasor should take the victim as he finds him.”92 Accordingly, in personal injury cases, “the injurer can be held
liable even for injuries of which the extent, duration, gravity, and nature are quite unexpected or unforeseeable.”93 As in
other European countries, the victim of personal injury is not confined by a normative standard to which he, as victim,
should comply.94 Rather, if the injuries are aggravated by a predisposition or vulnerability of the victim, the plaintiff
will nevertheless be compensated in full.95

As such, the Dutch’ Hoge Raad ordered a tractor driver to pay compensation for the death of a moped rider with
whom he collided.96 “The initial injury sustained by the victim was insignificant but he was so upset by the incident
that he died two hours later of a heart attack.”97 Despite the fact that the victim had had a weak heart, it was held that a
negligent driver must be liable for any fatal consequences, even when they are “very rare” and unexpected in “normal”
circumstances.98

Hence, calculation of the damage that flows from negligence is necessarily related to the subjective qualities
of the victim. In this way, damages from negligence are identity-focused. It is legitimate, therefore, to similarly
recognize and compensate for the extent of damage caused to a racialized person if their particular characteristics,
such as race and gender, and/or constitution (depressed for instance), impact the extent of the injury sustained. It
is conceptually possible to compensate racialized defendants, who are “thin-skulled” due to racism, for the
tortious wrongdoings they have suffered, whether egregious instances of racial hostility are in issue, or the more
typical random bombardment of everyday indignities, the battery of hyper-visibility or the violence of ascribed
otherwise.

Utilization of the Thin-Skull doctrine, together with the corresponding Eggshell doctrine, which focuses to a greater
extent upon emotional and mental injury, will be useful as a tool to more accurately define and shape a proper legal
remedy for racialized persons who might be particularly vulnerable or susceptible to injuries due to micro99 and macro
racial aggression. Microaggressions are the individualized forms of petit apartheid by Whites against Blacks100 and
include “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of Blacks by
offenders.”101 By contrast macro-aggressions are systemic and structural disparities indicative of institutionalized
behaviors directed against the Black race as a whole.102

Some cases speak of pre-existing vulnerabilities more generally as “conditions,” making an extrapolation from the
Thin-Skull to the Eggshell doctrine more inherently viable. If a physical injury triggers mental suffering or nervous
disorder, the defendant must pay the resultant damages, even if such damages are more serious than might be
expected.103 Similarly, if there is a pre-existing mental condition rendering the plaintiff particularly vulnerable, courts
may still allow recovery, thus transforming the Thin-Skull plaintiff into a plaintiff with an Eggshell personality. Recall,
the tortious act, which founds the negligence claim, need not be physical in nature. Arguably, then, assaults, threatening

91 Id. at 1162.
92 Koch and Helmut, supra note 50, at 230.
93 Id.
94 Id.
95 Id.
96 Von Bar, supra note 20, at 486.
97 Id.
99 To coin the term used by Peggy Davis in Law as microaggression, 98 Yale L. J. 1559 (1989) (articulating the concept of microagression in
critical legal theory and discussing those stunning, sudden acts of racial hostility that remind persons of color of their precarious status).
100 Douglas E. Tompkins, The presence and effect of micro/macro-aggressions and petit apartheid, in Petit apartheid in the U.S. Criminal Justice
System, Daniel E. Georges-Abeyie, Foreword to Petit apartheid in the U.S. Criminal Justice System: The dark figure of racism 22 (Dragan
101 Davis, supra note 98, at 1565.
102 Tompkins, supra note 99.
103 Linden, supra note 45, at 330 (Linden points out that in a case involving the claim for mental suffering by a plaintiff as a result of being thrown
against a seat of a streetcar when it collided with a train, the Supreme Court of Canada recognized that the “nervous system is as much a part of a
man’s physical being as muscular or other parts.” Toronto Railway Co. v. Toms (1911), 44 S.C.R. 268, 275).
conduct, harassment and emotional abuse are examples of potentially tortious activity which might lead to compensable injury.

The rule has been applied to cases of pre-existing psychological incapacity—the “thin psyche”\(^{104}\) as well as to explicitly physical conditions. Indeed, some scholars have interpreted the Thin-Skull doctrine to encompass the plaintiff’s physical, mental, or even financial condition.\(^{105}\) As an English court stated, “there is no difference in principle between an Eggshell skull and an Eggshell personality.”\(^{106}\)

Similarly, in America, Steinhauser v. Hertz Corp., the Court of Appeals for the Second Circuit held that a 14-year-old girl predisposed toward schizophrenia could recover damages for the full-blown psychosis precipitated by a car accident.\(^{107}\) In Walton v. William Wolf Baking Co.,\(^{108}\) the Louisiana Supreme Court held that a tortfeasor had to take the plaintiff as he found her, even with a predisposition to neurosis which aggravated the impact of the tortious injury. The Louisiana court has similarly held tortfeasors responsible for injuries exacerbated by the plaintiff’s underlying emotional instability\(^{109}\) and “psychological problems.”\(^{110}\)

In Pearlstein v. Scudder and German, a Federal District Court held that the tortfeasor, the plaintiff’s broker, was legally responsible for the full cost of injury where his mentally impaired victim lacked the volitional capacity to mitigate damages by ordering the sale of bonds that the broker had negligently failed to sell.\(^{111}\) The court held, “[a] tortfeasor must accept an injured party, ill and emotionally upset to the point of requiring professional counseling, as he finds him, even with a ‘thin skull.’”\(^{112}\)

The Canadian case of Vargas v. John Labatt Ltd\(^{113}\) is also instructive insofar as the extent of compensable damages are concerned. The plaintiff became ill upon drinking a bottle of beer that contained chlorine. Damages were awarded for mental suffering incurred as a result of the pre-existing condition of hysteria.\(^{114}\) The court held that if one injures a person who suffers from hysteria, one must take the victim as found. If the injury is out of all proportion to the event, as long as it is genuine, then the victim is entitled to damages to the extent of the harm.\(^{115}\)

The case of Enge v. Trerise\(^{116}\) may be helpful to those who would claim that such use of tort law is going too far to protect or compensate the particularly peculiar. In Enge, a young girl with latent schizophrenic tendencies was left with a scar following an accident. As a consequence of the accident she became schizoid, withdrawn, depressed, delusional and pre-occupied with the scar.\(^{117}\) Despite the dissenting judges vehement concern for such “irrational,” “morbid,” “unreasonable”, and indirect damages, the majority indicated that such mental repercussions were indeed compensable.\(^{118}\) Thus, criticisms or concern casting racism-related mental illness as too remote, idiosyncratic, irrational or peculiar should not find jurisprudential support given the weight of precedent which would allow for non-racebased illness or vulnerabilities to legitimately found a basis for unforeseeable exacerbated damages in an action for negligence.

\(^{104}\) Fowler V. Harper et al., The law of torts § 20.3, 123 n.25 (Little, Brown 2d ed. 1986) (citing cases).

\(^{105}\) Schafer v. Hoffman, 831 P.2d 897, 900 (Colo. 1992) (stating, “the term “thin-skull,” or “eggshell skull,” is derived from illustrations appearing in English cases wherein a plaintiff with an ‘eggshell skull’ suffers death as a result of a defendant’s negligence where a normal person would only suffer a bump on the head.”).

