

Racializing Disability, Disabling Race: Policing Race and Mental Status

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“A police officer is privileged to use the amount of force that the officer reasonably believes is necessary to overcome resistance to his lawful authority, but no more.”¹

“That school officials and/or police officers working with school officials would use pepper-spray and handcuffs to restrain a thirteen year old mentally disabled child is shocking.”²

“Faced with a rebellious prisoner, Officer Fowler ignored his training and chose to adopt a method of control that is both barbaric and cruel, particularly when applied to a mentally-retarded and inebriated individual.”³

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1. *Ali v. City of Louisville*, No. 3:05-cv-427, 2006 WL 2663018 at *8 (W.D. Ky. Sept. 15, 2006).

2. *Banks v. Modesto City School Dist.*, No. CVF046284RECSMS, 2005 WL 2233213 at *10 (E.D. Cal. Sept. 9, 2005).

3. *Culver v. Fowler*, 862 F. Supp. 369, 371 (M.D. Ga. 1994).

INTRODUCTION

The last two decades have witnessed the creation and proliferation of mental health courts and other initiatives meant to divert individuals with mental illnesses away from the criminal justice system.⁴ Experts increasingly agree that such diversion is necessary in order to ensure treatment and appropriate care of the mentally ill.⁵ While I applaud these initiatives, the reality is that police are increasingly asked to undertake the task of diversion, a role for which they receive little training. Given the minimal progress that has been made in the policing of the mentally ill, this Article commences where these policing and court-based initiatives have ended.⁶ It provides a

4. See Henry J. Steadman, Ph.D., Susan Davidson, M.A., & Collie Brown, M.A., *Law & Psychiatry: Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457 (Apr. 2001), available at <http://psychservices.psychiatryonline.org/cgi/content/full/52/4/457>; U.S. Dept. of Justice, Bureau of Justice Assistance, *Mental Health Courts Program*, <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html>; U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE (2000), <http://www.ncjrs.gov/html/bja/mentalhealth/contents.html>.

5. See Arthur J. Lurigio & Jessica Snowden, *Putting Therapeutic Jurisprudence Into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 210 (2009) (exploring the history of mental-health courts and concluding that “the operational history of MHCs demonstrates that they function best when using a team approach for brokering treatment and other services for [people with serious mental illnesses arrested by police]”); Marlee E. Moore & Virginia Aldigé Hiday, *Mental Health Court Outcomes: A Comparison of Re-Arrest and Re-Arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 LAW & HUM. BEHAV. 659, 670 (2006) (stating that “our results provide support for the expectation that mental health courts reduce the number of new arrests among this population”); Allison D. Redlich, Henry J. Steadman, John Monahan, Pamela Clark Robbins, John Pettila, PATTERNS OF PRACTICE IN MENTAL HEALTH COURTS: A NATIONAL SURVEY, 30 LAW & HUM. BEHAV. 347, 359 (2006) (surveying the “universe of mental health courts” and stating that “it is likely that the number of MHCs will continue to grow as jurisdictions struggle with creating responses to the number of individuals with mental illnesses entering the criminal justice system”). See also BAZELON CENTER FOR MENTAL HEALTH LAW, THE ROLE OF MENTAL HEALTH COURTS IN SYSTEM REFORM (2004), <http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts> (“The Council of State and Local Governments (“CSG”) found that ‘people with mental illness are falling through the cracks of this country’s social safety net and are landing in the criminal justice system at an alarming rate.’ The report also noted that many people with mental illnesses are ‘[o]verlooked, turned away or intimidated by the mental health system’ and ‘end up disconnected from community supports.’ As a result, and ‘not surprisingly, officials in the criminal justice system have encountered people with mental illness with increasing frequency.’ . . . [S]pecialty courts strive to reduce the incarceration and recidivism of people with mental illnesses by linking them to the mental health services and supports that might have prevented their arrest in the first place.”); COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE/ MENTAL HEALTH CONSENSUS PROJECT (2002), available at http://consensusproject.org/downloads/Entire_report.pdf [hereinafter “CRIMINAL JUSTICE/ MENTAL HEALTH PROJECT”]

6. Over the years there have also been policing initiatives including the creation of Crisis Intervention Teams, by which police officers receive specialized training from mental health professionals on how to deal with mentally-ill individuals; Specialized Response Units, which function as highly trained emergency policing units; and Comprehensive Advance Response

Foucauldian⁷ reading of the important triage function police are performing through their interaction with criminal suspects. Through an analysis of civil suits against police officers regarding their interaction with mentally ill individuals, I theorize not only the persistent criminalization of people with mental illnesses but also the disparate, yet routine, use of excessive force by police against persons of color with mental illness. These behaviors are consistent with Michel Foucault's notions of discipline and punishment and are demonstrative of the ongoing need for policing initiatives regarding encounters with the mentally ill and for maintained vigilance with respect to racial profiling.

While it might be expected that the mentally ill are treated similarly throughout the criminal justice system irrespective of race, the cases I have reviewed suggest otherwise. By focusing on the triage function performed by police in their street-level encounters, this project provides insight into the intersecting factors at work in police encounters with the mentally ill.⁸

Teams, which either incorporate co-responding mental health professionals or specially trained police officers into police encounters with the mentally ill. See CRIMINAL JUSTICE/MENTAL HEALTH PROJECT, *supra* note 5, at 40-41; Gary Cordner, U.S. Dept. of Justice, Office of Comm. Oriented Policing Services, *People With Mental Illness: Problem-Oriented Guides for Police*, available at <http://www.cops.usdoj.gov/files/RIC/Publications/e04062003.pdf>; NAMI: National Alliance on Mental Illness, *Crisis Intervention Team (CIT) Advocacy Toolkit*, available at <http://www.nami.org/Template.cfm?Section=CIT2&template=/ContentManagement/ContentDisplay.cfm&ContentID=68177> (last visited Sept. 29, 2009).

7. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

8. While these insights add to the intersectionality literature, this is not their central contribution. Over the last two decades, legal scholars have produced robust literature on a phenomenon that has alternatively been denoted as intersectional, multidimensional, cosynthetic, simultaneous and symbiotic. Each one of these legal theories has recognized the cumulative oppressive impact experienced by people whose identity is constructed along multiple axes. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1990); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) (discussing the theories, insights and problems of, *inter alia*, intersectionality theory as it relates to race, gender, class, and sexual orientation, and positing that systems of subordination function in symbiosis); Darren Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (arguing for analysis of racial oppression and other forms of social inequality through a multidimensional framework that ceases to view race, class, sexual orientation, and other such forces as exclusive or conflicting); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (explaining that “[c]osynthesis offers a dynamic model whose ultimate message is that the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted”); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995) (arguing that subordinated sexual minorities ought to strive for inter-connectivity between and among their communities); Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women*, 18 QUEEN'S L. J. 306, 306 (1993) (highlighting “the complexity of the dominant ideology of motherhood, in particular the race, class, and gender specificity of its form, content, operation, and effects” through the lens of the operation of child welfare systems on First Nations women and their families in Canada);

Ultimately, this Article calls for renewed attention to the ways in which police exercise their discretion, as it appears that they do so in markedly different ways depending upon the race of the person deemed mentally ill.

A. *Gauging Multiple Dynamics: Policing at the Foundational Intersection*

This research began with a survey of civil cases against police officers for misconduct in their encounters with mentally ill persons where the Court stated the race of the suspect (for a summary of these cases, see Appendix). For this Article, I have examined instances in which police encounter an individual with a known or presumed history of mental illness. The police either received information regarding the mentally disordered status of the suspect or quickly assumed that the suspect had a diagnosable mental illness. I label this type of initial interaction “Foundational Intersectionality.” The cases reveal that for people who are negatively racialized, that is people who are perceived as being non-white, and for whom mental illness is either known or assumed, interaction with police is precarious and potentially dangerous. Indeed, most of these cases were brought by the estates of suspects killed by the police who asserted the use of excessive force against the deceased.

My broader interest is to explore the role, if any, that the intersection of race, class, gender, sexuality and disability play in policing decisions. Thus, this Article is but a first step in this inquiry by which I analyze the relevance of only two identity variables for policing: race and mental disability. I theorize the relevance of the intersection of racialization and disability to police decision-making through a Foucauldian approach to the exercise of police discretion. As such, these cases provide a lens through which to study the multilayered dynamics between communities, police, and the criminal justice system.

My theory is that in their encounters with individuals deemed mentally ill, police have discretion to stream people into different management modalities. Based on my reading of case law there emerges the existence of three modalities governing the interaction of the police with the mentally ill. The first is a medical modality of interaction in which the suspect would be removed to a mental health care facility for stabilization and medical treatment.⁹ Second, police can exercise their discretion by employing an

Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297 (1992); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

9. The advent of mental health courts has provided for increased use of this treatment modality. The first such court was introduced in Broward County, Florida in 1997. For information on the inception of the Broward County Court, see Frontline, *A New Justice System for the Mentally Ill*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/>

intermediary modality, the traditional criminal modality, which prioritizes containment and incarceration over treatment. Finally, police can enter into a more severe and punitive modality, the disciplinary force modality, which actively involves immediate physical punishment of the individual with whom they are dealing. I draw upon Michel Foucault's theories in *Discipline and Punish* to elucidate the operation of this last modality.¹⁰

Though I cannot discuss each case that I discovered,¹¹ this Article examines archetypal cases from which one might analyze two policing phenomena—the disabling of race and the racing of disability. By this I mean to draw attention to the manner in which the race of a suspect may be a hindrance or a burden for them in police interactions and the ways in which harsher treatment might be meted out by police towards mentally-ill persons of color. The cases selected are illustrative of broad themes or behavioral patterns in the exercise of police discretion that tend to follow the aforementioned three modalities.¹² These modalities indicate that the interplay of race and mental disability generate different policing outcomes which might be dependent upon the identity of the suspect. I theorize that the choice of modality selected by police in their encounters with mentally-ill individuals is in large part driven by racialization. While there has been commentary and critique of the role race may play in police use of force and police brutality,¹³ there has been little

special/courts.html.

10. See FOUCAULT, *supra* note 7.

11. *Graham v. Connor*, 490 U.S. 386 (1989); *Terry v. Ohio*, 392 U.S. 1 (1968); *Gregory v. County of Maui*, 523 F.3d 1103 (9th Cir. 2008); *Lee v. Hefner*, No. 04-5445, 136 F. App'x. 807, 2005 WL 1385930 (6th Cir. June 7, 2005); *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367 (4th Cir. 2000); *Castillo v. City of Round Rock*, No. 98-50163, 1999 WL 195292 (5th Cir. March 15, 1999); *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990); *Ali v. City of Louisville*, No. 3:05CV-427-R, 2006 WL 2663018 (W.D. Ky. Sept. 15, 2006); *Hassan v. City of Minneapolis*, No. 04-3974, 2006 WL 2583182 (D. Minn. Sept. 1, 2006); *Winters, ex rel. Estate of Winters v. Arkansas Dep't of Health & Human Servs.*, 437 F. Supp. 2d 851 (E.D. Ark. 2006); *Hoskins v. Woulfe*, No. 05-C-113, 2006 WL 2252878 (E.D. Wis. Aug. 4, 2006); *Banks ex rel. Banks v. Modesto City Schools Dist.*, No. CVF046284, 2005 WL 2233213 (E.D. Cal. Sept. 9, 2005); *Sallenger v. City of Springfield*, No. 03-3093, 2005 WL 2001502 (C.D. Ill. Aug. 4, 2005); *Ali v. City of Louisville*, 395 F. Supp. 2d 527 (W.D. Ky. 2005); *Harvey v. Alameda County Med. Center*, 280 F. Supp. 2d 960 (N.D. Cal. 2003); *LaLonde v. Bates*, 166 F. Supp. 2d 713 (N.D.N.Y. 2001); *Martin v. City of Philadelphia*, No. Civ.A. 99-543, 2000 WL 1052150 (E.D. Pa., July 24, 2000); *Porter v. City of Muncie*, No. IP 98-1491-C H/G, 2000 WL 682660 (S.D. Ind. Feb. 16, 2000); *Tofano v. Reidel*, 61 F. Supp. 2d 289 (D.N.J. 1999); *Swans v. City of Lansing*, 65 F. Supp. 2d 625 (W.D. Mich. 1998); *Culver v. Fowler*, 862 F. Supp. 369 (M.D. Ga. 1994); *Viney v. Flynn*, No. 90-7819, 1991 WL 161071 (E.D. Pa. Aug. 15, 1991); *Little v. City of Chicago*, No. 86 C 1107, 1986 WL 6247 (N.D. Ill. May 23, 1986); *Melton v. Shivers*, 496 F. Supp. 781 (M.D. Ala. 1980); *Coghlan v. Phillips*, 447 F.Supp. 21 (S.D. Miss. 1977); *Thompson v. Douds*, 852 So. 2d 299 (Fla. App. 2003).

12. Since this article is not an empirical study, it is possible that cases in which the race of the victim was not indicated demonstrate results contrary to my thesis. An empirical study might include factors such as comorbidity, and examine data from death, autopsy, and arrest records in which race is often indicated.