\(^{106}\) Malcolm v. Broadhurst, supra note 73, at 511(husband’s negligence exacerbated wife’s pre-existing nervous depression).

\(^{107}\) Steinhauser v. Hertz Corp., 421 F.2d 1169, 1172 (2d Cir. 1970).


\(^{111}\) Pearlstein v. Scudder and German, 346 F. Supp. 443, 452 (S.D.N.Y 1972) rev’d 527 F.2d 1141 (2d Cir. 1975). The Second Circuit reversed the district court on the grounds that an earlier factual finding, had determined that the plaintiff’s “ill health did not affect his capacity ‘to understand and evaluate his business dealings ...’” Id. at 1145. The Court of Appeals, therefore, had no occasion to revisit the legal soundness of the district court’s application of the eggshell skull.

\(^{112}\) Although reversed on factual grounds, the reasoning by which the court equated the victim’s inability to “exercise the necessary volition” to lessen his damages with an eggshell skull remains instructive. Id. at 452.


\(^{114}\) Id. at 1009–1010.

\(^{115}\) Id. at 1022. See also Love v. Port of London Authority, (1959) 2 Lloyd’s Rep. 541 (where compensation was granted to a plaintiff with a “vulnerable personality” that flared up into an “hysterical neurosis”). See also Beiscak v. National Coal Board, (1965) 1 All. E.R. 895, 895–896.


\(^{117}\) Id. 532.

\(^{118}\) Id.
3. Part two—the nexus of critical psychology and outsider jurisprudence

There is thus during this calm period of successful colonization a regular and important mental pathology which is the direct product of oppression. Frantz Fanon.119

Recent research has indicated that the prevalence of mental disorders is estimated to be higher among Blacks than Whites, most likely due to the nexus of race and socioeconomic disparity.120 Blacks are under-represented in inpatient populations and more likely than Whites to use emergency rooms for mental health treatment.121 Studies confirm that Blacks drop out of mental health services at a significantly higher rate than Whites and use fewer treatment sessions for mental health issues.122 Furthermore, Blacks enter mental health treatment at a later, more advanced stage than Whites, under-consume community mental health services, are misdiagnosed more often than Whites, and are more often diagnosed with severe mental illnesses than Whites.123 People from diverse ethnic and racial backgrounds are often prevented from receiving adequate mental health treatment due to misdiagnoses and lack of access to necessary services. Factors contributing to disparate access include a general mistrust of medical health professionals, cultural barriers, co-occurring disorders, socioeconomic factors, and primary reliance on family and the religious community during times of distress.124

Unfortunately, the traditional institutions of racialized research largely ignore the disparate social and political exposures confronting people of color, such as residential and occupational segregation, racial profiling, tokenism,125 discrimination, racism, and the consequential physiological and psychological effects flowing from the macro and micro effects of such interactions.126 In the course of psychotherapy, it is noteworthy that some researchers have determined that Blacks report racial discrimination so frequently that depression, anxiety, or anger about racism is one of the most common problems presented by Blacks in their mental health treatment sessions.127 Despite these disparities, the nexus of race and gender is often underexplored.

Research indicates that women of color are more likely than men to experience co-occurring mental health, substance abuse and addiction disorders.128 Women from all ethnic and racial groups have served as the traditional center of families and are largely responsible for the emotional, physical, and spiritual well-being of its members.129 For Black women and other women of color, in particular, however, this has also included sharing or carrying the major responsibility for the economic viability of the family, coping with their own gendered and racialized life experiences, and moderating the impact of life stresses on other family members.130 Indeed, acceptance of this “strong woman”...
image, or the myth of the Black Superwoman, is an additional burden and stressor. Cultural norms dictating that Black women should be able to handle life’s challenges may prevent some Black women from seeking professional assistance for their problems. On the other hand, fulfilling strong traditional matriarchal roles may actually contribute to the resiliency, resourcefulness, and flexibility of many Black women in dealing with stressful situations.\textsuperscript{131}

Problematically when women of color experiencing mental health problems, substance abuse, addiction or co-occurring disorders do seek professional help, they often encounter inadequate or irrelevant treatment programs with little sensitivity to their specific gender, racial, socio-economic and cultural issues, such as childcare and family support issues.\textsuperscript{132} As such, effective psychotherapy for Black women explicitly requires cultural literacy and competence—empathy not sympathy. Cultural literacy and competence demands understanding the “collective social plight of Black women and the individual client in the context of the prevailing reality of race, gender, and sexual orientation bias and the interpersonal and institutional barriers that result from that bias.”\textsuperscript{133} Additionally, mental health programs need to be adjusted to provide services that support a woman’s ability to recover successfully \textit{within her community}, such as appropriate job skills training, transportation, child-care and affordable housing.\textsuperscript{134}

Cultural and racial background plays a significant role in the manner in which symptoms of mental illness, substance abuse and addiction manifest, are reported and interpreted. Consequently, this implicates any contingent treatment.\textsuperscript{135} Racialized women have less access to routine medical care, where early diagnosis and intervention are more likely.\textsuperscript{136} As such, the mental health, substance abuse and addiction problems of racialized women are often more developed and complicated by the time they present for treatment.\textsuperscript{137} Further, their social supports and coping mechanisms are more depleted by the time they do attempt to access mental health treatment.\textsuperscript{138} Therefore racial and ethnic identity and cultural sensitivity issues are complex and cannot be isolated from other societal systemic factors that may either draw a woman of color into treatment, or cause her to leave treatment all together.\textsuperscript{139}

3.1. Depression in Black communities

The overriding experience of the Black American has been grief and sorrow and no man can change that fact. His grief has been realistic and appropriate. What people have so earned a period of mourning? William H. Grier and Price M. Cobbs.\textsuperscript{140}

While it is not uncommon in Black communities to joke about heightened levels of anxiety and paranoia as normal consequences of knowing the all-pervasive power of “the Man,”\textsuperscript{141} and to be reasonably suspicious, given the hideous experiments\textsuperscript{142} which have been performed on Black people, an admission of depression is somehow seen as...
contradictory to what people in many Black communities regard as normal. Socioeconomic factors that contribute to misdiagnosis and inadequate care include limited access to medical care, and a mistrust of medical health professionals, based in part on historically higher-than-average institutionalization for members of minority groups with mental illness. Furthermore, Black communities often prescribe hearty stoicism when dealing with outsiders—it is important to be a rock in the presence of Whites. The below extracted narrative of a Black female journalist explores the tension implicit in the battle many Black women face when they attempt to come to terms with difficulties in their lives and the consequent mental health implications.

Depression struck me as being real but ridiculous. To be Black is to inherit conditions that are well beyond depressing—I couldn’t imagine recalling incidents of racism and then confessing, “Doc, I’ve got this little self-esteem problem, can you help?” There’s little documented evidence of such psychic quandaries but plenty of concurrence. … We kind of accept that depression is a part of our reality and accept that we have to deal with it the best way we can.” (emphasis added).

Approximately 12 million women in the United States experience clinical depression each year. One in every eight women can expect to develop clinical depression during their lifetime—twice the rate for men. Depression occurs most frequently in women aged 25 to 44, prime child-bearing years, and is misdiagnosed roughly 30% to 50% of the time. Research shows that between one-third to one half of depressed people also suffer from some form of substance abuse and addiction or dependence. Further, women who are depressed are more likely to become alcoholics than their male counterparts.

Biological factors, such as the developmental, reproductive, hormonal and genetic characteristics of women, may contribute to these disparate statistics. Gendered social factors may also lead to higher rates of clinical depression among women, including stress from work, family responsibilities, the roles and expectations of women and increased rates of sexual abuse and poverty.

Furthermore there is evidence which suggests that women and minorities are most likely to be depressed, or have Post Traumatic Stress Disorder (PTSD). Depression, in particular, has often been misdiagnosed and under-diagnosed in communities of color. Approximately 63% of African-Americans believe that depression is a “personal weakness” and only 31% of African-Americans said they believed depression is a “health” problem. Furthermore, close to 30% of African-Americans said they would “handle it” themselves if they were depressed, while close to 20% said they would seek help for depression from friends and family. There is significant belief amongst Blacks that prayer and faith alone will successfully treat depression “almost all of the time” or “some of the time.”

145 Id.
146 Coridan and O’Donnell, supra note 119, at 2.
147 Id.
148 Id.
149 Id.
150 McGrath et al., Women and depression: Risks factors and treatment issues 93 (American Psychological Association 1995).
152 Id.
154 National Mental Health Association, Clinical depression and Africans (2000) available at www.mcmha.org/facts/depression_and_african_americans.pdf (last visited May 25, 2005) (only one in four African-Americans recognize that a change in eating habits and sleeping patterns are a sign of depression; only 16% recognize irritability as a sign. Only one-third of African-Americans said they would take medication for depression, if prescribed by a doctor, compared to 69% of the general population). [hereinafter Clinical depression and African Americans].
155 Id.
156 Id.
157 Id.
Additionally, many racialized people suffering from depression “mask” depressive symptoms with other medical conditions, somatic complaints, substance abuse, addiction and other psychiatric illnesses. These facts partially explain why depression has been on the rise amongst Blacks. Even the National Mental Health Association admits that depression has often been under-diagnosed or misdiagnosed in the African American community.

There are several reasons for this under-diagnosis, including the aforementioned mistrust of medical health professionals. Similarly, cultural barriers exist which are influenced by language, socio-economic status, and values in the relationship between the doctor and the patient. Moreover, institutional racism continues to produce prejudice and discrimination even among those who are well trained, educated and well-intentioned. Not surprisingly, these biases permeate many health care systems and the disciplines involved with the delivery of social services—it would be ridiculous to expect that health care professionals are exempt from prejudice.

3.2. Stress in Black communities

The inequity inducing constructs of racialized and gendered power are capable of driving even the kindest most tender-hearted person into a blizzard of rage or self-destructive behavior, including depression. Equally compelling is the ability of racialized offenses to strip a person of her sense of self and self-esteem with resultant potential of a downward spiral into depression, substance abuse or other destructive behaviors. The health effects of such ongoing abuses of Black children and those less educated, less self-actualized or less protected is in need of serious consideration. The situation confronting members of Black communities who are less able to appropriately channel the resultant injury from such offenses, or those who lack substantial coping mechanisms, is dire and presents a compelling reason to recognize the trauma from racialized abuse as relevant to the Eggshell and Thin-skull rules.

Take the example of the ten-year old Black girl now in need of mental health treatment following the racialized forms of violence directed at her family by a White neighbor in St. Louis, Missouri. Without constructive outlets to diffuse the negative and damaging stimulus generated by such unilateral racialized encounters, many people of color simply internalize these injustices. Indeed, Blacks and other people of color are

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159 Clinical depression and African Americans, supra note 153. Even the National Mental Health Association admits that depression has often been under-diagnosed or misdiagnosed in the African American community.

160 Id.

156 This is based, in part, on historically higher-than-average institutionalization for African-Americans with mental illness. Coridan and O’Donnell, supra note 119, at 2.

162 Id.


164 Spirit murdering, supra note 11, at 128.

165 The FBI were called in to investigate the behavior of Keith Allen Dagenais of North St. Louis County, as a hate crime against his Black neighbors, the McIntosh family. While wearing a black skull cap and a black turtleneck Mr. Dagenais constructed a wooden cross, placed it on the driveway and poured a liquid over the cross. Mr. Dagenais said he is a practitioner of Wicca, a belief whose adherents practice a form of witchcraft. “I put up a cross. I was sitting out there in black trying to scare them,” he said. “I didn’t dress in a white cloak like the Ku Klux Klan.” While there were intervening events leading to what police generously described as “two families that have a dispute and apparently don’t get along,” matters escalated again when police charged Dagenais with disturbing the peace after Ms. McIntosh said that he had followed her as she drove from the house and complained that he had been videotaping her. Subsequently the father of the ten-year old McIntosh girl saw what he believed was a black-faced doll, hanging by the neck in a porch window of Mr. Dagenais’ house which faced the McIntosh home. Additionally, a crucifix had been applied to the window with tape, and the garage door was painted with the number “666,” a biblical reference to the devil. Mr. Dagenais said the doll was actually a black cat figure dressed in a brown dress. See Racism or witchcraft available at www.stltoday.com/stltoday/news/stories.nsf/News/AC08973A3B18683986256CBB001A87FD?OpenDocument (last visited April 21, 2005).
often conditioned from childhood to see themselves negatively, to see only what others who despise them see, or to accept that one’s life is preordained to be unjustly difficult. This burden of being conceptualized and othered as “a problem” is recognized, if not accepted as a given, by many Blacks in America. This issue caused W.E.B. DuBois to ruminate, “How does it feel to be a problem?” He replied, “... being a problem is a strange experience.”

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Accordingly, the psychical experience of racism, which is not addressed and constructively coped with, is typically discharged in one of two ways, either inwardly in the form of self-destructive behaviors, or outwardly in the form of other-directed destruction. When an individual directs their destructive behavior inwards, they are self-abusing thereby rendering themselves even more vulnerable. This creates a spiral of enhanced vulnerability. Racial abuse, whether explicit isolated incidents, ongoing cumulative humiliations, or structural impediments, “weathers” even the most resilient victim.

Professor Patricia Williams conceptualizes racism as a crime, as “an offense so deeply painful and assaultive as to constitute something she calls ‘spirit-murder’.” She further notes that, “[s]ociety is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same.” Further extrapolation allows for the recognition of racism as systemic and individual invidious abuse. The psychic violence of racism creates a nexus between racism, as abuse, and other forms of violence such as child or domestic abuse. Hence, racism is properly analogized to other types of abuse as both involve a massive external intrusion into the psyche by the imposition of dominating powers—this keeps the self from ever fully seeing and appreciating itself. Simply put, racism is violence and its effects are similar to those experienced by victims of other forms of abuse. Acknowledging racism as a cultural cancer, with spiritual and genocidal consequences, recognizes the pathological implications of this violent disease. Like any disease, the cultural scourge of racism has physical and psychological consequences which render victims vulnerable. Pursuant to the Thin-skull and Eggshell rules, if a tort exacerbates injury by triggering the underlying vulnerability or condition of the victim—whatever the source—the tortfeasor is responsible for the full extent of the injury.