13. See Matthew J. Gickman, Alex R. Piquero & Joel H. Garner, *Toward a National Estimate of Police Use of Nonlethal Force*, 7 CRIMINOLOGY & PUB. POL'Y 563 (2008) (noting

scholarship on the more nuanced question of the possible role that mental illness, or aberrant behavior, plays in triggering the use of force, particularly with respect to suspects of color. This exploration builds upon the existing literature on policing practices, use of force, and race, in light of the reality of increased contact between police and people suffering from mental illnesses.¹⁴

The cases beg the question of whether people of color with actual or assumed diagnosable mental illnesses are being subjected disparately to excessive police force instead of being taken for medical treatment and rather than being steered into the criminal justice system. In short, the medical modality cases might provide a baseline for more appropriate police behavior in dealing with the mentally ill as they tend to demonstrate police exercising restraint and often a great deal of patience in their interactions with individuals racialized as white. Given the seeming discrepancies in my review of the available cases, the goal of this Article is to theorize the ways in which people who are thought to have diagnosable mental illnesses are triaged by police in the exercise of their discretion in a manner that either helps or harms them.

Consequently, my immediate concerns are twofold. First, it appears, based on the cases that I have reviewed, that despite having mental health issues, negatively racialized individuals are being criminalized and contained rather than treated. Mental illness itself is thus criminalized.¹⁵ Second, the

that males and racial minorities report greater police use of force); Amie M. Schuck, *The Masking of Racial and Ethnic Disparity in Police Use of Physical Force: The Effects of Gender and Custody Status*, 32 J. OF CRIM. JUST. 557 (2004) (finding that police were more likely to use force against Blacks and Hispanics who were not in custodial situations. Importantly, this study was based on what were believed to be conservative self-reports of the use of force by police based upon their perceived threats. The author notes that “attributions about race and ethnicity are social constructs, including assumptions and attributions about what *kinds* of people are considered threats.”). *See also*, AMNESTY INTERNATIONAL, USA: RACE, RIGHTS AND POLICE BRUTALITY, available at <http://www.amnesty.org/en/library/info/AMR51/147/1999>; HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 2 (1998), available at <http://www.hrw.org/en/reports/1998/07/01/shielded-justice>; JEROME H. SKOLNICK AND JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001 (2009); Gregory H. Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACK LETTER L.J. 79 (1993); AMNESTY INTERNATIONAL, USA: RIGHTS FOR ALL (1998), available at <http://www.amnesty.org/en/library/info/AMR51/035/1998>.

14. Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicides in the United States, 1934-2001* 4 (2007), available at <http://ssrn.com/abstract=970341> (“During the 1980s, 1990s and into the twenty-first century, mental health populations dwindled to negligible levels, while the state and federal prison population exploded, rising exponentially to their present levels.”). For an overview of the impact of the deinstitutionalization of the mentally ill, see Frontline, *Deinstitutionalization: A Psychiatric “Titanic”*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html#3> (referencing E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS (1997)).

15. *See generally* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illness: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143, 144-145 (2003) (“Approximately a quarter million individuals with severe mental illnesses are incarcerated at any given moment—about half arrested for nonviolent offenses such as trespassing

cases that I explore suggest that people of color who are mentally ill, or whose mental situation is unstable, are at greater risk of being subjected to police brutality.¹⁶ This Article thus complicates our understanding of policing by focusing upon police encounters with individuals whose mental status is diagnosable as disabled.

B. SIC: Suspect Identity Construction

As I have stated, above, in my review of the available case law, the modality chosen by police appears to be contingent upon how the identity of the suspect is constructed. Specifically, the police not only pass over the medical modality for persons of color whose mental well-being is dubious, but they also routinely use tactics of brutality more in line with the harsh disciplinary force modality than an intermediate criminal one. These cases suggest that the modality selected by police depends upon what I refer to as Suspect Identity Construction (hereinafter “SIC”), the interactive identity variables which determine one’s ascribed race, gender, etc. SIC is the “what is the person” question—are they interpreted as being White, Black, Latino/a, Asian, male, female, straight, gay, poor, uneducated, etc.¹⁷

or disorderly conduct.”).

16. National studies have suggested a general increase of the use of force by police in regard to mentally-ill individuals across racial designations. See NAT’L INST. OF JUSTICE & BUREAU OF JUSTICE STATISTICS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA, viii (1999), available at <http://www.ojp.gov/bjs/abstract/ufbponld.htm> (finding with modest confidence that police are more likely to use force when dealing with mentally-ill individuals and calling for further study). See also Treatment Advocacy Center, *Law Enforcement and People with Severe Mental Illnesses* (2007), available at <http://www.treatmentadvocacycenter.org/> (In addressing the consequences of deinstitutionalization, the authors note that the police have become “front line mental health workers,” with the unfortunate consequences that “[t]he safety of both law enforcement officers and citizens is compromised when law enforcement responds to crises involving people with severe mental illnesses who are not being treated.” The authors note that, “In 1998, law enforcement officers were more likely to be killed by a person with mental illness than by an assailant with a prior arrest for assaulting police or resisting arrest. And people with mental illnesses are killed by police in justifiable homicides at a rate nearly four times greater than the general public In Phoenix, incidents in which police used force with mentally ill people tripled between 1998 and 2003, continuing to rise despite a training program introduced in 2001 to teach officers about mental illness and how to appropriately respond to a mentally ill individual in crisis. In 2002, 30 chronically mentally ill people had confrontations with Phoenix police that ended with force, from physical restraint to shooting. Nearly one third of those killed in police shootings in New York City in 1999 were mentally ill. A review of 30 cases of people shot and killed by police in Seattle disclosed that one-third of the people showed signs of being emotionally disturbed or mentally ill at the time of the incident.”).

17. This nomenclature is to be distinguished from constitutional law notions of a suspect class, a categorization which “call[s] for a more searching judicial inquiry” into the validity of the legislation or actions at issue. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). Instead, SIC addresses the fact that in street-level encounters, police rely on numerous variables in ascertaining whether they are dealing with an innocent individual who should attract no criminal investigation or with a suspect or person of interest to police. In deciphering whether they are merely dealing with an innocent individual as opposed to a suspect, police often rely upon identity-based ascriptions of suspicion. For instance, race has been identified as a variable by

Again, depending upon the racial identity of the suspect, and irrespective of police awareness or suspicion of mental illness, police appear to forgo the medical modality in favor of criminal or disciplinary force modalities. This observation is helpful in understanding both the racial disparities evident in incarceration rates and the prevalence of mental illness in the prison population.¹⁸ Indeed, legal and political science scholar Bernard Harcourt suggested the need for further investigation; pondering whether it was possible that during the latter half of the twentieth century, “as the population in mental hospitals became increasingly African American and young, our society gravitated toward the prison rather than the mental hospital as the proper way to deal with at-risk populations?”¹⁹ However, the U.S. Department of Justice has indicated that of the individuals who are incarcerated, women, young inmates, and white inmates are more likely than others to have mental health problems.²⁰ Accordingly, Prof. Harcourt’s suspicions likely represent only a part of the story as people of color with mental illnesses might alternatively

which police improperly “profile” people of color. See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 13 (2002); see also DAVID COLE, NO EQUAL JUSTICE 20-21 (1999); Katheryn K. Russell, “*Driving While Black*”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999). For a discussion on negative police attitudes towards the mentally ill, see MELISSA REULAND, MATTHEW SCHWARZFELD, LAURA DRAPER, LAW ENFORCEMENT RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 8 (2009), available at consensusproject.org/downloads/le-research.pdf (noting that “[o]fficers surveyed in a study on police use of force considered ‘mentally impaired’ people significantly more ‘threatening’ during arrests and ‘required more effort to arrest,’ but did *not* consider this population more likely than individuals without ‘mental impairments’ to inflict injury on officers”).

18. See MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 6 (The Sentencing Project, July 2007), http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf (noting that in 2005, the nationwide incarceration rate for whites was 412 per 100,000 residents, 2,290 for African Americans and 742 for Latinos); Bernstein & Seltzer, *supra* note 15. According to a 2006 U.S. Department of Justice’s Bureau of Justice Statistics report, the percentage of the prison population of each ethnic category with mental health problems is:

White 62.2 (state), 49.6 (federal), 71.2 (local jail)
 Black 54.7 (state), 45.9 (federal), 63.4 (local jail)
 Hispanic 46.3 (state), 36.8 (federal), 50.7 (local jail)
 Other 61.9 (state), 50.3 (federal), 69.5 (local jail)

BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, NCJ 213600, Table 3 (September 2006), www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf [hereinafter “BJS-MENTAL HEALTH”].

19. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1782-83 (2005-2006) (noting that “[t]here is some evidence to suggest that the proportion of minorities in mental hospitals was increasing during deinstitutionalization”).

20. BJS-MENTAL HEALTH, *supra* note 18, at 4 (Although there is no racial breakdown for the youth category, the report indicates that inmates aged 24 and younger suffer from mental illnesses at a greater rate. The reasons for this statistic require further study. It is unclear whether persons coming into the system are mentally ill or whether it is incarceration itself that causes the illness.).

face under-diagnosis of their mental health issues, or perhaps they are no longer being triaged into the mental health care system or the prison system in numbers consistent with their police interactions. This Article is one response to Prof. Harcourt's appropriate call for further inquiry.

These suppositions, of lower mental health issues for incarcerated people of color despite increased incarceration rates for people of color, at first appear to be mutually exclusive, however I propose one possible theoretical explanation for these curious phenomena. I hypothesize that we encounter relatively fewer people of color deemed mentally ill in prison populations, despite the fact that people of color have been increasingly incarcerated because police, as Foucauldian disciplinarians, have gravitated toward harsher ways of dealing with negatively racialized mentally-ill individuals. I am suggesting that it is possible to theorize disparate police interactions based upon SIC that might help to explain the aforementioned disparities. Because of the exercise of police discretion to deal with suspects summarily through the expeditious use of excessive force, people of color with mental illnesses seem particularly vulnerable to police brutality.²¹ Put bluntly, people of color with mental illness might be more likely to be killed or injured by Foucauldian disciplinarians in their exercise of discretion.²²

21. See, *infra* note 205 (explaining that while many groups of people are subject to police brutality, people of color bear the brunt of such violence. This note also addressed the unfortunate escalation in violence that often takes place when police interact with mentally-ill suspects. It should not, therefore, come as a huge shock that when negative racialization is intersected with mental illness, police might not behave as they would with mentally healthy white suspects.). See also, *supra* note 17 (for race-based policing scholarship).

22. ANDREA J. RITCHIE, JOEY L. MOGUL, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES, A REPORT PREPARED FOR THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON THE OCCASION OF ITS REVIEW OF THE UNITED STATES OF AMERICA'S SECOND AND THIRD PERIODIC REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 13-15 (2007), available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/9_Police%20Brutality.pdf (Providing example cases and noting that, "People of color with mental and physical disabilities are often killed by police, at times due to the impacts their disabilities have upon their ability to comply with police orders, as well as their ability to survive excessive force."). See also Schuck, *supra* note 13, at 562-3 (addressing the ways in which the perceived threat of the accused is constructed yet consistently interacts with police officers' assessments of danger). For information that does not parse mental illness but does address race, see UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS IN THE UNITED STATES, 2003-2005, NCJ 219534, 2, 5 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ardus05.pdf> (addressing the race of suspects who were subjected to police violence and noting that, of law enforcement homicides between 2003-2005 the percentage of blacks was 30% for DCRP (Deaths in Custody Reporting Program), and 32% for SHR, (Supplementary Homicide Reports) and finding also that "Suicide was the only type of death in which a majority (57%) of the decedents were white"); UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICING AND HOMICIDE, 1976-98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS, NCJ 180987, 5, 9 (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ph98.pdf> (stating that "[i]n 1998 blacks made up 12% of the population age 13 or older but accounted for 40% of persons arrested for violent crime and 35% of felons killed by police. The 1998 statistics illustrate both the comparatively high rate of

Certainly, many white mentally ill individuals die or are injured at the hands of police as well, and this phenomenon is also in need of serious study. But I perceive a marked difference, based upon race, in the manner of their deaths and the level of police restraint used before the resort to force.²³ This theory is consistent with both the race-based critiques of police brutality and the disability advocates' critique of policing. This factual constellation raises a number of concerns with implications well beyond incarceration, including, but not limited to: mental health treatment and diagnosis, cultural competence in law enforcement and healthcare, police training and cross-pollination with mental health experts, mediation of police interactions through third party assistance, or techniques of de-escalation and the use of non-lethal techniques of police restraint and detention.

The Article will proceed as follows. As background, Part I will briefly explore the social construction of race and mental status. It will start with a brief account of the way contemporary notions of racial construction differ from historic notions of race as scientifically founded. This Part next addresses the ways in which mental status might be socially constructed. Unlike race, however, there is a contemporary scientific realist²⁴ framework for mental illness that is anchored in medical science, as summarized by the Diagnostic and Statistical Manual IV (hereinafter "DSM").²⁵ This section is aimed at

justifiable homicide involving blacks and the racial similarity between persons arrested by police and felons killed by police," and recognizing that "[f]rom 1980 to 1998 young black males were killed by police in justifiable homicides at a rate approximately 6 times that of young white males").

23. Additionally, while this Article does not focus upon the doctrinal analysis of the Fourth Amendment claims of excessive force, there appear to be differences in the jurisprudential responses along racial lines. It appears that courts are more willing to dismiss the summary judgment motions brought by police when the deceased victim of police use of force was white. Similarly, courts appear more inclined to allow the police summary judgment motions when the victim of police use of force was negatively racialized. See cases discussed *infra* Part II (exploring the medical, criminal, and disciplinary modalities).

24. By "scientific realist" I mean to convey a biologically based, as opposed to purely constructed, identity.

25. Although any distinction between a mental disorder and a mental illness is not one that preoccupies police in their suspect encounters, I do want to acknowledge the fact that mental health practitioners often draw this distinction. The DSM-IV defines mental disorder as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. . . . Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological or biological dysfunction in the individual." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH EDITION, DSM-IV-TR, AMERICAN PSYCHIATRIC ASSOCIATION, xxxi. The National Alliance on Mental Illness defines mental illness as "medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others, and daily functioning. Just as diabetes is a disorder of the pancreas, mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life." NAMI: National Alliance on Mental Illness, *What is*

providing a framework for understanding the ways in which lay members of society, specifically police, participate in the construction or exacerbation of a mentally disordered identity. Part II looks at criminal procedure case law to analyze police modality selection. As I am most concerned with the disciplinary modality, this part specifically engages with police misconduct and excessive force cases for the optics they provide into police participation in SIC. Part III theorizes the patterns observed in Part II with reference to Michel Foucault's *Discipline and Punish*.²⁶ Foucauldian theories of police as socially empowered disciplinarians shed light on SIC and provide for the development of a theory beyond Foundational Intersectionality. The Conclusion of this Article will speak briefly to the deeper implications of these theories for an exponential encounter of identity collision. It is plausible that the relevance of the interaction of mental status and race in the realm of policing is not merely cumulative but is a distinct type of encounter with implications well beyond policing.

I. CONSTRUCTIONS OF DIFFERENCE

A. *The Power of Context: Racing and Disabling Identity*

Contemporary work on race examines the societal ascriptions and technologies that lead to the social construction of racial difference.²⁷ Recent critical race work recognizes that race is founded not upon the inherent, internal differences between whites and non-whites, but upon the attitudes and corresponding practices of a race-based society.²⁸ Accordingly, societal

Mental Illness: Mental Illness Facts http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited March 11, 2009). As I will explain, the cases, however, reveal that to police, these technicalities make little difference in the manner of dealing with a suspect deemed mentally ill, disordered, or "crazy." See *infra*, note 462, with respect to terminology. For the purposes of the Article, I will follow the lead of the case law in using these terms synonymously.

26. FOUCAULT, *supra* note 7.

27. See Miriam R. Hill & Volker Thomas, *Strategies for Racial Identity Development: Narratives of Black and White Women in Interracial Partner Relationships*, 49 FAM. REL. 193, 193 (2000) ("[R]ace is not a typology of concrete, mutually exclusive categories. We can best understand it within a social constructionist framework as the negotiated interaction between a societal phenomenon of categorization based on physical markers . . . and a personal phenomenon of identity development."). See also Audrey Smedley, "Race" and the Construction of Human Identity, 100 AM. ANTH. 690, 690 (1998) ("Scholars in a variety of disciplines are increasingly holding that 'race' is a cultural invention, that it bears no intrinsic relationship to actual human physical variations, but reflects social meanings imposed upon these variations."). For further information on the construction of race, see generally TOMMY L. LOTT, THE INVENTION OF RACE: BLACK CULTURE AND THE POLITICS OF REPRESENTATION (1999); LEE D. BAKER, FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896-1954 (1998); Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1136 (2004) (discussing how the "American legal system has no fixed, uniform definition of the term 'race' or mechanisms by which to identify membership in particular 'racial' groups.").

28. By "race-based," I mean to convey the notion that in America the color of one's skin,

valuations and distributions are manipulated according to racialization.²⁹ As certain constructed identities are marginalized, the identities that are the normative reference points are accorded privileged societal statuses.³⁰ In extrapolating these critical legal studies insights and critical race theories to the realm of policing, I hypothesize that police, too, struggle with bias. Admittedly, bias might be a matter of simple ignorance (from lack of exposure or lack of knowledge for example), or it might be rooted in animus or hostility, or even some sentiment in between these extremes. Either way, the point is to interrogate the consequences of these racialized views for suspects in police encounters.

This notion of the construction of privilege and the corresponding marginalization of people of color recognizes that in a different world, a world in which race truly had no consequence, there would simply be no societal significance and no material significance to the various indicators or proxies of race, be that skin color, facial features, hair texture or speech pattern.³¹ Race

even the tone or shade, matters in terms of the ascriptions made and the treatment, marginal or privileged, which one receives. Faye V. Harrison, *The Persistent Power of "Race" in the Cultural and Political Economy of Racism*, 24 ANNUAL REV. OF ANTHROPOLOGY 47, 57–58 (1995) (“That race still matters in the post-civil rights era United States is reflected in recent studies that go beyond conventional bipolar approaches to the race problem . . .”). See also ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (observing and analyzing the way race affects housing, income, employment, education, crime and politics); Neil Gotanda, *Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1 (1991-1992) (discussing and analyzing the ways in which color blindness is a constitutional law legal fiction). See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1992-1993) (addressing the privileges accorded to whiteness); Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, <http://www.feministzine.com/feminist/modern/WhitePrivilege-MalePrivilege.html> (last visited March 14, 2010) (Professor McIntosh’s famous listing of daily instances of white privilege).

29. DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (Erwin Chemerinsky et al. eds., 6th ed. 2008); DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1st ed. 1995); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002).

30. Racial constructions simultaneously exclude those racialized as “of color” as they privilege those whose appearance is closer to the norms of whiteness; hence the term white supremacy. See Charles R. Lawrence, III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 826 (1995) (calling for an examination of the ways in which various communities are marginalized in furtherance of white supremacy and asking that we interrogate the ways in which the experiences of different groups are related to the maintenance of white supremacy).

31. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. ed. 2006) (providing an exploration of the consequences of race through an examination of cases in which judges sought to determine “whiteness.” The author’s ultimate conclusion is that whites must renounce their investment in whiteness in order to further the ends of social justice.); John Tehranian, *Performing Whiteness: Naturalization litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (1999-2000) (examining performative aspects of

itself only has the meaning and consequences that we have given to it. As is the case with being racialized as non-white (that is, negatively racialized), having a physical impairment becomes socially disabling.³² Meaningful analogies are drawn when one considers physical disability. Analyzing the marginalized identity of “disabled” further reveals the advantages accorded to those occupying the normative, yet often unacknowledged power-position of “ablebodiedness.”⁴²

In many ways, the movement that identifies physical disability as a socially-contingent identity builds nicely upon the work done by race-critics and contemporary scientists who debunk the physiological underpinnings of race.³³ Like those recognizing and analyzing the socio-political construction of race, many disability rights advocates are increasingly acknowledging the systemic constructs that actively disadvantage those with physical challenges so as to produce “an identifiable class”³⁴ of people with physical challenges or disabilities. Thus disability rights scholars have recognized physical disability as a constructed identity.³⁵ Just as whiteness “is an invisible insignia of the

whiteness, specifically assimilatory behavior, by which successful plaintiffs enhanced their status by acquiring whiteness.); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94(4) AM. ECON. REV. 991 (2004) (exploring racial discrimination in the labor market as evidenced by the use of names as racial proxies); KOBENA MERCER, WELCOME TO THE JUNGLE: NEW POSITIONS IN BLACK CULTURAL STUDIES (1994) (using cultural theories to interrogate race in popular culture.); *see also infra* notes 64, 65, for a brief discussion of the ways in which racialization is consequential.

32. Michael Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007) (exploring the evolution of approaches to disability and disability rights and culminates with the advocacy of a disability human rights paradigm); Anita Silvers & Michael Ashley Stein, *Disability and the Social Contract*, 74 U. CHI. L. REV. 1615, 1616 (2007) (exploring societal assumptions about the physically disabled as part of an exploration of Nussbaum’s capabilities theory). *See* Rose Galvin, *The Making of the Disabled Identity: A Linguistic Analysis of Marginalization*, 23(2) DISABILITY STUD. Q. 149, 149 (2003) (analyzing and extending the social model of disability, which includes recognition that “disability ‘is something [societally] imposed on top of our impairments’” to include “the negative status imposed upon people when they become impaired” (internal citations omitted)). *See also* MICHAEL OLIVER, THE POLITICS OF DISABILITY: CRITICAL TEXTS IN SOCIAL WORK AND THE WELFARE STATE (1990); CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS (1988). *See generally* HANDBOOK OF DISABILITY STUDIES (G.L. Albrecht et al. eds., 2001). DISABILITY, KEY CONCEPTS (Campbell, J., & Oliver, M. eds. 1996); DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE (L.J. Davis ed., 1997); D. JOHNSTONE, AN INTRODUCTION TO DISABILITY STUDIES (1998); H. STIKER, A HISTORY OF DIABILITY, CORPorealities: DISCOURSE OF DISABILITY (W. Sayers, trans., University of Michigan Press 1999) (1987).

33. *See* Richard Devlin & Dianne Pothier, *Introduction: Toward a Critical Theory of Dis-Citizenship*, in CRITICAL DISABILITY THEORY 19-20 (2006); Theresa Man Ling Lee, *Multicultural Citizenship: The Case of the Disabled*, in CRITICAL DISABILITY THEORY 95-102 (2006).

34. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418 (2000).

35. *Id.* at 428 (explaining that “disability should not be considered to be the unmediated product of limitations imposed by a physical or mental impairment. . . . [S]uch a view erroneously regards existing social arrangements as a neutral baseline. The social model instead treats

norm, 'ablebodiedness' is also an unquestioned, unremarked upon state which only becomes notable in its absence."³⁶ One becomes disabled not so much because of the existence or non-existence of an actual impairment, but because of the societal overlay which "others" the impairment to the point of creating an identity which is itself based upon that difference.³⁷

An individual's impairment is therefore exacerbated as disabling, or vitiated as innocuous. Depending upon the manner of societal construction, the external environment presents a sliding scale of disabling potential. In certain contexts, therefore, society may render the impairment benign and produce no disability; in other contexts societal structures may create profound disability.³⁸ An analogous notion of the constructedness of mental illness is also possible. In contemporary discourse, however, mental status is usually analyzed from the perspective of medical science. But there is also a sociological vantage point of constructedness that is worth considering.

B. *Mental Status as an Identity*

1. *Mental Health: According to the Scientific Realists*

To scientific realists, there is a bio-dynamic or physical component to mental illness.³⁹ Unlike contemporary understandings of race, this approach

disability as the interaction between societal barriers (both physical and otherwise) and the impairment . . .").

36. GALVIN, *supra* note 32, at 149.

37. For instance, if most members of society knew sign language, deafness would no longer be a societal handicap. Similarly, if every building, structure or venue was wheel chair accessible, physical mobility would be less of an issue or a mere nuisance. See National Federation for the Blind, <http://www.nfb.org/nfb/Default.asp> (last visited March 11, 2009) ("[T]he real problem of blindness is not the loss of eyesight. The real problem is the misunderstanding and lack of information that exist. If a blind person has proper training and opportunity, blindness can be reduced to a physical nuisance.").

38. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 427–28 (2006) ("A key insight of the study of disability has been the recognition that a person's impairment may or may not be disabling depending upon the features of the world around her."). See also BAGENSTOS, *supra* note 34, at 429 ("Consider, for example, a person with paralysis that prevents her from walking. If workplaces' entrances are accessible only by stairs, or they are too narrow to accommodate a wheelchair, then she cannot work. If the bus route that runs by her apartment does not employ buses equipped with wheelchair lifts, then she may not be able to shop, worship communally, or engage in recreational activities. And if the sidewalk around her building does not have curb cuts, then she may not even be able to leave her block. Such a person's paralysis is very real. But in each of these examples, the social relations model posits, it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes. The point can readily be extended to other physical structures: subway platforms that are unsafe for people with visual impairments because they are built without raised bumps at the edges, elevators with buttons that are too high for wheelchair users to press, and so forth.").

39. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 25, at xxx ("[T]he term *mental disorder* unfortunately implies a distinction between "mental" disorders and "physical" disorders that is a reductionist anachronism of mind/body dualism. A compelling

recognizes organic, internal reasons for mental illness. Traceable patterns of brain functioning, chemical production, hormonal uptake and other biological features are consistent with variation in mental well-being.⁴⁰ As mental illness is found in all societies, chances are that we regularly come into contact with people from all walks of life suffering from poor mental health. To be sure, many people cycle through periods of compromised mental health or live with episodic bouts of mental illness or vulnerability.⁴¹ Indeed, as others have noted, physical disability is the one identity category into which we will all find ourselves, if we live long enough.⁴² Mental illness is no different; the longer we live the greater the likelihood that our mental faculties will become increasingly compromised. This realists' view of mental illness is affirmed by the Surgeon General's statement that,

Mental health and mental illness are dynamic, ever-changing phenomenon. At any given moment, a person's mental status reflects the sum total of that individual's genetic inheritance and life experiences. The brain interacts with and responds—both in its function and in its very structure—to multiple influences continuously, across every stage of life.⁴³

As with physical health and the provision of adequate and timely bodily health care, there are barriers to mental health care that exist along the identity axes of race, gender and class.⁴⁴ Indeed, a recent Surgeon General's report devoted entirely to mental health determined that "African Americans are over-

literature documents that there is much "physical" in "mental" disorders and much "mental" in "physical" disorders.").

40. *Id.*

41. For example, some women with no history of mental illness develop postpartum depression, or, rarely, postpartum psychosis (the symptoms of which can include paranoia, frantic energy, and irrational thoughts). Postpartum depression can affect a woman any time from a month to a year after childbirth. *National Institutes of Health, Understanding Postpartum Depression: Common But Treatable*, NIH NEWS IN HEALTH (Dec. 2005). Famous women like Brooke Shields, Marie Osmond, and the late Princess Diana have publicly acknowledged their experiences with postpartum depression. See *Special Baby Edition: It's a Girl for Brooke, Too!*, NEWSDAY, April 19, 2006, at A13; Meg Kissinger, *Of Sparkling Smiles, and Sadness: Osmond Tells of Her Depression*, MILWAUKEE J. SENTINEL, March 19, 2002, at 6B; Elaine Moyle, *Beyond the Baby Blues: Sadness, Fatigue Could Point to Postpartum Mood Disorder*, TORONTO SUN, Aug. 27, 2000, at 52; National Alliance of Mental Illness, *About Mental Illness: Major Depression*, <http://www.nami.org> (click on "Depression" under "Mental Illnesses") ("Life events, such as the death of a loved one, a major loss or change, chronic stress, and alcohol and drug abuse, may trigger episodes of depression.").

42. SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 18, 61 (1996) (noting that aging is a process that is disabling as "unless we die suddenly, we are all disabled eventually." In the realm of physical disability non-disabled people might be referred to as TABS (temporarily able-bodied)).

43. See Mental Health: A Report of the Surgeon General 12 (1997), <http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c1.pdf>.

44. See *id.* at 16 ("[S]ocio-economic factors affect individuals' vulnerability to mental illness and mental health problems. Certain demographic and economic groups are more likely than others to experience mental health problems and some mental disorders.").

represented in high-need populations that are particularly at risk for mental illness.”⁴⁵ These disparities result in a situation where “mental illnesses exact a greater toll on the . . . overall health and productivity” of racial and ethnic minorities.⁴⁶ These factors beg an inquiry into the role of societal impositions in contributing to and constructing mental illness.

2. *Mental Health—Is Mental Illness and Disability Constructed?*⁴⁷

Alongside the scientific realist understanding of mental status, contemporary discourse is also beginning to consider the ways in which mental status is socially constructed.⁴⁸ Race is now accepted as socially constructed.⁴⁹ Increasingly, we see how physical disability is also socially constructed. It is a relatively short step to consider the ways in which mental disability might be similarly constructed.

45. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: CULTURE, RACE, ETHNICITY SUPPLEMENT TO MENTAL HEALTH: REPORT OF THE SURGEON GENERAL, FACT SHEET available at <http://mentalhealth.samhsa.gov/cre/fact1.asp> (High-need populations in which African-Americans are disparately represented include the homeless, the incarcerated, those in foster care and also those exposed to violence.). The supplement to the Surgeon General’s report referenced above is devoted in its entirety to the disparate racial, ethnic, and cultural consequences of uneven mental health and systemic disparities that exist with respect to access to mental health care.

46. *Id.* at iii (“Message from Tommy G. Thompson”). In short, there is cause for concern about the status of “minority mental health.” *Id.* at iv (“Foreword”) (noting the seriousness of disparities existing with respect to the delivery of mental health services to racial and ethnic minorities.).

47. For an analysis of the confusion surrounding the definition of mental disorder and the relevance of the constructedness of illness, as opposed to disease see Robert L. Woolfolk, *The Concept of Mental Illness: An Analysis of Four Pivotal Issues*, 22 J. OF MIND & BEHAV. 161, 165 (2001) (“[S]ome of the imprecision in our ideas about mental illness results from nebulosity in the cluster of concepts that includes ‘illness,’ ‘disease,’ and ‘disorder.’” . . . ‘Illness’ is a concept that is related to other concepts such as ‘disease,’ ‘disorder,’ ‘medical condition,’ ‘malady,’ ‘defect,’ and ‘disability.’ Various distinctions can be drawn among these One such distinction . . . is that between disease and illness. This distinction is between theoretical and practical concepts of sickness, respectively. Disease is conceived in naturalistic terms, as a malfunction of an organismic mechanism, and is thought to be a value-free concept. Illness, on the other hand, is regarded as a value-laden cultural category that is contextualised within a complex web of formal and informal social practices. A recent influential account of mental disorder . . . also holds that the theoretical and practical dimensions of psychopathology can be separated into a value-free component (a mind/brain malfunction) and a symptom set that is socially disvalued.”).

48. *Id.* at 171-73; ALLAN V. HORWITZ, CREATING MENTAL ILLNESS (2003).

49. Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* 55 (2d ed. 1994) (“Race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies. We define racial formation as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” (emphasis omitted)). See also Ian F. Haney-López, *White by Law: The Legal Construction of Race* 78 (1996) (“Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.”). See generally Tommy L. Lott, *The Invention of Race: Black Culture and the Politics of Representation* (1999).

This approach recognizes that as a society we hold certain conceptions of mental well-being. Perhaps more accurately, we make assessments of certain behaviors as indicative of mental disorder. As such, mental illness is also a socio-cultural category contingent upon cultural categorizations and social definitions.⁵⁰ We must, therefore, be mindful of the “social forces behind the emergence, maintenance, and change in definitions of mental illness and the ways in which these definitions further the interests of particular groups. Concepts of mental illness, from the constructionist perspective, are aspects of programs of social action not of disturbed individuals.”⁵¹ This social constructionist view is not mutually exclusive of the realists’ view; rather it emphasizes different manifestations, and origins, of mental illness.⁵²

Proponents of both the realist approach and the social framework approach recognize that, unlike many other illnesses or identities, there remains overt stigmatization of, and hostility towards, those suffering from, regarded as suffering from, or perceived to be suffering from, mental health issues.⁵³ Discrimination against the mentally ill is still evolving from blatant prejudice to the subtle, more sophisticated techniques of discrimination typically deployed against women and people who are negatively racialized.⁵⁴ The technologies

50. HORWITZ, *supra* note 48, at 6 (“In contrast to the disease model, the social constructionist view sees systems of knowledge as reflections of culturally specific processes. The central assumption of the constructionist tradition is that mental illnesses are inseparable from the cultural models that define them as such . . . they are socially contingent systems that develop and change with social circumstances.”).

51. Allan V. Horwitz, *Creating Mental Illness in Non-Disordered Community Populations*, in ESTABLISHING MEDICAL REALITY: ESSAYS IN THE METAPHYSICS AND EPISTEMOLOGY OF BIOMEDICAL SCIENCE 123 (Harold Kincaid & Jennifer McKittrick eds., 2007) [hereinafter Horwitz, *Creating Mental Illness*] (referencing IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* (1999)); ESTABLISHING MEDICAL REALITY: ESSAYS IN THE METAPHYSICS AND EPISTEMOLOGY OF BIOMEDICAL SCIENCE ch. 9 (Harold Kincaid & Jennifer McKittrick eds., 2007).

52. Horwitz, *Creating Mental Illness*, *supra* note 51, at 123.

53. See SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* xiii-xvii (2002) (The introduction of this book sets out the ways in which people with known mental illnesses are negatively perceived and treated and the ways in which those who are better able to manage their mental illnesses hide them so as not to be treated negatively); EMENS, *supra* note 38, at 427–28.

54. See Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (exploring the ways in which racialized names are used as proxies for anti-black racism); HARRISON, *supra* note 29, at 58 (“The racism of the postmodern era is not understood to be a uniform configuration of power and experience, nor is it necessarily expressed in overt language and consistent practices. As Gregory puts it, ‘racial meanings are implicated in discourses, institutional power arrangements, and social practices that may or may not be explicitly marked as ‘racial.’ With the crystallization of a racial politics that retreats from a civil rights agenda . . . , the salience of race is both obscured and amplified.”); Jessica Salvatore and J. Nicole Shelton, *Cognitive Costs of Exposure to Racial Prejudice*, 18 PSYCHOL. SCI. 810 at 810 (2007) (remarking that “[s]ocial and legal norms in the United States discourage the overt expression of many kinds of prejudice. Ethnic bias, in particular, is strongly sanctioned. Despite

of discrimination against the mentally ill can still be rather barbaric. As Elizabeth Emens has noted, “classic animus-based discrimination . . . still features prominently in discrimination against people with mental illness.”⁵⁵ She also states:

[I]n contrast to the domains of sex and race, and even physical disability, where overt hostility and dislike have arguably diminished to some extent, or at least gone underground by morphing into less conscious forms of discriminatory animus, overt animus against people with mental illness is not uncommon.⁵⁶

With respect to mental illness, therefore, there is little covering of our prejudicial sentiments.⁵⁷ Susan Stefan, an expert in disability law, makes this point by referencing the following comments made by Kitty Dukakis, the wife of former Governor Michael Dukakis, in her educational advocacy work, as typical of the way we consider mental illness:⁵⁸ “[W]hen I think of mental illness I think of people who are schizophrenic, who are psychotic, who can’t function in society, people with whom you and I wouldn’t want to spend much time.”⁵⁹ Because of their pervasiveness, societal preferences for “normal” people over “crazy” people are clearly articulated in social and professional spaces.⁶⁰

Any naked hostility toward people with mental illness is particularly important in the policing context. Police use of force necessarily involves subjective interpretations of the encounter and the need for force. It is unlikely that police are devoid of the animus or suspicion of the mentally ill so prevalent in society. They use their discretion to determine whether the person with whom they are dealing is a harmless individual, a person in need of help, or a suspect in need of either criminalization or harsh disciplining. If the latter, they frequently adopt a more forceful posture, especially when they encounter resistance, defiance or deviance.⁶¹ The convergence of criminality and mental

this, many ethnic minority groups continue to face discrimination, and even seemingly egalitarian behavior may mask prejudice. Contemporary forms of prejudice incorporate a mixture of negative and positive elements and are therefore more ambiguous and harder to categorize than the straightforward antipathy of ‘old-fashioned’ forms of prejudice.” (citations omitted)).

55. EMENS, *supra* note 38, at 409-10.

56. *Id.* at 410.

57. Cf. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (exploring various legal and narrative manifestations of conformity identity manipulation). Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 Nw. U. L. Rev. 1351, 1363, 1364 (2008) (stating that “[i]ndividuals with psycho-social disabilities historically have been among the most excluded members of society[,]” and “[r]esearch firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities”).

58. STEFAN, *supra* note 53, at xiii.

59. *Id.* at xiii-xiv.

60. EMENS, *supra* note 38, at 419.

61. Indeed, Professor Chevigny of NYU states that “[t]he problem with police brutality is that sometimes, officers react with violence to defiance. Minorities might be more defiant, might

impairment often leads to stereotyping of the mentally ill as violent.⁶² Consequently, based on fear, the mentally impaired are thought to be in need of supervision or surveillance.⁶³ It should therefore come as no surprise that a National Institute of Justice report has hypothesized that “[u]se of force is more likely to occur when police are dealing with persons under the influence of alcohol or drugs or with mentally ill individuals.”⁶⁴ Further, there exists a stereotypical, yet robust, understanding of blackness as “badness.”⁶⁵ The social distance between blacks and whites in America fosters the possibility of misunderstanding and mistranslation of communications and behavior.⁶⁶

give the cops more sass. And people who do that are likely to get hit, especially if the officer has a racist attitude.” Andy Alford, *Resistance, Race Affect Police Response: Minorities Not Charged with Resisting Arrest Subject to Unequal Force Compared to Whites*, AUSTIN AMERICAN STATESMAN, March 28, 2004.

62. John Monahan & Henry J. Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, 4 CRIME & JUST. 145, 146 (1983).

63. EMENS, *supra* note 38, at 416-17 (“The common stereotypes about people with mental illness include the beliefs that they are dangerous, unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care. Beliefs about these traits are often exaggerations.”). See, e.g., Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 393-97 (1992) (describing the pervasive prejudice against people with mental illness as “sanism” and listing commonplace sanist myths).

64. Kenneth Adams et al., *Use of Force by Police: Overview of National and Local Data*, National Institute of Justice and Bureau of Justice Statistics viii (1999), available at: <http://www.ncjrs.gov/txtfiles1/nij/176330.txt> (suggesting that factors other than race or mental illness might exacerbate police officers’ perceptions of threat, which may also contribute to the use of force in the cases I discuss. As a result, further empirical inquiry would help in determining whether race alone is the factor that causes police to use higher levels of force against mentally ill individuals of color.)

65. Supporters of racial profiling often base their arguments on the claim that objective data indicate that people of color commit more drug offences, for instance. Therefore, if it is true that people of color commit certain crimes at rates higher than white do, it is sensible and efficient to racially profile. See R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 577-80 (2003). Summarizing this position, Alex Geisinger states that, “[p]ut simply, the logic of profiling suggests that, if minorities commit more crimes, they should be stopped and searched more often.” Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 660. As Professor Jones has noted, “Profiling in this context ‘can be defined as a broad method of targeting police resources based on where they are most likely to encounter crime.’” Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621, 630 (2006) (citing to Brandon del Pozo, *Guided by Race: An Ethical and Policy Analysis of Racial Profiling in Law Enforcement Decisionmaking*, 1 QUEENSLAND U. TECH. L. & JUST. J. 266, 272 (2001)). For counter-narratives which address the consequences of such thinking see Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907 (2006); N. Jeremi Duri, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004).

66. KERRY ANN ROCKQUEMORE & DAVID L. BRUNSMAN, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* ix (2001) (“Blacks and whites continue to be the two groups with the greatest social distance, the most spatial separation, and the strongest taboos against interracial marriage.”). As Professor Cooper has noted, this mistranslation often culminates in a contest and is even more acute when white police encounter men of color. See Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 8 COLUM. J. GENDER & L. 671 (2009) (asserting that there is also a hegemonic form of police masculinity whereby police feel the need to dominate civilians, especially those who show signs of disrespect, through

Given the conflation of madness with criminality,⁶⁷ the overlay of notions of blackness as “badness” has profound implications for the criminal justice system generally and policing in particular. Thus, at this juncture, when racialized notions of criminality are overlaid, the relevance of Foundational Intersectionality comes into sharper focus.