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166 Spirit murdering, supra note 11 at 128, 141. See generally Kenneth Clark, Dark Ghetto (Harper and Row 1st ed. 1965); Kenneth Clark, Prejudice and your child (Beacon Press, 1955); J. Comer and A. Poussaint, Black child care (Simon and Schuster 1975); Grier, supra note 139.
168 Id.
169 See Jean T. Griffin, Racism and humiliation in the African community, 149 J. Primary Prevention 150, 160 (1991). See bell hooks, Killing rage: Ending racism 163 (1995) (discussing Black on Black violence as abuse and frustration that cannot be directed against White America without serious consequences). For information about self-destructive behaviors in Black communities, see Alton R. Kirk, Destructive behaviors among members of the Black community with a special focus on males: Causes and methods of intervention, 14 J. Multicultural Counseling and Dev. 3, 4 (1986), which contends that stress is significantly related to the degree and amount of power perceived by an individual within the societal context and that, consequently, Blacks experience a great deal of stress.
170 See generally Ellis Cose, The rage of a privileged class (1993); see also Joe R. Feagin and Melvin P. Sikes, Living with racism: The Black middle-class experience 12–17 (1994).
172 Spirit murdering, supra note 11, at 129.
173 Id. at 129.
174 Id. at 142.
175 Id. at 155.
The disease of racism produces depression, stress and disease.\textsuperscript{176} In addition to increasing levels of depression, the critical psychology reveals that Blacks have significantly higher distress levels than similarly situated Whites.\textsuperscript{177} Stress has been defined as “environmental demands that tax or exceed the adaptive capacity of an organism, resulting in biological and psychological changes that may be detrimental and place the organism at risk for disease.”\textsuperscript{178} Stressful life events have been characterized as “those situations that are tension producing and could adversely affect an individual’s mental health,” while distress is the state that occurs when the individual is unable to cope effectively with the stress.\textsuperscript{179}

Although systems of racial caste have a significant effect on individuals, the hierarchy of race also has profound implications for communities—specifically, there are systematic effects on communities of color. Perceived wrongs inflicted on persons of color are communicated from one individual to another within “the community”—word spreads quickly through communities of color as the effect of negative ascriptions germinate like a plague.\textsuperscript{180} This sense of contamination is real. The bodies politic and corporeal of Black communities absorb, and must contend with, the disease of racism.\textsuperscript{181}

Admittedly, egregious instances of individualized racial violence have declined from the rampant violence of slavery and the Jim Crow era. This should not, however, be the benchmark from which we applaud our society as equitable, fair and benevolent to all. Indeed, to do so is to set our standards far too low. The politically correct willingness to say “the ‘N’ word”, instead of the actual racial slur, betrays the fact that racial epithets are still bandied about with sufficient frequency to justify study.\textsuperscript{182} Racial slurs and assaults objectify people—they are a form of violence that taps into historical terror to inflict wounds.\textsuperscript{183} Professor Patricia Williams keenly observes that, “the attempts to construct bias as distinct from violence have been this society’s most enduring and fatal rationalization, for prejudice does hurt and has lasting consequences.”\textsuperscript{184}

The effects of racial deprivation and racial privilege are transmitted within families across generations—intergenerational trauma often runs counter to intergenerational health and wealth. Racism objectivizes and obliterates, just as an absence of prejudice nurtures.\textsuperscript{185} The particularly heinous reality for racialized children saps them too early

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\textsuperscript{176} See generally Handbook of racial and ethnic minority psychology (Guillermo Bernal et al. eds., 2002).
\textsuperscript{177} Ronald C. Kessler and Harold W. Neighbors, A New perspective on the relationships among race, social class, and psychological distress, 27 The J. of Health and Social Behavior. 107 (1986). For literature detailing increased levels of depression, anxiety and somatic illness due to racism, see James H. Carter, Racism’s impact on mental health, 86 J. Nat’l Med. Ass’n 543 (1994); Patricia J. Falk, Novel theories of criminal defense based upon the toxicity of the social environment: Urban psychosis, television intoxication, and Black rage, 74 N.C. L. R ev. 731, 774 (1996) (stating that the majority of social scientists agree that Black individuals’ mental and physical health suffer negative effects as a result of racism) citing Chester M. Pierce, Psychiatric problems of the Black minority, in American handbook of psychiatry 512 (Silvano Arieti ed., 2d ed. 1974); Cultural and historical perspectives in counseling Blacks, in Counseling the culturally different: Theory and practice 141, 146 (Derald Wing Sue ed., 1981) (stating that it was historically reported that “[b]lacks suffered from a high rate of schizophrenia, a claim that is still made today because of this group’s precarious racial position in the United States”); Eugene Cash, Jr., Extra-dimensional systemic frustrations that endanger the mental health of Black people, in Key mental health issues in the Black community 2 (Eugene Cash, Jr. et al. eds., 1976), cited in Mark J. Wolff, Article: Sex, race, and age: Double discrimination in torts and taxes, 78 Wash. U. L.Q. 1341, 1455–56 n.737–39 (2000).
\textsuperscript{179} Essentially, stress is now recognized as “harms, threats, and challenges, the quality and intensity of which depend on personal agendas, resources and vulnerabilities of the person, and environmental conditions.” Richard S. Lazarus, Puzzles in the study of daily hassles, 7 J. Behav. Med. 375, 375 (1984).
\textsuperscript{180} See West, supra note 1, at 9.
\textsuperscript{181} See West, supra note 1, at 9.
\textsuperscript{182} The prevalence of racial slurs is revealed by the incidence of such words triggering litigation. A simple Lexis search of the term “Black bitch” received 211 hits, “nigger” received in excess of 3,000 hits, “cunt” received 336 hits, “squaw” received 594 hits, “spic” received 261 hits, “chink” received 279 hits, “kike” received 91, “gook” received 115 hits, “coon” received in excess of 3000 hits, “porch monkey” received 27 hits, “jigaboo” received 9 hits, “fagot” received 550 hits, “fag” received 588 hits, “slut” received 676, “nip” received 833 hits, “wetback” received 189 hits, and “mooley” received 26 hits (Lexis search Dec. 7, 2003) (on file with author) citing Nelson, supra note 4, at 77. See Randall Kennedy, Nigger: The strange career of a troublesome word (Pantheon Books, 2002).
\textsuperscript{183} See Richard Delgado, Words that wound: A tort action for racial insults, epithets, and name-calling, 17 Harv. C.R.-C.L.L. Rev. 133, 145 (1982).
\textsuperscript{184} Spirit murdering, supra, note 11, at 138, 140.
\textsuperscript{185} Id 140.
\end{footnotesize}
of their innocence. Specifically, racialized children experience the cumulative effects of macro and micro-level discrimination before they are in a position to fit the racialized interaction into any category of easily cognizable harm. Racial abuse in such a context is child abuse. It has lasting psychological effects and should not be underestimated. Concomitantly, children born into Whiteness experience the cumulative effects of racial privilege, often in ways they are not even in a position to appreciate.

Racial inequities in psychological distress are particularly pronounced among people with low income levels. Indeed, poverty and economic disadvantage are recognized as risk factors to both mental illness and substance abuse and addiction. Socio-economic disparities are catalysts for and exacerbate mental, and consequently physical, health vulnerabilities. “Poverty, overcrowding, illiteracy, unemployment, the breakdown of two-parent families, and environmental stressors” associated with micro and macro racialized abuses are causative factors for substance abuse and addiction in communities of color.