II. UNDERSTANDING POLICE INTERACTIONS AT THE INTERSECTION OF RACE AND MENTAL STATUS

At the same time that society devises techniques of marginalization, be that racialization or the construction of disability, it also creates and empowers enforcers, or disciplinarians, to police these constructs.⁶⁸ According to philosopher and historian Michel Foucault, these disciplinarians are instrumental in the perpetuation of and ultimate enforcement of ideologies of difference, which are themselves founded upon ways of “knowing” individuals.⁶⁹ The essence of the disciplining function is “the subje[gation] of those who are perceived as objects and the objectification of those who are subjected.”⁷⁰ Yet the “physics” of discipline is complex and multifaceted.⁷¹ It is “a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a ‘physics’ or an ‘anatomy’ of power, a technology.”⁷²

Foundational Intersectionality requires recognition that police involvement in the construction or exacerbation of madness is likely complicated by their participation in racial profiling. These implications will

masculinity contests); Frank Rudy Cooper, *Against a Bi-Polar Black Masculinity*, 39 U.C. DAVIS L. REV. 853, 904 (2006) (“Now more than ever, we need laws to limit police discretion to act on the stereotypes of the Bad Black Man image and laws allowing difference in the workplace to counter the assimilationist assumptions of the Good Black Man image. Only when we get beyond bipolar black masculinity might we have arrived at the point when we can get beyond law.”).

67. MONAHAN & STEADMAN *supra* note 62, at 146 (explaining that this “enduring public perception that the mentally ill are prone to violence” leads to “the construction of prisonlike secure treatment facilities”). See also MENTAL HEALTH COMMISSION, PRESIDENT’S NEW FREEDOM COMMISSION ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA, GOAL 1: AMERICANS UNDERSTAND THAT MENTAL HEALTH IS ESSENTIAL TO OVERALL HEALTH, <http://www.mentalhealthcommission.gov/reports/FinalReport/FullReport-02.htm> (“Stigma is a pervasive barrier to understanding the gravity of mental illnesses and the importance of mental health. For instance, 61% of Americans think that people with schizophrenia are likely to be dangerous to others. However, in reality, these individuals are rarely violent. If they are violent, the violence is usually tied to substance abuse.”).

68. Disciplinarians can include teachers, health care professionals, security and prison guards, politicians, religious leaders and the like as it is a “physics” of power and an “anatomy” of power” which assists authorities in “reinforcing or reorganizing their internal mechanisms of power.” FOUCAULT, *supra* note 7, at 215.

69. See *id.* at 184-185.

70. *Id.* at 184-185.

71. *Id.* at 215.

72. *Id.*

be explored through the lens of archetypal excessive force claims at the intersection of race and mental status. Admittedly, such claims often involve frenzied and dangerous encounters for police—situations in which police are called upon to make split-second decisions, often determinative of life and death.

In appreciating this reality in cases involving claims of police brutality, I want to acknowledge the interaction of a number of competing concerns: the police concern for the prevention and detection of criminal activity; the community concerns for safety and crime control; and the competing concerns of suspects that their rights to be let alone, to be secure in their person, and to have their property be respected. Within this milieu, police nevertheless have considerable discretion. The manner in which their discretion is exercised is based upon a number of contingencies. SIC is one determinant of modality selection. The archetypal cases explored below highlight the interaction of race and mental status in portending which modality will be operationalized by police. In this way, the modalities are derivative of SIC. I will start with the medical modality.

A. *The Medical Modality (and Its Subset, the Family Mode)*

The medical modality centers on treatment. The goals of this modality are to recognize the need for medical intervention and to achieve an appropriate treatment response from health care professionals. It is the most interdisciplinary of the modalities in that it provides for the incorporation of medical knowledge into policing practices. As such, it is in line with contemporary initiatives geared towards ensuring an appropriate response to people with mental illnesses who come into contact with the criminal justice system.⁷³ It is the most benign modality in terms of police use of force. Police employing this modality recognize the suspect's need for medical intervention. They attempt to deescalate the situation in order to secure the scene and ultimately to transport the suspect into a hospital or treatment center for assessment, counseling or the administration of medication.⁷⁴ The cases detailed below indicate baseline police behavior for dealing with a person deemed mentally ill while employing the medical modality.⁷⁵ The responsive

73. See Steadman *supra* note 4. This appears to reference the correct footnote (providing information on initiatives meant to divert the mentally ill from the criminal justice system and into treatment modalities).

74. For an examples of a recent policing initiatives meant to address the policing of the mentally ill population, see Information on the Memphis Police Department, *Crisis Intervention Team (CIT)*, <http://www.memphispolice.org/Crisis%20Intervention.htm> (last visited Nov 18, 2009); CIT International, *Statement of Purpose*, http://www.citinternational.org/data/broch_p2.html (last visited Nov. 18, 2009); Truro Police Department, *Dealing With the Mentally Ill* (2007), <http://www.truropolice.org/On%20Line%20Manuals/Dealing%20with%20the%20Mentally%20Ill.pdf>.

75. As will be seen in the cases below, the police either receive information about the

tactics used by police in these cases demonstrate attention to the demands of interacting with persons in mental crisis and indicate police restraint in interactions with these suspects. The last case in this section additionally demonstrates a subset modality, the family mode, which is seldom evident in cases in which the SIC involves a person of color.

Tofano v. Reidel presents a case in which police utilized the medical modality.⁷⁶ This case demonstrates the heroic, but ultimately unsuccessful, attempts of police to secure medical treatment for a mentally unstable suspect. Even though the police would likely have been justified in using force against Mr. Tofano, they refrained from doing so. Instead they made every effort to take him for a medical assessment and later, when he was in distress, to save his life.

This case involved a “thirty-four year old, 6’ 2” white male weighing 211 pounds” with a “very muscular build.”⁷⁷ A radio dispatch alerted two officers to Mr. Tofano who was partially clad, sweating profusely, yelling and running around a parking lot at approximately 2:00 am.⁷⁸ Recognizing that Mr. Tofano appeared unstable, the officers “tried to calm [him] down,” eventually got him to put down some rocks that he was carrying, and persuaded him to hand them his wallet so that they could check his identification and “ascertain whether he was under the care of a doctor.”⁷⁹

Appropriately, two officers attempted to de-escalate the situation. They “engaged in small talk with Tofano in an attempt to calm him down but were unsuccessful”⁸⁰ as Mr. Tofano was paranoid and was convinced that non-existent people were all around them.⁸¹ A total of three officers attended the scene and one officer advised that “Tofano seemed to be in need of psychiatric screening and evaluation from 262-HELP,” a local mental health facility.⁸² Based on Mr. Tofano’s erratic behavior, the officers decided to take him into custody for disorderly conduct and for a “mental status evaluation.”⁸³ Before the evaluation could take place, however, a series of tumultuous events unfolded when police attempted to usher Mr. Tofano to the patrol car.⁸⁴

suspect’s mental impairment before they come into contact with him or her, or they assume that the person is mentally ill at some point during their policing encounter.

76. *Tofano v. Reidel*, 61 F. Supp. 2d 289, 292 (D.N.J. 1999). This action was brought by the deceased’s wife alleging that the police violated the deceased’s “Fourth and Fourteenth Amendment rights as well as New Jersey common law” in arresting the deceased. *Id.* at 291. In granting the defendant’s motion for summary judgment the court held that the officers were entitled to qualified immunity and, further, that the town was not liable under § 1983. *Id.* at 307.

77. *Id.* at 292.

78. *Id.* at 291-92.

79. *Id.* at 292.

80. *Id.* The court described this as an effort to “reason with and verbally coax Tofano into custody.” *Id.* at 300.

81. *Id.* at 292.

82. *Id.*

83. *Id.*

84. *Id.* at 292-93 (“Tofano refused and grabbed Stitz’s arm, dragging him through the

During the altercation, Tofano was able to drag an officer through the parking lot, break free, slash an officer on the neck with a handcuff, and throw an officer into a patrol car.⁸⁵

Mr. Tofano, having broken free of the officers, ran to a stairwell in a nearby building.⁸⁶ In an attempt to grab Mr. Tofano around the waist, Officer Reidel subsequently lost control of his pepper spray.⁸⁷ Tofano grabbed the canister of pepper spray and aimed it at another officer.⁸⁸ That officer, Devine, was able to “wrestle the canister out of Tofano’s hand,” but fell backwards into his colleague, Officer Reidel, during the ensuing struggle.⁸⁹

It is little wonder, therefore, that the court granted the police’s summary judgment motions asserting the use of appropriate force and qualified immunity.⁹⁰ What *is* remarkable is that the three officers did not call for additional police support or employ greater force and compliance techniques, given Mr. Tofano’s size and level of resistance.⁹¹ It is also noteworthy that the officers did not use their batons, beanbag rounds, or Tasers, nor did they discharge their firearms to subdue or seize Mr. Tofano.

The officers could justifiably have used much greater force in light of Mr. Tofano’s flight, his active resistance, the danger he posed to others, and his violent response to the officers.⁹² Yet the officers remained steadfast in their attempts to restrain Mr. Tofano so that he could be brought to a medical treatment facility, rather than using greater force to subdue him. The three officers in *Tofano* tried to keep him on the ground and to “convince [him] to stop struggling and relax.”⁹³ Nonetheless, Mr. Tofano continued to struggle while the officers sought to secure his left wrist in the handcuffs, which they

parking lot. Stitz placed one handcuff on Tofano’s right wrist, and informed him that he was under arrest for disorderly conduct. Stitz was unable, however, to attach the second handcuff to Tofano’s left wrist. Reidel grabbed Tofano’s left arm but Tofano broke free and swung his arm at Reidel. Devine rushed in to help and Tofano again swung his right arm, slashing Devine’s neck with the handcuff, and creating a cut that later required five stitches. Tofano then started to run and Reidel tackled him from behind. After Tofano threw Reidel off him, . . . Reidel [pepper] sprayed Tofano in the face and frontal area with the pepper spray but it had no effect on him. . . . Stitz was also hit by the pepper spray and was temporarily incapacitated. Tofano then threw Stitz into the patrol car, with Stitz hitting his head and falling to the ground.”).

85. *Id.*

86. *Id.* at 293.

87. *Id.* (Officer Reidel had first attempted to tackle Tofano but was unsuccessful. “Tofano then started to run and Reidel tackled him from behind. After Tofano threw Reidel off him, Reidel informed the other officers that he was going to use pepper spray to try to subdue Tofano.”).

88. *Id.*

89. *Id.*

90. *Id.* at 307.

91. The court noted that “[i]t was Tofano who introduced the element of physical force into the encounter when he grabbed Stitz and dragged him through the parking lot. Stitz was acting reasonably when, as he was pulled by Tofano, he attempted to handcuff Tofano and informed him that he was under arrest for disorderly conduct.” *Id.* at 300.

92. *Id.* at 293.

93. *Id.*

were eventually able to do when he stopped resisting.⁹⁴

Once Tofano was handcuffed the police rolled him onto his back and found he was not breathing.⁹⁵ One of the officers ran to a patrol car for oxygen equipment and it was noticed that Tofano had a strong pulse.⁹⁶ At that point an officer who was a licensed paramedic administered rescue breathing to Tofano while another officer called for ambulance and paramedic units.⁹⁷ Officers applied a heart defibrillator and cardiopulmonary resuscitation to Mr. Tofano in an effort to save his life.⁹⁸ More police arrived and assisted in the effort to resuscitate Tofano.⁹⁹ He was ultimately transported to a hospital where he was pronounced dead.¹⁰⁰

It turns out that Mr. Tofano died suddenly of what the coroner later determined to be “positional asphyxia due to respiratory compromise in a person with toxic levels of cocaine and a congenital heart defect during police restraint.”¹⁰¹ Nonetheless, unlike some of the cases that will be examined in section II, the police in this case appropriately attempted to deescalate the situation in their interactions with a person they identified as unstable. As the court noted, “the officers immediately recognized that Tofano was mentally unstable and acted appropriately when they tried to talk him into getting into the car so that he could receive medical assistance from 262-HELP, the County mental health division.”¹⁰² Additionally, the police quickly recognized the need for medical attention, called for medical assistance, and applied life-saving intervention techniques themselves. As will be seen later, police do not always employ these techniques when they realize a suspect is in medical distress.¹⁰³ This heightened level of police medical and psychological intervention during an interaction with a white suspect is to be contrasted with the subsequent cases in which police use the disciplinary force modality, not the medical modality, when dealing with negatively racialized suspects who arguably pose less of a threat and who have far less physical agility, fitness or stature than did Mr. Tofano. The cases reveal the importance of SIC in determining officer behavior and modality selection.

This point is even more clearly made in the case of *Coghlan v. Phillips*,¹⁰⁴

94. *Id.* at 294.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 306.

103. See *infra* notes concerning *Castillo*, (219, 220); *Ali* (241, 246); *Reynolds* (273, 274, 275); *Banks* (282, 285, 286, 289); *Swans* (319, 324, 327, 330, 340, 349); and *Culver* (359, 372, 375, 376).