Such stressful living conditions are mentally and physically harmful. Racialized threats and challenges, the quality and intensity of which depend upon the victim’s personal characteristics, resources and vulnerabilities, impact persons of color in disparate ways. The assessment of racialized abuses as stressful implies a knowing person who construes or appraises the significance of what is happening for his or her well-being. Accordingly, critical psychology recognizes that a more subjective approach to the assessment of stress is required. This evaluation shifts the paradigm to respect the subjective cognitive activity evaluating the personal significance of racialized and gendered exchanges—it examines the specific variables of person and environment that actually influence the appraisal process. It is not for an outsider to externally assess what is or is not real or distressing for a victim of abuse. It is important, therefore, that women of color be given the autonomy to subjectively assign the personal significance which best captures their assessment of racialized and gendered abuses.

A notion of “socially-induced stress,” which appreciates the effects of racism and sexism as precipitating factors in chronic diseases, is gaining acceptance among a wide spectrum of health care providers. The research relating to the intersection of socio-economic status and race as a complicating confluence impacting stress is equally important to people of color, as, in America, the face of poverty is disparately Black and Brown. Indeed, the intersection of poverty and race is a large racialized space in which “despair and dread […] flood the streets of [B]lack America.” Dr. Cornel West keenly acknowledges the nexus in America between race, poverty, alienation and mental health consequences. Such work focuses on the evidence of disparate treatment and impact within Black communities—these statistics highlight an America which, despite rhetoric to the contrary, marginalizes a racialized underclass.

To talk about the depressing statistics of unemployment, infant mortality, incarceration, teenage pregnancy, and violent crime is one thing. But to face up to the monumental eclipse of hope, the unprecedented collapse of

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188 Coridan and O’Donnell, supra note 119, at 2.
189 For instance, the poverty rates for Latino/a families and Latino/a children remain disproportionately high producing disparate health consequences. See C. Soles, Substance abuse : A real situation that places the Hispanic community at risk for HIV infection and other diseases (factsheet), (National Council of LaRaza 2000).
190 Coridan and O’Donnell, supra note 119, at 2.
191 Lazarus, supra note 178, at 375.
192 Id., at 375.
196 West, supra note 1, at 19.
meaning, the incredible disregard for human (especially [B]lack) life and property in much of [B]lack America is something else.197

While Professor West acknowledges that in the Unites States those most affected by the additive or interactive nature of race and poverty are Black people, he does not address the gendered impact of this dynamic. It is true that a sizable minority of Black women have experienced upward social mobility by gaining entry into historically segregated spaces. At the same time, however, a significant percentage of Black women remain disproportionately “glued to the bottom of the bag.”198 According to various social indicators, Black women and their children “remain disproportionately poor, homeless, sick, undereducated, unemployed, and discouraged,” leading some social scientist to posit that Black women in the United States are part of a growing, seemingly permanent urban “underclass.”199

The mythology surrounding this gendered, racialized and classed segment of American society is distressing. It has generative propaganda-like capabilities as, “[t]he fact that 90% of women on welfare have only two children, and that most welfare recipients are White, means nothing to those who indulge in their masturbatory mulling about [B]lack welfare queens who purportedly reproduce like rabbits.”200 The manufacturing of such ignorance highlights the fact that the politics of single-parenthood is not only gendered, but is racialized.201 Single mothers, especially Black and/or poor single mothers, who bear a great responsibility and burden for raising our children, are demonised.202 This stigma and marginalization is stress inducing. Additionally, the continuing ghettoization of women in the workplace, the disparity between women’s and men’s salaries, and the direct links between these inequalities and the fact that women fall below the poverty line in greater numbers than men surely yield mental health consequences.203

In 1956, Hans Selye proposed the notion that exposure to stress may have damaging effects on physical health. According to Selye, individuals who experience “general adaptation syndrome” (GAS) respond to stress with “nonspecific physiological responses” that, cumulatively, produce wear and tear on the system.204 Selye argued that repeated cycling through the stress response would eventually result in damage to the organism.

More recently, McEwen and Stellar coined the term “allostasis” to refer to the normal fluctuations of certain body systems that maintain stability and “provide protection to the body by responding to internal and external stress.”205 Common allostatic responses include the activation of the sympathetic nervous system and hypothalamic–pituitary–adrenal (HPA) axis with the resulting release of stress hormones.206 Over time, this stress exposure results in an increase in allostatic load, indicating the physiological costs of overtaxing these bodily systems—wear and tear on the system results.

According to McEwen and Stellar, allostatic load is increased under four conditions: (a) frequent exposure to stress, which promotes repeated exposure to stress hormones; (b) inadequate habituation to stressful experiences, which also results in prolonged exposure to stress hormones; (c) inability to recover from stress, in which physiological arousal and reactivity continue even after the stressor has been removed or terminated; and (d) system fatigue or dysfunction, which “triggers pathological compensatory responses in other systems.”207 Thus, no matter its genesis, stress takes its
toll on the mind and body. Stress has a cumulative negative impact for those facing greater exposure, including racialized and sexist situations that are stress-inducing.

In addition to the mental health implications of being part of this raced and gendered underclass, the physical health of Black women is also negatively impacted in several areas including, but not limited to, disparities in breast cancer diagnosis, treatment, and survival.\textsuperscript{208} The relevance of the intersection of race, gender and class is evident, as cancer specialists believe that, “while biological differences could be a contributing factor, [the] lack of access to health care is the largest factor behind the increased mortality rates for African Americans, Native Americans, and Hispanics.”\textsuperscript{209} To be a poor Black woman is a (melo)drama into itself—one that has been recognized as implicating physical, mental and spiritual health.\textsuperscript{210} That health care professionals are beginning to recognize this disparate reality belies its frequency.

Poor patients’ ailments are made worse by delays in getting care, and they show up at doctors’ offices with more of what one physician called “sociomas,” social problems that range from not having a ride to the doctor’s office, to drug addiction, to homelessness, to the despair that accompanies miserable life circumstances.\textsuperscript{211}

This matter cannot be overstated. It seems there is a reluctance to engage the reality which many Black people, Black women in particular, face. It is often women in all communities, who are the carriers of culture and, so too, the carriers of hope. Accordingly, the present sense of despair that afflicts many poor Black women is particularly disconcerting given their essential and important role in child-rearing and the maintenance of Black communities.

When the interactive effect of gender, race and class is taken into consideration, the data reveal that race has a substantial effect on psychological functioning among people in the lower SES classes.\textsuperscript{212} These results are consistent with the view that racial discrimination exacerbates the health-damaging effects of poverty among persons of color.\textsuperscript{213} Specifically, critical psychology reveals that the interactive effects of race and class contribute to disparate levels of distress for Blacks at low levels of income—this is entirely consistent with critical race theorists’ scholarship on intersectionality.\textsuperscript{214} Hence, for Blacks in America, the intersection of race and class produces an experience of oppression that is greater than the sum of the parts. Throw gender into this equation and the particular subjugation necessitates an understanding of the complex interplay between competing and complementary systems of oppression.\textsuperscript{215} Accordingly, outsider jurisprudence and critical psychology are consistent in recognizing the cumulatively interactive effects of poverty, racism and sexism.

\textsuperscript{208} See American Cancer Society News Center, Race and ethnicity affect breast cancer outcome, available at \url{www.cancer.org/docroot/NWS/content/NWS_1_1x_Race_And_Ethnicity_Affect_Breast_Cancer_Outcome.asp} (last visited April 21, 2005).