104. *Coghlan v. Phillips*, 447 F. Supp. 21, 23 (S.D. Miss. 1977). The son of the deceased brought this suit against the sheriff and his deputies. *Id.* The action was to recover damages

which featured a white suspect who initiated violence against police. *Coghlan* involved an instance of gunfire against police after which they regrouped to “await[] further instructions or assistance” before responding.¹⁰⁵ In this case, Mr. Coghlan’s family had approached the Sheriff’s office requesting that they serve a “lunacy writ” upon Mr. Coghlan, a person known to have a criminal record who was armed and had “uncontrollable fits of anger.”¹⁰⁶ Serving the writ on Mr. Coghlan would have resulted in his commitment to a psychiatric unit for assessment and treatment.¹⁰⁷

Two deputies went to Mr. Coghlan’s home. After police knocked on the door and communicated why they were there, Mr. Coghlan told the police that he was not coming out and “threatened to shoot [them] if [they] did not immediately remove [themselves].”¹⁰⁸ He shouted to “get out of his yard [or else] he would shoot them.”¹⁰⁹ Then he immediately fired four to ten gunshots at the officers.¹¹⁰ Neither officer was injured by the shots, but the windows of their police car were broken and a bullet tore one officer’s uniform.¹¹¹ Instead of returning fire, the officers then removed themselves from the property, retreated to the end of the road and radioed for assistance.¹¹² In the meantime, Mr. Coghlan coerced his daughter-in-law, who lived nearby, to provide him with “two automatic 12 ga. shotguns, one 30.06 and one 22 mag. rifle, and

pursuant to the Civil Rights Act, the Mississippi Wrongful Death Act, and Mississippi common law. *Id.* The court held that the deputies did not use excessive force in responding to the deceased’s gunfire, but rather acted with justifiable self-defense. *Id.* at 28. The sheriff’s “failure to promulgate procedures and regulations governing the use of weapons by officers in self defense . . . as well as the procedures to be followed in executing a lunacy writ . . . did not amount to negligence” and further was not the proximate cause of death. *Id.* at 26. Finally the court held that the police actions were “immune under the protective doctrine of qualified immunity.” *Id.* at 28. This judgment was later affirmed. *See Coghlan v. Phillips*, 567 F.2d 652 (5th Cir. 1978). The original case describes Mr. Coghlan as “a divorced white male” who had been dishonorably discharged with five years imprisonment after Court Martial for assault with intent to commit murder. *Coghlan*, 447 F. Supp. at 23. Additionally, he had twice been convicted of assault with intent to commit murder and had served time in a mental hospital. *Id.* Later, Mr. Coghlan was convicted of attempted rape and was sentenced to probation, which was later revoked upon a subsequent conviction of attempted rape. *Id.*

105. *Id.* at 25.

106. *Id.* at 23-25.

107. With respect to the application procedure and goals of this writ the court states that, “Mrs. Coghlan executed a formal statutory application to have the decedent adjudged a lunatic, alleging that he was ‘suffering from a mental or nervous condition, affliction or disorder to such an extent that [he was] in need of treatment, supervision or control and to an extent that [he was] likely to become dangerous or a menace if left at large.’ This application asked that Coghlan be ‘adjudged to be suffering from a mental or nervous condition, affliction or disorder and be committed to and confined in the proper mental institution for treatment, care and supervision as authorized by [state law].’” *Id.* at 24.

108. *Id.* at 25.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

numerous ammunition.”¹¹³

Once the police were able to regroup they returned to Mr. Coghlan’s house, this time with a bullhorn.¹¹⁴ They informed him over the loudspeaker that “they wanted to talk with him and wished to take him to a doctor.”¹¹⁵ While the police were secretly approaching his home, Mr. Coghlan came out of his house carrying two rifles.¹¹⁶ The police “ask[ed] him to come to the road and throw his guns down, [and told him] that they wanted to talk to him.”¹¹⁷ In response Mr. Coghlan repeatedly fired his weapons at the officers, who either took cover or threw themselves to the ground.¹¹⁸ At this point, the officers, none of whom had been hit, returned fire.¹¹⁹ One of the officers’ bullets struck Mr. Coghlan, who later died at the hospital.¹²⁰ Not surprisingly, the Coghlan family’s excessive force claims were dismissed.¹²¹ The police demonstrated restraint in not returning fire after the first volley of bullets and only responded in kind after Mr. Coghlan had rearmed himself and recommenced shooting at them. The court correctly found that this response was proportionate and was justified in the circumstances.

The next case is an even more powerful example of the lengths to which police will go when dealing with individuals whose SIC is white and mentally impaired. Specifically, in the following encounter with a violent autistic white youth, police exhibited great restraint and released the young man to the custody of his family, rather than engaging the juvenile justice system. In forgoing the arguably justified use of force, police navigated their encounter with the young man with great delicacy and compassion.

(i) The Family Modality: A Compassionate Subset of the Medical Modality

In *Bates ex rel. Johns v. Chesterfield County, Va.*,¹²² police released a violent youth to his parents despite his numerous assaults on at least two police officers. A concerned father called police and reported that an odd-acting, shirtless young man had approached him and his children as they played outside.¹²³ The first officer, Genova, located this young man, Brian Bates, who

113. *Id.*

114. *Id.* at 26.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. The court stated, “This Court, as the trier of fact, finds that McPhail and Adams were acting within the scope of the privilege of self defense which privilege of course inures to the benefit of the defendants.” *Id.* at 28. The court also found the killing of Mr. Coghlan justified within the meaning of the Mississippi Code. *Id.* Ultimately, the police behavior was immune under the protective doctrine of qualified immunity. *Id.* at 31.

122. *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367 (4th Cir. 2000).

123. *Id.* at 369 (Mr. Schwartz told the dispatcher, “I don’t know if this boy is on drugs or

was a 17-year-old “male juvenile with blond hair [and] bad complexion.”¹²⁴ Despite Officer Genova’s request that Brian “come talk with him,” in light of his earlier trespass on private property, Brian walked away.¹²⁵ Officer Genova then ordered Brian to “come back,” at which point Brian “walked over to the police motorcycle, which [Officer] Genova had dismounted. Without permission from Genova, Bates sat sideways on the motorcycle.”¹²⁶ The officer’s response was to push Brian off of the motorcycle.¹²⁷ What then ensued was a violent back and forth between the officer and Brian Bates. Bates physically resisted being restrained, drew the blood of the officer by biting him, and spat on the officer.¹²⁸

While Officer Genova and Brian Bates were still struggling, another officer arrived who immediately recognized that “the officer was in trouble and needed assistance.”¹²⁹ Working together to grapple Bates, the officers were eventually able to cuff his arms in front of his body.¹³⁰ With the arrival of two more police, all four officers “wrestled with Bates” who was “bucking up and down on the pavement” and “were able to handcuff his arms behind his back.”¹³¹ As Officer Genova disinfected his wounds at a patrol car, the two officers who had most recently arrived watched over Bates.¹³² He commenced kicking the officers and delivered a blow directly to the groin of Officer Biller, thereby incapacitating him.¹³³ At this time a friend of the Bates family arrived and told police that Bates was autistic. His parents arrived shortly thereafter and confirmed his mental status.¹³⁴

After consultation amongst the officers, it was decided that Brian would be charged “as a juvenile for assaulting Officers Genova and Biller.”¹³⁵ He was then released to the custody of his parents, “rather than transporting him to the detention center as the police would normally have done.”¹³⁶ The officer in

drunk but he is acting weird or crazy and just went running through the woods.”).

124. *Id.* at 371.

125. *Id.* at 369.

126. *Id.*

127. *Id.*

128. *Id.* (“Bates then pushed Officer Genova and walked away. Genova attempted to grab Bates, but Bates fought him off. During the struggle, Bates used his fingernails to scratch Genova’s left arm. Bates then ran down the street. Genova called for back up and remounted his motorcycle. Genova caught up with Bates, dismounted, and tried to grab Bates by the wrist. Bates resisted, spit on Genova, and told the officer to leave him alone. Genova grabbed Bates by the throat and wrestled him to the pavement. Genova warned Bates not to spit on him. Genova then attempted to handcuff Bates, but Bates continued to resist. Bates also bit Genova, drawing blood from the officer’s left forearm.”).

129. *Id.*

130. *Id.*

131. *Id.* at 370.

132. *Id.*

133. *Id.* (Officer Biller’s groin injury was significant and took over 16 days to heal.).

134. *Id.*

135. *Id.*

136. *Id.*

charge “thought that a night in the detention center would be detrimental to Bates given his mental disorder and aggressive behavior.”¹³⁷ Even the court seemed amazed by the level of restraint demonstrated by the four attending officers.

By taking the first step to commandeering the officer’s motorcycle, Bates threatened not only Officer Genova and police property; he also put himself and the public at risk. In response, Genova simply pushed Bates off the motorcycle.

. . .

Bates then initiated a series of physical confrontations with the police to which the officers responded in reasonable fashion. . . . Bates spit, bit, and kicked the officers. It ultimately required four officers to restrain Bates *And yet in light of what the district court described as Bates’ “fierce resistance,” the officers did not pepper spray Bates nor use their batons against him.*¹³⁸

Not only did the police forgo use of a disciplinary force modality with a suspect who had fled, scratched, bit, kicked and spat at several officers, but they also used neither the criminal modality nor the treatment-oriented medical modality. Perhaps this is the appropriate result given that Brian Bates was only seventeen and suffered from autism. This case demonstrates that police have the capacity to restrain themselves from using force. Further, by returning Bates to the care of his parents, they also revealed generosity in the exercise of their discretion.

As will be seen in the archetypal cases explored in the disciplinary force modality section, police demonstrate far less tolerance with suspects whose SIC is black and mentally ill. These suspects are seized forcefully upon the slightest instance of violence on their part. Even the suspicion that the suspect has a gun—much less actual gunfire—attracts a forceful, often lethal, police response when the SIC is black and mentally ill.¹³⁹ The police conduct demonstrated in the above cases—specifically the failure to return gunfire after repeated threats and instances of violence, and composure in the face of persistent forceful resistance—is remarkable. Such composure is not seen in cases when the SIC involves a negatively racialized individual. Additionally, as will be seen, in managing negatively racialized suspects the police do not exercise their discretion in favor of the family modality, even when there are instructions that family members should be contacted.¹⁴⁰ In those cases involving violent suspects of color with dubious mental health, the intermediary criminal modality is also often forgone in preference for harsh techniques of disciplinary punishment involving brutal force. Yet the cases

137. *Id.*

138. *Id.* at 371-72 (emphasis added).

139. *See infra*, note 238

140. *See Swans, infra*, notes 304, 320, 321.

show that police continue to make use of the criminal modality in cases involving violent white suspects. The next case is such an example.

B. *The Criminal Modality*

The criminal modality is the intermediate modality available to police in their dealings with the mentally ill. This modality centers on the criminal justice system. Despite a belief that a suspect has a mental illness, police may use the criminal modality either because of the heightened threat posed by the suspect, or because of lack of access to the medical modality. Thus, use of the criminal modality may reveal a scarcity of psychiatric resources that might explain the slippage of white suspects out of the medical modality into the criminal modality and the push of individuals of color towards harsher treatment.¹⁴¹ I hypothesize that the medical modality is the police modality of choice for white mentally-ill suspects, and thus, any rationing of the scarce commodity of medical care might tend to disadvantage individuals of color.¹⁴² This theory might help to explain the curious statistics indicating the predominance of mentally ill white people in prisons and jails, despite increasing incarceration rates for people of color.¹⁴³ The following cases provide a vantage point from which to consider these issues.

Mr. Donald Winters, a fifty-nine year old white male, suffered from psychotic episodes and paranoia.¹⁴⁴ His behavior was occasionally erratic and

141. See comment of Bernard E. Harcourt, *supra* note 14.

142. See generally E. FULLER TORREY, M.D., KURT ENTSMINGER, J.D., JEFFREY GELLER, M.D., JONATHAN STANLEY, J.D., D. J. JAFFE, B.S., M.B.A., THE SHORTAGE OF PUBLIC HOSPITAL BEDS FOR MENTALLY ILL PERSONS: A REPORT OF THE TREATMENT ADVOCACY CENTER 1-2, www.treatmentadvocacycenter.org (“In 2005 there were 17 public psychiatric beds available per 100,000 population compared to 340 per 100,000 in 1955. Thus, 95 percent of the beds available in 1955 were no longer available in 2005. . . . The consequences of the severe shortage of public psychiatric beds include increased homelessness; the incarceration of mentally ill individuals in jails and prisons; emergency rooms being overrun with patients waiting for a psychiatric bed; and an increase in violent behavior, including homicides, in communities across the nation.”); E. RICHARD BROWN, PHD, VICTORIA D. OJEDA, MPH, ROBERTA WYN, PHD, REBECCA LEVAN, MPH, RACIAL AND ETHNIC DISPARITIES IN ACCESS TO HEALTH INSURANCE AND HEALTH CARE, x (2000), <http://www.kff.org/uninsured/1525-index.cfm> (“Racial and ethnic groups, including both children and adults, differ in their access to health services.” *Id.* at xi. Further, “[h]ealth care is only one of many factors that affect health status, but the lack of health insurance and other barriers to obtaining health services effectively diminish racial and ethnic minorities’ utilization of preventive services and medical treatments that could reduce their burdens of disease and contribute to improved health.” *Id.* at 1. Ultimately the authors note that “[d]isparities in health insurance coverage and access to health care services thus contribute to and exacerbate disparities in health status.” *Id.* at 67); BJS-MENTAL HEALTH, *supra* note 18, at 1 (“[One] in [three] State prisoners and [one] in [six] jail inmates who had a mental health problem had received treatment since admission.”). See also *Winters*, *infra* notes 144-178.

143. See BJS-MENTAL HEALTH, *supra* note 18, at 2.

144. *Winters*, ex rel. Estate of *Winters v. Arkansas Dep’t of Health & Human Servs.*, 437 F. Supp. 2d 851, 855, 867-68 (E.D. Ark. 2006). This case was brought by the administrator of the estate of the deceased who died of peritonitis while in police custody in Arkansas. *Id.* at 854. The suit was brought under § 1983, the Americans with Disabilities Act, and the Rehabilitation Act.

delusional.¹⁴⁵ The case of *Winters ex rel. Estate of Winters v. Arkansas Department of Health and Human Services* mentions two previous police encounters, which took place prior to the events upon which the case is focused.¹⁴⁶ The first incident took place in 1996 after neighbors called the police complaining that Mr. Winters had “stopped several cars and complained that people were out to kill him.”¹⁴⁷ On this occasion, police employed a medical modality, and Mr. Winters was “taken to a mental hospital and recovered to his prior functional level.”¹⁴⁸ In 2000, Mr. Winters again exhibited erratic behavior that attracted police attention. Mr. Winters believed that Wal-Mart and the police were inserting camera devices into people to spy on him, which led to an incident described as “a stand-off and confrontation with the police, during which his arm was broken.”¹⁴⁹ Again, on this occasion the medical modality was used, and Mr. Winters was taken to a psychiatric hospital where he remained for three weeks.¹⁵⁰

During the incident that led to Mr. Winters’ third interaction with police, in 2002, Mr. Winters, who had been off of his medication for two years, went to a neighbor’s home and commenced banging on the door.¹⁵¹ Before that he had become convinced that there was a sniper in the wooded area near his home, as “he could see the red laser beams from a weapon.”¹⁵² The neighbor called the police and Mr. Winters’ son, Darin who then called the local Sheriff’s office and told them that his father needed mental health services.¹⁵³ The Sheriff’s office explained that they were not equipped to provide mental health services.¹⁵⁴ Despite not being able to provide mental health services, the officers who arrested Mr. Winters understood that he was mentally ill and demonstrated great restraint.

Police went to the neighbor’s house to find Mr. Winters still knocking on the door.¹⁵⁵ Upon seeing the officers, Mr. Winters told them that they were all going to be executed.¹⁵⁶ The officers could not effectively communicate with Mr. Winters, who responded to them with blank stares.¹⁵⁷ Mr. Winters refused to heed the officers’ instructions to return to his own home, stating that if he

Id. The court found that neither the sheriff nor the Arkansas Department of Human Services were liable. *Id.* at 904.

145. *Id.* at 855-56.

146. *Id.*

147. *Id.* at 855.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 856.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 857.

156. *Id.*

157. *Id.*

went there, the officers would kill him.¹⁵⁸ When the officers attempted to escort Mr. Winters to the patrol car, Mr. Winters “tightened his body, struggled to pull loose and refused to walk.”¹⁵⁹ At that point Mr. Winters was “taken to the ground by the three officers and handcuffed.”¹⁶⁰

Interestingly, the court noted that “[i]t took all three officers to handcuff him and load him into the patrol car. Winters bit and kicked the officers.”¹⁶¹ Yet the three officers did not use restraints, sprays, bean bag rounds nor their weapons to subdue Mr. Winters. Indeed, one of the officers noted that “in the struggle Mr. Winters was not struck by a baton or other object,”¹⁶² as is frequently done in the disciplinary force cases. Moreover, the court noted that “[a]fter the officers got Mr. Winters in the patrol car, they took him directly to Bates Medical Center” to have him “examined and admitted to the psychiatric ward.”¹⁶³ Thereafter, Mr. Winters was treated in the emergency room as an attending physician determined that Mr. Winters was “too violent and aggressive to be admitted to the hospital” as “[it] was not equipped to handle violent cases like his.”¹⁶⁴ Upon the suggestion of the hospital, the police advised Mr. Winters’ son that he should arrange to have Mr. Winters civilly committed.¹⁶⁵ In the meantime, Mr. Winters was discharged into police custody and taken to a detention center.¹⁶⁶

Upon his arrival at the detention center, Mr. Winters walked away from the deputies, and behaved in a manner that was belligerent, obscene, and non-cooperative.¹⁶⁷ “Finally, three officers held Mr. Winters while the fourth deputy did the pat-down search, after which Donald Winters was placed in [a] holding cell”¹⁶⁸ Several incidents followed wherein officers used force or restraints as Mr. Winters refused to change cells, refused being taken to the “detox” unit,¹⁶⁹ began beating his head on the toilet, and resisted attending and then leaving the hearing for his criminal trespass charge.¹⁷⁰

158. *Id.*

159. *Id.* at 858.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 858, 859.

165. *Id.* at 859.

166. *Id.*

167. *Id.* at 860. Mr. Winters refused to be booked and patted down by falling to the floor and lying on his back. Later, after exposing and playing with himself, Winters was placed in a suicide smock and then in a restraint chair from which he escaped. *Id.* at 860-61.

168. *Id.* at 860. Shortly thereafter Mr. Winters also refused to be removed from the booking cell and to have his handcuffs removed. *Id.* As the case indicates, “Force was used to remove the cuffs.” *Id.*

169. *Id.* Officers moved Mr. Winters into the detox cell so that he could be monitored with surveillance cameras. *Id.*

170. *Id.*

The officer in charge of the detention center commented that “[Mr. Winters] displayed episodic violent behavior until medicated at Ozark Guidance Center No staff person beat or hit Mr. Winters. Rather, staff personnel tried to protect him from himself while trying to carry out their many duties.”¹⁷¹ Over the course of the next thirty-six to forty-eight hours, Mr. Winters routinely refused to heed police instructions and resisted being moved.¹⁷² Indeed, Mr. Winters’ erratic and non-compliant behavior—even in the courtroom—went a long way in convincing the presiding judge that since he posed “a clear and present danger to himself or others,” he should be committed.¹⁷³

Ultimately, a diagnosis of “Delusional Disorder, Paranoid Type” was made at the Ozark Guidance Center.¹⁷⁴ Despite this diagnosis indicating that if “not admitted to treatment NOW, [there was] a reasonable probability” of death or serious bodily injury, Mr. Winters could not be accommodated, as all psychiatric beds were full.¹⁷⁵ Thus, given the scarcity of psychiatric services, Mr. Winters was discharged from temporary treatment at the Ozark facility and returned to police custody.¹⁷⁶ Ultimately, Mr. Winters died alone in his cell from what an autopsy determined to be peritonitis due to a perforated ulcer that punctured sometime after his arrest.¹⁷⁷

In absolving the police and the Arkansas Division of Health and Human Services of liability, the court concluded that “the acts or omissions of the Defendants did not cause or contribute to the death of Donald Winters.”¹⁷⁸ Throughout their contact with a belligerent, disruptive and often violent Mr. Winters, police demonstrated restraint and a refusal to use responsive violence in their dealings with Mr. Winters. The police would have been well within their jurisdiction, pursuant to *Graham v. Connor*, the leading excessive force case, to respond to Mr. Winters with violent force, yet they did not exercise their discretion in this manner.¹⁷⁹ Rather, despite being denied access to the

171. *Id.* at 861.

172. *Id.* at 864. Consistently, upon being taken to court for a civil commitment hearing, Mr. Winters “fought being transported” and “had to be physically restrained.” *Id.*

173. *Id.* at 865.

174. *Id.* at 868.

175. *Id.* at 867 (Revealing the scarcity issue, the hospital record stated: “Client to return to Benton County Jail to await placement at Arkansas State Hospital (ASH). Single Point of Entry done and faxed to ASH. No charitable care male bed available at any facility that accepts mental health commitments at the present time.”). Also noteworthy, as the case observes: “In 2002 Donald Winters had no health insurance and little cash. He could not pay for medical services.” *Id.* at 856.

176. *Id.* at 866.

177. *Id.* at 873, 875-76.

178. *Id.* at 877.

179. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (the Court instructed an examination of the particular facts and circumstances of each case “including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”).

medical modality, the police nonetheless recognized the need to treat Mr. Winters in a manner befitting a patient rather than a criminal prisoner. For instance, on at least a couple of occasions the police orchestrated medical intervention and the administration of psychotropic drugs for treatment of Mr. Winters.¹⁸⁰ After this infusion of the medical modality into the criminal, Mr. Winters was returned to detention.¹⁸¹ This type of medical intervention is not seen in the cases below involving suspects of color where police seem less able or willing to recognize the need for medical treatment and help. The next case, *Sallenger*, provides an even more remarkable framework for analysis, given the judicial impatience displayed with regard to violent policing tactics for white mentally-disturbed suspects.

The case of *Sallenger v. City of Springfield*¹⁸² is notable in several respects. Despite finding that the deceased put officers in reasonable apprehension of serious physical harm through a confrontation and protracted struggle, the court denied the defendant police's summary judgment motion with respect to plaintiff's Fourth Amendment excessive force claim.¹⁸³ Instead, the court determined that there was a material issue of fact "with respect to the timing and amount of force used by the officers and the reasonableness of the force used."¹⁸⁴ This determination was based in part on the court's recognition that the officers, in following their departmental

180. *Winters*, 437 F. Supp. 2d at 858 ("After the officers got Mr. Winters in the patrol car, they took him directly to Bates Medical Center. . . . 'to have him examined and admitted to the psychiatric ward.'). After being admitted to the psychiatric ward, Mr. Winters "[mostly] displayed episodic violent behavior until medicated at Ozark Guidance Center on December 31." *Id.* at 861. "[R]ecords indicate that the Ozark medical staff forcefully administered two shots into Mr. Winters' buttocks, one an anti-psychotic." *Id.* at 878. "Dr. Foster had prescribed and sent along Zyprexa Zydia, an atypical anti-psychotic drug to be administered orally." *Id.* at 879. *See also id.* at 855 (for information on prior instances of police use of the medical modality in their dealings with Mr. Winters).

181. *Id.* at 866.

182. *Sallenger v. City of Springfield*, No. 03-3093, 2005 WL 2001502 (C.D. Ill. Aug. 4, 2005). The matter involved the defendant's motion for summary judgment of all claims brought by the mother of the deceased who alleged that police had violated her son's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as violations of Illinois state law and the ADA. The court denied the defendant's motion with respect to the Fourth Amendment excessive force claim, but allowed the motion with respect to the failure to provide medical care (Eighth Amendment) and the claims based on the Fourteenth Amendment. *Id.* at *31.

183. "Viewing this evidence in the light most favorable to the Plaintiff, however, there is still sufficient consistency between the officers' accounts to demonstrate that Andrew approached the officers and put them in apprehension that he was about to batter Sergeant Zimmerman." *Id.* at *16.

184. *Id.* at *17 ("Thus a question of fact exists regarding the degree of control the officers had over Andrew when they administered these strikes since Sergeant Zimmerman felt safe leaving Officers Oakes and Oliver alone with Andrew on these three separate occasions. Further, Plaintiff has presented evidence in the form of expert testimony that closed-fist and flashlight strikes on a handcuffed arrestee may be an unreasonable use of force. . . . Third, there is an issue of fact as to whether the hobbling itself was a reasonable use of force. . . . Fourth, there is an issue of fact as to whether the officers properly positioned Andrew after hobbling him." (citation omitted)).

protocol “of treat[ing] all individuals equally, regardless of mental illness[,]”¹⁸⁵ departed from the protocol adopted by the International Association of Chiefs of Police (IACP) for dealing with the mentally ill.¹⁸⁶ The court’s reasoning indicates that the police adopted a criminal modality when a medical modality was in order. Given the threat and resistance they encountered, however, the police conduct in *Sallenger* is relatively restrained, especially when compared to the encounters with negatively racialized suspects, as examined below.

Mr. Sallenger was a 262 pound, six-foot tall “35 year-old, divorced Caucasian male” who experienced a “psychotic episode caused by mental illness.”¹⁸⁷ Upon Mr. Sallenger waking his family in the middle of the night, running around naked and locking the cat in the bedroom, his sister called 911 for assistance, reporting: “[H]e’s very psychotic. I mean he’s running around naked in front of the kids and everything.”¹⁸⁸ She informed the 911 operator that Mr. Sallenger was “schizophrenic bipolar manic depressive.”¹⁸⁹ Once the police arrived at the scene, the sister again told the officers that her brother was mentally ill.¹⁹⁰

Police entered the residence, which was in darkness, and used flashlights to ascertain whether Mr. Sallenger was still in the house. They found him naked in his room, confused as to who they were despite their earlier announcements.¹⁹¹ Mr. Sallenger “then stood up and approached the officers, who had paused at the threshold of the bedroom . . . [and] he swore at the officers, rushed at [Officer] Zimmerman, grabbed his shoulder radio equipment, and knocked his flashlight out of his right hand.”¹⁹² Another officer at the scene testified that Mr. Sallenger “swore at the officers, threatened to kill them, clenched his fists and quickly came at the officers with his fist up.”¹⁹³ At this time, one of the officers discharged pepper spray into Mr. Sallenger’s face.¹⁹⁴ Thereafter, a struggle between Mr. Sallenger and two

185. *Id.* at *2.

186. The court makes specific reference to section 157, which states:

[U]nless a crime of violence has been committed and or a dangerous weapon is involved, officers should normally respond to the incident or approach a known mentally ill subject in a low profile manner . . . officers should request backup and any specialized crisis intervention assistance available while taking initial steps necessary to moderate or diffuse a situation.

Id. (citations omitted).

187. *Id.* at *1-2.

188. *Id.*

189. *Id.* at *1. Sallenger’s sister further reported that she had attempted to have her brother involuntarily committed but that the state’s attorney had indicated that they could not do anything because there was insufficient evidence. *Id.* (citation omitted).

190. *Id.* at *2 (citation omitted).

191. *Id.* at *3.