\textsuperscript{209} Id. (last visited April 21, 2005) (According to Christopher Li, MD, PhD, at the Fred Hutchinson Cancer Research Center in Seattle, “There is reason to believe that there would be differences in breast cancer outcomes based on diverse cultural practices, dietary habits, and possibly genetics. But, socioeconomic factors are likely to play the most important role.”).

\textsuperscript{210} Coridan and O’Donnell, supra note 119, at 2.

\textsuperscript{211} Abraham, supra note 135, at 4.

\textsuperscript{212} Handbook of racial and ethnic minority psychology, supra note 175, at 179–234, 378–389.

\textsuperscript{213} Coridan and O’Donnell, supra note 119, at 2.

\textsuperscript{214} Professor Kimberle Crenshaw states that “because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.” Kimberle Crenshaw, Demarginalizing the intersection of race and facts: A Black feminist’s critique of anti-discrimination doctrine, feminist theory and anti-racist politics, 1989 U. Chi. Legal F. 139, 140. Kimberlé Crenshaw, Mapping the margins: Intersectionality, identity politics, and violence against women of color, 43 Stan. L. Rev. 1241, 1242 (1991) (“Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.”).

It is also possible that the joint effects of poverty and discrimination have synergistic effects—specifically that financial success functions to shield Blacks from the more distressing aspects of discrimination.\textsuperscript{216} Thus the effects of racism are most pronounced the lower the SES. Alternatively, race differences in distress could be most pronounced at high levels of social class, because financially successful persons of color might experience the psychological stresses associated with this marginal position. Evidence consistent with this later possibility was reported in a treatment study\textsuperscript{217} and has been addressed in a number of scholarly works including “Living with racism: The Black middle class experience”,\textsuperscript{218} “The rage of the privileged class,”\textsuperscript{219} “The many costs of racism”,\textsuperscript{220} and “Two nations: Black and White, separated, hostile, unequal.”\textsuperscript{221}

Accordingly, intersectionality operates on many levels. Sexism, racism, class exploitation, and other forms of inequality and domination reinforce each other and manifest in ways that might be subtle but which remain pervasive. Recognition of the ways in which abuses against Black and Latina women, in particular, are manifestations of inequalities based on gender, race, and class would improve the capacity of the legal system to address these issues and possibly provide recovery for injuries flowing from, or exacerbated by, such abuse.\textsuperscript{222} Although empirical evidence shows that on some indicators, such as educational and occupational status, conditions for Black women are improving, on many other indicators, such as poverty, disparate conditions remain or have deteriorated.\textsuperscript{223}

For instance, Black women have long suffered from the dual disadvantage caused by the intersection of race and gender, especially in the labor force. In the post-slavery era, Black women in the United States were largely agricultural laborers.\textsuperscript{224} Thereafter, Black women in the United States worked primarily in domestic service and more recently have become concentrated in low-level service and clerical jobs.\textsuperscript{225} With the decline of sex segregation in the professional labor market, there are presently more women of all colors who are physicians, dentist, lawyers, accountants and managers.\textsuperscript{226}

Upon looking below the surface, however, there exists embedded racial disparity within the social structures. For instance, instead of being evenly split between the private and public sector, the majority of professional and managerial Black women are employed in the public sector as teachers, librarians, social workers and other positions that are primarily dependent upon, and hence vulnerable to, government funding.\textsuperscript{227} The clustering of Black professional women in the public sector reveals the pervasiveness of systemic gendered racism—a racism that reinforces structural barriers for all women of color.

Furthermore, a pervasive spectre of violence threatens Black women in almost every sphere of society.\textsuperscript{228} Black women experience racialized violence collectively through large institutions and social systems (such as the criminal

\textsuperscript{216} David R. Williams et al., Racial differences in physical and mental health: Socioeconomic status, stress and discrimination, 2 J. Health Psychol. 335, 341–42 (1997) (“The interplay of race, socio-economic status, stress and disease is hypothesized to result in cumulative bio-behavioral vulnerability over the life span... [which] accounts, at least in part, for the cross-generational persistence of the health disparities that is documented in the epidemiological literature.”) [hereinafter Racial differences in physical and mental health].

\textsuperscript{217} Kessler and Neighbors, supra note 176, at 108. It might be that the pronounced distress among lower-class Blacks as compared to that of lower-class Whites is due to the greater proportion of Blacks than Whites with thwarted mobility aspirations. It has been found that high distress among lower-class Blacks was associated with high goal-striving stress. Other explanations are possible. For example, the joint effects of poverty and discrimination might have synergistic effects that explain the comparatively high distress scores of lower-class Blacks, or certain resources for coping with stress might be less readily available to lower-class Blacks than to lower-class whites. See Kessler and Neighbors, supra note 176, at 113.

\textsuperscript{218} Joe R. Feagin and Melvin P. Skies, Living with racism: The Black middle-class experience (Beacon Press 1994).

\textsuperscript{219} Cose, supra note 169.


\textsuperscript{221} Andrew Hacker, Two nations: Black and White, separate, hostile, unequal (Ballentine 1995).

\textsuperscript{222} Manning Marable, Black liberation in conservative America 57 (South End Press 1997).


\textsuperscript{224} Id. at 15.

\textsuperscript{225} Id. at 15.

\textsuperscript{226} Id. at 119.

\textsuperscript{227} Id. at 122.

justice system, prisons and social organizations), within the economy, as well as individually at work, on the street, and in the home.\textsuperscript{[229]} Wherever it occurs, what creates a context for the violence is the “deafening silence”\textsuperscript{[230,231]} that meets the call for recognition, change or compensation for this racialized and gendered underclass. For instance, crimes against Black women are not taken as seriously inside and outside of Black communities. Black communities are implicated in this patriarchal pattern due, in part, to the general failure of Black men in particular, to seriously challenge sexism and heteronormativity within Black communities and to end patterns of violence.\textsuperscript{[232]}

3.3. Daily hassles

Models of stress assessment which focus upon environmental inputs and outputs have been criticized as overemphasizing change and failing to consider the individual significance of events.\textsuperscript{[233]} Such models often minimize underplay individual coping resources and liabilities.\textsuperscript{[234]} Critical psychology recognizes these limitations and instead focuses on the \textit{subjectivized psychological situation} — the environment as perceived and reacted to by an individual, as opposed to the supposed objective environment.\textsuperscript{[235]}

Utilizing the language of the law, the focus on individual psychological situation shifts the evaluative process from an universalized objective assessment to a subjective appreciation of a person’s position. Accordingly, critical psychology emphasizes subjective appraisals of stress and coping, focusing upon stress as an inharmonious fit between the person and the environment. Such a disconnect creates a situation in which a person’s resources are taxed or exceeded, forcing the person to struggle to cope. Critical psychology is, therefore, capable of incorporating the internal self-appraisals of stress as assessed by racialized and gendered persons victimized by macro and micro aggression — indeed the cumulative affect of such aggression might also be duly considered. Hence, a \textit{racialized psychological situation} might appropriately be infused into relevant legal doctrine including the Eggshell personality analysis.

Daily Hassles are a subset of socially induced or exacerbated stress.\textsuperscript{[236]} They are an example of stressful occurrences that consume the resources of people struggling to cope. The Hassles Scale was developed by psychologists to assess the reality of relatively minor psychological difficulties encountered in everyday life as sensed by an individual, as opposed to the creation of supposedly objective stimulus and response categories.\textsuperscript{[237]} The scale includes a mixture of items including (1) spontaneous environmental events, such as an inconsiderate smoker or unexpected houseguests, (2) chronic environmental conditions, such as rising prices, neighborhood deterioration, increasing crime, or downward property values, (3) continuous worries, such as troubling thoughts about one’s future or job dissatisfaction, and (4) distressed emotional reactions, such as loneliness and fearing rejection.\textsuperscript{[238]}

As such, daily hassles are experiences and conditions of daily living that have been subjectively appraised as salient, harmful or threatening to a person’s well-being.\textsuperscript{[239]} This scale emphasizes the individual or personalized assessment of an experienced situation. In such a case, a racialized incident is ascribed the meaning the individual victim subjectively believes most appropriate — the incident may be remembered as salient and viewed as distressing given their personal character and constitution.

The possibilities of the Hassles Scale are particularly relevant to racialized persons as there is a tendency, by the majority, to dismiss micro-aggressions as innocuous, aberrant or inconsequential. Outsider jurisprudence reveals, however, that seemingly trivial racialized incidents viewed in isolation, such as micro-aggressions and “indignities du jour, gather into a spirit-numbing thud of racial domination.”\textsuperscript{[240]} There is a cumulative impact to such racialized encounters as well. The old adage of “once bitten, twice shy” translates into a situation in which racial domination is

\begin{thebibliography}{99}
\bibitem{229} Marable, supra note 221, at 55.
\bibitem{230} Id. at 55.
\bibitem{231} Id. at 62–97.
\bibitem{232} Id.
\bibitem{233} Id.
\bibitem{234} Id.
\bibitem{235} Id
\bibitem{236} Lazarus, supra note 178, at 376–377.
\bibitem{237} Id.
\bibitem{238} Id.
\bibitem{239} Id.
\bibitem{240} Patricia J. Williams, Notes from a small world, The New Yorker, Apr. 29 and May 6, 1996, at 87, 92. [hereinafter Notes from a small world].
\end{thebibliography}
concretized by personal encounters denying subordinated groups full citizenship thereby refusing the respect necessary for the flourishing of voice.\textsuperscript{241} Outsider scholarship is insightful in illuminating how ostensibly unconnected instances of racial abuse translate into systemic racial dominance so as to create highly stressful racialized encounters from seemingly innocuous, interactions.

One example of such a transaction is [Professor] Williams’s story about trying to buy a sweater for her mother, only to find herself shut out of a Benetton store by a callow clerk and a buzzer system seemingly designed to maintain the “comfort level” of [W]hite patrons.\textsuperscript{242} In a later piece, [Professor] Williams describes the weary resignation of a Harvard Law School classmate repeatedly mistaken for a baby-sitter when she picked up her child from school in an affluent neighborhood. African-Americans also receive racial slights from [W]hite professionals, as demonstrated by Peggy Davis’s story, set in a courthouse elevator, of a city attorney’s contempt for a [B]lack woman on the fifth floor who had the temerity to ask if the elevator was going down.\textsuperscript{243}

The cumulative impact of such racialized incidents is consistent with the particular vulnerability of a plaintiff with an Eggshell personality. The racialized victim, however “abnormal” to the tortfeasor, may ascribe heightened threats, injury and stress to the behavior of the defendant. As hassles are heavily weighted by appraisals of the significance of events, based in large part on individual patterns of beliefs, values, and commitments, critical psychology is informative and allows for subjectivization to the racialized psychological situation of the victim. When subjects endorse a hassle they are indicating not only what happened, but also how they appraised and experienced it—this reflects its immediate or long-range significance for their well-being.\textsuperscript{244} Such critical reflection endorses the idea that a victim of abuse is capable of assessing whether he or she was “hassled” sufficiently to find the experience both negative and salient.

It will not always be the case that every incident, racialized or not, is assessed as a hassle, rather what makes hassles harmful or threatening is that they involve demands that tax or exceed the person’s resources.\textsuperscript{245} This is consistent with the Eggshell doctrine insofar as there must be a particular vulnerability that exacerbates the extent of harm. Such vulnerability might well depend on the individuals resources, support systems, coping strategies and other factors adding to heightened resilience, or lack thereof. For instance, relationships demonstrated between hassles, uplifts and health-related variables include morale, psychological symptoms, and somatic health—these factors, therefore, interact to impact the resilience of the victim to gendered or racialized abuses.\textsuperscript{246}

The frequency and intensity of hassles are also capable of explaining psychological and somatic health better than life events.\textsuperscript{247} “The more a particular hassle has influence beyond the brief encounter, entering into much of the life space, pervading thought and generating emotion, mobilizing sustained coping, and touching on long-range values, goals, and commitments, the greater the impact on health and the greater the likelihood of negative physical and mental health consequences.”\textsuperscript{248}

Alternatively, “the presence of a major, pervasive, and intrusive hassle might even increase in a nonadditive way, multiplying the capacity of other hassles to mobilize or disturb.”\textsuperscript{249} In such a context, other life events become more upsetting and stressful. The ability to cope is diminished as energies better spent elsewhere are consumed in the struggle to cope with racialized or gendered infringements and abuses. With a preponderance of such discriminatory exposures, the cumulative impact of ongoing hassles renders every arguably discriminatory encounter suspect, and each hassle is elevated in its influence.\textsuperscript{250} Of course, there is a tendency for some hassles, which are more central to

\textsuperscript{241} Margulies, supra note 6, at 1140.
\textsuperscript{242} See Williams, supra note 5, at 44–51.
\textsuperscript{243} Margulies, supra note 6, at 1141. See Davis, supra note 98, at 1561. The attorney’s comment is, “You see? They can’t even tell up from down. I’m sorry, but it’s true.” Id.
\textsuperscript{244} Well-being is loosely defined as a harmonious fit between the person and his or her environment. Lazarus, supra note 178, at 376.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Lazarus, supra note 178, at 380.
\textsuperscript{250} Id. at 380–381.
individual personal agendas, to change the overall pattern and dynamics of stress thereby affecting physical health as well as mental well-being. Therefore, the recent interest in the disparate health statistics for Blacks in America is a well-founded subject in need of significant analysis.  

There is ample empirical evidence indicating that differences in access to quality medical treatment partly explains the existence of higher rates of death for Blacks from nearly all diseases. Even when diseases are diagnosed, Blacks fare worse than Whites in obtaining the aggressive treatment modalities which may be required. Instead, there is a racial profiling that has been recognized in research and the clinical decision-making that takes place either on an in-patient or outpatient basis. In this regard, Professor Bowser states:

[R]acialized research is maintained and perpetuated because many researchers cannot imagine plausible, alternative non-biological explanations for the inferior health status of Blacks. A host of deleterious conditions accompany Black status in the United States, including differential exposure to environmental toxins, community-level and individual stressors, and differential political power, both in terms of individual level of control and the allocation of societal resources. It is now well established that physiological processes respond to psychological stress. (emphasis added).

A vicious cycle is reinforced as a consequence of such disparate racialized treatment. Medical racial profiling of Blacks as unhealthy, and accordingly less deserving, ensures that Blacks are viewed as less likely to thrive or heal, and consequently less deserving of aggressive medical attention.

Whether racialized (dis)stress is generated in business, health care treatment, education or one’s personal life, the primary appraisal of a hassle largely concerns the discrimination between exchanges in which there is some personal investment and those that are irrelevant for the person’s well-being. Black people, generally, have a personal investment in equality and justice. At a minimum people of color have an investment in fairness on an individualized level. At the moment of racial abuse, the victim makes an assessment—the core psychological issue involved in any appraisal of a hassle or stressful situation is whether there is something at stake in an encounter and whether this stake is considered to be in jeopardy. The victim of racialized abuse considers “what is on the line,” whether there is a significant and justifiable battle to be waged, and whether they can win or even survive. This deliberative process is vexing, distracting, stressful and consuming of one’s energies that could be put to alternative productive uses. Even if the victim decides the costs of resisting the abuse exceeds the benefits, the mental health effects of the hassle are still felt—this is a stressful and possibly abusive situation no matter the outcome.

Critical psychology reveals that individuals who perceive racism experience measurable psychological distress. The experience of racism, as abuse, like other stressful life events, produces measurable reports of subjective, yet diagnosable, distress. Overall, individuals who experience more stressful life events tend to adapt less well than do individuals in more benign circumstances, rendering them more vulnerable to debilitating health consequences from continued stress.
The term “distribution of sadness” has been articulated as a powerful metaphor that captures some of the psychic and emotional costs of prejudice. The metaphor recognizes some of the mental health issues disparately afflicting Black communities as a result of racism. This article has addressed but a portion of this research and will hopefully lead to other explorations of mental health issues impacting marginalized communities.

4. Part three—conclusion

‘You are saved,’ cried Captain Delano, more and more astonished and pained; ‘you are saved: what has cast such a shadow upon you?”

Given the increasingly conservative tenor of many American courts, and the challenges posed by the intent to discriminate threshold in Title VII cases, it might be prudent to reconsider traditional doctrine, such as the Thin-skull and Eggshell tort law rules. In the interest of considering alternative equality-enhancing legal doctrine, exploration of traditional doctrine, as capable of incorporating social justice concerns, should be considered in tandem with viable civil rights laws, since the scope of many civil rights laws are facially limited.

Civil rights laws were enacted to “prohibit race and gender discrimination in a handful of markets—employment, housing, and public accommodations—in which discrimination was perceived to be particularly acute.” Outside of these more obvious venues, there are numerous other areas in which discrimination occurs with its consequent mental and physical health risks. The absence of quantifiable benchmarks does not imply the absence of discrimination. There is no reason to think that racial animus or discrimination manifests themselves only in markets in which interracial comparisons and testing are easily undertaken. “Indeed, as various overt forms of discrimination have become illegal, more subtle and covert manifestations have often replaced them.”

In this vein, Professor Ayres has recognized and analyzed the “bargaining tax” on women of color. Racialized negotiations result in “Black female testers being asked to pay over three times the markup of White male testers, and Black male testers being asked to pay over twice the White male markup for new cars.” Moreover, race and gender discrimination are synergistic or “superadditive,” as the discrimination against Black female testers was greater than the combined discrimination against both the White female and the Black male testers.

The results of this American Bar Foundation study highlight a gaping hole in our civil rights laws where gender discrimination is concerned—the inability to address the “superadditive” consequences of the combination of race and gender. Accordingly, the exploration of traditional doctrine such as the Thin-skull rules is important because the “price dispersion engendered by the bargaining process,” as it confronts racialized women, “implicates basic notions of equity and indicates that the scope of the civil rights laws has been under-inclusive.” Obviously, this transactional example is but one area in which the mental, physical and spiritual well-being of Black women may be disparately affected.

Consistent with outsider jurisprudence, this empirical work also reveals that, in addition to from market place discrimination, Black women testers were subjected to several forms of non-price discrimination. Specifically, Black women were systematically steered to salespeople of their own race and gender (who then gave them worse deals), were asked different questions and told about different qualities of the car. Therefore, ascriptions based upon race and gender play an important role in both price discrimination and non-price discrimination. That a person of color should inflict such abuses complicates the analysis, but does not detract from the cumulative, financial, mental and spiritual toll of such disparate treatment.

261 Rooster’s egg, supra note 199, at 186.
262 Herman Melville, Benito Cereno in The old glory (1965).
263 Herman Melville, Benito Cereno in The old glory (1965).
265 Id. at 865.
266 Id.
267 Id. at 872.
268 Id. at 828–829.
269 Id.
270 Id. at 819.
271 Id. at 822.
272 Id. at 819.
Critical psychology suggests that such racial discrimination plays a unique and powerful role in producing significant symptoms of psychological distress among Blacks.\(^{273}\) Despite historical recognition of the predisposing role of societal factors in the onset of mental and physical illness, “it is only during the last 40 years that scientists have attempted to study these phenomena systematically.”\(^{274}\)

It is true that the Thin-skull and Eggshell rules do not make the defendant liable for the plaintiff’s pre-existing condition itself. Moreover, these rules apply only to the proximate cause issue, not to the negligence itself. In other words, the Thin-skull and Eggshell doctrines do not require the defendant to exercise special care for an *unforeseeably* vulnerable plaintiff.\(^{275}\) The defendant need only exercise ordinary care to prevent foreseeable harms. Hence, the rules only come into play when the defendant’s conduct would put normal people at risk. As such, these rules insist on tortfeasor liability for all the personal injuries actually caused, although they may be greater than those that would be suffered by a person lacking the victim’s particular vulnerabilities. There are, however, normal people from all walks of life—critical psychology reveals the reasonable and predictable reactions of people of color to racialized abuse. Whether some racialized communities or individuals should be foreseen as particularly vulnerable demands further research and heightened concern for possible pathologization of communities of color.

People of color in general, and Blacks in particular, are not rendered idiosyncratic by virtue of having been relegated to the margins, at a minimum, and abused at the maximum, over the course of American history. Accordingly, depending on the nature of the duty of care owed and the particular allegation of negligence, the Thin-skull and Eggshell doctrines are activated so as to be inclusive of any particular vulnerabilities which might render the racialized plaintiff particularly vulnerable, resulting in increased harm. This brief survey of racism-related mental health issues as they relate to racialized patterns of depression, stress and daily hassles is one small example of particular vulnerabilities which disparately affect racialized persons.

It is a foreseeable consequence of the legacy of racial apartheid in America that Black people might suffer harm, both physical and psychological, based upon their racialization and marginalization. This is especially the case when the nature of the harm is directed to their racialization, i.e. racial abuses and epithets for instance, which lead to increased and enhanced stress. Hence, even in the absence of an extension of liability based upon unforeseeable harm, the exercise of ordinary care towards Black people demands a contextual subjectivized appreciation of the foreseeable, yet preventable harms.

Accordingly, exploration of the legal relevance of what one psychiatrist’s assessment of a Black male patient termed “…a complex case of depression [ ] complicated further by a delicate social problem [of racism]” is in order.\(^{276}\) The precise legal significance of this “delicate social problem” when it affects the psyche remain under-explored. Obviously, there are many points of departure and this article has considered but one.

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\(^{273}\) Moos supra note 258, at 1–13; See Kessler and Neighbors, supra note 176, at 112.

\(^{274}\) See generally Rabkin, supra note 192.

\(^{275}\) Dobbs, supra note 14, at 465.

\(^{276}\) See William Kafe’s story, as researched and explored by, Caroline Knowles in Racism and psychiatry, 33 Transcultural Psychiatry Research Review 297 (1996).