192. *Id.*

193. *Id.* Another officer corroborated this saying that Mr. Sallenger came at them in the “boxing position.” *Id.*

194. *Id.* OC spray is commonly referred to as pepper spray and is used to subdue an arrestee by inflaming their eyes and nose. *Id.* at *4 n.2.

of the officers ensued, with one of the officers pushing Mr. Sallenger backwards, causing both of them to fall to the floor.¹⁹⁵ Another officer struggled to assist in turning Mr. Sallenger onto his back, as he had “tucked his arms under his torso to prevent handcuffing.”¹⁹⁶ When the officers informed Mr. Sallenger that he was under arrest and commanded him to stop resisting, he “repeatedly told the officers to leave his house and threatened to kill them.”¹⁹⁷

What followed thereafter demonstrates police restraint and the adoption of “progressively severe means of force”¹⁹⁸ to achieve compliance—techniques absent in the cases below involving police encounters with negatively racialized individuals. Refusing to follow police orders to remain prone, Mr. Sallenger “was able to lunge to the bed, lifting his torso onto the bed, with his knees on the floor[,]” making it impossible for police to handcuff him.¹⁹⁹ Since Mr. Sallenger was naked, sweaty, and covered with the oily pepper spray, he was difficult to hold.²⁰⁰ During the course of the scuffle, the bedroom lamp was knocked over, leaving the room without light.²⁰¹ The officers had to use a flashlight in their efforts to restrain Mr. Sallenger. The court describes the police response in this way:

Before Andrew [Sallenger] was handcuffed, the officers applied several progressively severe means of force to get him to comply with their orders. First, Officer Oliver used several pressure point techniques, which were ineffective, and Sergeant Zimmerman used an armbar technique in an attempt to bring Andrew’s left arm behind his back. Second, both Officer Oliver and Oakes administered closed-fist strikes to Andrew, with Officer Oliver striking Andrew’s right shoulder two or three times, and Officer Oakes striking the right common peroneal area, a nerve area behind the right thigh, with two sets of three punches each. Third, Officer Oaks struck Andrew with three sets of flashlight strikes, three per set, in Andrew’s right common peroneal area.²⁰²

This progressive escalation in police force is revealing when contrasted against the accelerated escalation of force found in the disciplinary force modality cases examined in the next section. First, when the disciplinary force modality is used on negatively racialized suspects, police use pain compliance techniques in the absence of forceful resistance or threats.²⁰³ Second, as described below, the pain compliance techniques used on suspects of color continue after the police have achieved their ostensible goal of suspect

195. *Id.* at *4.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *4 (citation omitted).

203. See *Banks*, *supra* note 2; *Swans*, *infra* note 304.

submission.²⁰⁴ Third, under the disciplinary force modality, police frequently resort to more forceful forms of seizure, (such as shooting earlier—or at least questionably—in the encounters).²⁰⁵ Additionally, SIC is important when the police escalate the situation and then resort to extreme measures of containment when the suspect is a person of color with a mental illness. These encounters, by which police come to view a person as a suspect, or by which police might actively construct an individual as a criminal, indicate the importance of SIC in the modality pursued by police.²⁰⁶

Ultimately, the police were able to handcuff Mr. Sallenger despite his attempts to pull his hands apart and his threats to kill them.²⁰⁷ Thereafter, police “hobbled” Mr. Sallenger by “pull[ing] [a] strap connecting the leg restraint to the handcuffs taut enough that, although [his] knees were on the floor, ‘his feet were no longer—the toes of his feet were no longer touching the ground; they were elevated . . . [and] [h]is lower legs from below his knees were . . . pointing towards his butt.’”²⁰⁸ Shortly thereafter, Mr. Sallenger stopped breathing and had no pulse, ultimately dying of positional asphyxiation after being hobbled.²⁰⁹

204. See Swans, *infra* note 304.

205. NATIONAL LAWYERS GUILD, ET AL., *STOLEN LIVES: KILLED BY LAW ENFORCEMENT* iv-v (2d ed. 1999) (documenting over 2000 cases in which a person has died at the hands of police, the report states: “[t]he main targets of police brutality are Black and Latino people. . . . While it strikes young men of color most, police brutality is increasingly experienced where we would not expect it: in white communities, by women, by the mentally ill and psychologically distraught, the disabled, and even sometimes the elderly. . . . Most cases we list concern people who were unarmed and/or either committed no crime or were involved in a situation that should have been settled without the use of deadly force. . . . When police arrive on the scene, they often escalate the situation rather than diffuse it. There is an increase in the use of paramilitary units (e.g. SWAT teams, Emergency Response Teams) in responding to domestic violence incidents or other disturbances. . . . Police, not social workers or psychologists, are called to deal with the mentally ill and psychologically distraught. . . . In too many cases, the incident rapidly escalates and the person is killed.”). See also *infra* notes Castillo, 220; Ali, 246, 259; Reynolds, 269; Banks, 285, 289, 290; Swans, 327, 328, 329, 352; Culver, 372.

206. See Bates, *supra* note 122, 128; Tofano, *supra* note 76; Coghlan, *supra* note 104; Winters, *supra* note 144; Reynolds, *infra* note 262; Ali, *infra* note 238, ; see also SHEILA FITZGERALD, *POLICE BRUTALITY: OPPOSING VIEWPOINTS* (2006); GAIL STEWART, *POLICE BRUTALITY: OVERVIEW SERIES* (2005). For scholarship examining the role of race in policing, see John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1022 (2009) (“[A]t least some police violence is systematic, as demonstrated by the recent examples of the Rampart scandal in Los Angeles and the widespread use of torture and other abuse in the Chicago Police Force’s Area 2.”) (citations omitted); Banks, *supra* note 65; Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1272-73 (1998) (addressing the persistence of racism encountered by black men in their dealings with police); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 789 (1999) (examining the issue of race-based police suspicions). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 3 (1997). See also the work of Professor Cooper, *supra* note 66.

207. Sallenger, 2005 WL 2001502, at *5.

208. *Id.* at *6 (brackets in original) (citations omitted).

209. *Id.* at *7. The doctor who performed the autopsy concluded that death resulted from “a cardio respiratory arrest during prone police restraint due to excited or agitated delirium.” *Id.*

The *Sallenger* court's reasoning provides insight into the importance of SIC. The court held that "[t]he undisputed evidence is that Andrew [Sallenger] initiated the aggressive behavior toward the officers."²¹⁰ "Questions exist," however, "with respect to the officers' response to [Sallenger's] initial aggression."²¹¹ *Sallenger* could provide a judicial template or threshold for the policing of mental illness. The judicial opinion can be theorized as encouraging a compassionate approach to police encounters with mentally ill suspects. However, an examination of the disciplinary modality case law reveals that such an empathetic judicial temperament with regard to the policing of mental illness is found only where the level of police force used borders on barbarity or cruelty,²¹² where the police behavior is deeply shocking to the court²¹³ or where the actions of the officers are "repugnant to the conscience of mankind."²¹⁴

C. The Disciplinary Force Modality

The disciplinary force modality derives from a Foucauldian theorizing of police interactions at the identity intersection of negative racialization and mental illness: the SIC results in the punishment of a dangerous "monster."²¹⁵ This modality circumvents both the medical and criminal modalities, as it dispenses with treatment and the traditional criminal justice system. Cases involving the disciplinary force modality thus reveal the problem that many negatively-racialized people with mental illness may not be entering the criminal justice system, let alone the medical modality.

Theoretically, when using force, police proceed from force A, to B, to C, to D in an ordered escalation. This is generally what seems to happen in cases

Such delirium is "characterized by agitation, hostility, bizarre or hyperactive behavior, paranoia, shouting, thrashing, ranting and usually performing feats of exceptional strength or endurance without apparent fatigue." *Id.* at *8.

210. *Id.* at *16.

211. *Id.*

212. *Culver v. Fowler*, 862 F. Supp. 369, 371 (M.D. Ga. 1994).

213. *Banks v. Modesto*, No. 1:04-cv-6284, 2005 WL 2233213 at *10 (E.D. Cal. Sept. 9, 2005).

214. *Fowler*, 862 F. Supp. at 371 (quoting *Hudson v. McMillian*, 503 U.S. 1 (1992) (citation and internal quotations omitted)).

215. FOUCAULT, *supra* note 7, at 256. In discussing societal views of crime, Foucault asserts that the entire social order is upset by the offense, which "opposes an individual to the entire social body; in order to punish him, society has the right to oppose him in its entirety." *Id.* at 90. As the offender becomes constructed and objectified as worse than the enemy of the state, and instead is perceived as a monster, punishment becomes imperative: "[t]hus a formidable right to punish is established, since the offender becomes the common enemy. Indeed, he is worse than an enemy, for it is from within society that he delivers his blows—he is nothing less than a traitor, a 'monster.' . . . In such a case the preservation of the state is inconsistent with his own, and one or the other must perish; in putting the guilty to death we slay not so much the citizen as the enemy." *Id.*

involving white mentally-ill suspects. However, this does not appear to be the tendency in cases where police encounter negatively racialized people deemed mentally ill. Instead, I theorize that there is circularity to the police involvement with suspects of color. It appears that police often escalate the situation, which further agitates the mentally-ill person to the point that police force seems justified, thereby constructing a suspect in need of disciplinary force. Further, I theorize that police use of force appears not to be proportionately progressive, but rather is expedited in its trajectory from A to D without the appropriate intermediate steps. Finally, the force used by police appears to be a disproportionate, yet orchestrated, response of violence by numerous officers at the scene. The following cases are archetypal examples of police encounters with suspects of color thought to be suffering from mental illness.

In *Castillo v. City of Round Rock*,²¹⁶ the police shot Jesus Castillo as he held a beer bottle over his head. This occurred after the Round Rock Police Department received “911 reports that a pedestrian was yelling and interfering with traffic” and that a person fitting the same physical description stole popcorn and beer from a gas station at that location.²¹⁷ Officer Kincaide arrived first and “ordered Castillo to stop where he was, and Castillo complied, placing a pack of beer on the ground, taking a drink from the bottle of beer he held in his hand, and then raising both hands while he continued to hold the beer bottle in one hand.”²¹⁸ Mr. Castillo was described as “a relatively short and heavy, 39-year-old Hispanic male with a history of mental illness.”²¹⁹ Accepting the facts most favorable to the plaintiff, the court stated that “Kincaide approached Castillo and ‘attacked him,’ knocking the beer bottle out of his hand.”²²⁰ A struggle ensued between Officer Kincaide and Castillo, causing the officer to bleed profusely.²²¹ Two more officers and a passerby finally restrained Mr. Castillo on his back, placing him in handcuffs.²²² In restraining Castillo, Officer Kincaide and the bystander climbed on top of Castillo as the three officers put flex cuffs on his legs.²²³ As Officer Kincaide

216. *Castillo v. City of Round Rock*, No. 98-50163, 1999 WL 195292 (5th Cir. March 15, 1999). This suit was brought by the survivors of Jesus Castillo against the City and three of its police officers. The plaintiffs alleged that three police officers used excessive force against Mr. Castillo and that they were deliberately indifferent to his subsequent medical needs in contravention of 42 U.S.C. § 1983, the Texas Wrongful Death Act, the Texas Survivor Statute, the Texas Tort Claims Act, and Common Law tort law. *Id.* at *1. The United States Court of Appeals for the Fifth Circuit determined that even viewing the evidence in the light most favorable to the plaintiffs, the actions of the police were in good faith and were reasonable. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

and the bystander remained on Castillo's back, the officer "shoved his knee in the back of Castillo's neck and kept it in there for some five to ten minutes."²²⁴ During the course of this encounter, Castillo "exclaimed in Spanish that he was going to die."²²⁵

After Castillo stopped struggling, he was rolled onto his back, at which point the officers noticed that his face was blue and he appeared to be unconscious.²²⁶ Shortly thereafter, he was taken to a hospital but never regained consciousness and ultimately died a week later. The cause of death was determined to be "anoxic encephalopathy that produced cardio-respiratory arrest during the positional asphyxia that resulted from his being laid on the ground, handcuffed and in the prone position, for four to six minutes with the weight of two adults on his back."²²⁷

Despite the court's findings and the fact that the holding of the beer bottle was deemed the catalyst for the police use of force, the court entered judgment in favor of the officers and dismissed all claims against them.²²⁸ The court held that the officers did not use excessive force nor deliberately disregard Castillo's medical needs.²²⁹ In coming to this conclusion, the court seemed to rely heavily on the fact that Castillo had "raised the beer bottle in the air in response to the officer's commands."²³⁰ Given the totality of circumstances, the court felt that it was reasonable for the police to interpret such conduct as threatening.²³¹ Interestingly, the court went so far as to state that "a pre-emptive strike by the officer to disarm the perceived adversary imparts no culpability to the officer, even if his action is found (or assumed) to be the immediate producing cause of the ensuing altercation."²³²

The court supported its finding by noting that "in the struggle that followed, Castillo refused to submit, actively resisting by kicking and yelling—and bloodying the officer's nose—in a manner that a reasonable officer could perceive as hostile."²³³ Thus, despite the fact that the *officer's* behavior seems to have escalated the situation with a short and overweight mentally ill man,²³⁴ the court disregarded that very escalation as insignificant. Indeed, the court's comments are remarkable for their failure to note the circularity of the police

224. *Id.*

225. *Id.*

226. *Id.* at *2.

227. *Id.* The court also noted, "Castillo suffered from health problems that included obesity and an enlarged heart, which might have contributed to his death." *Id.* at *2 fn.2.

228. *Id.* at *4.

229. *Id.* at *3.

230. *Id.*

231. *Id.*

232. *Id.* The court appears to be recognizing that Officer Kincaide had "attacked" Castillo and knocked the beer bottle out of his hand. *Id.* at *1.

233. *Id.* at *3.

234. *Id.* at *1. Curiously, the court later characterized Castillo as "large and powerful." *Id.* at *3.

behavior and the disproportionate nature of their response. While the court recognized that “Castillo’s struggle might eventually have become a panic reaction to his positional asphyxia,”²³⁵ they found that such a possibility neither changed “its perception to reasonable officers as hostility and resistance to arrest nor the fact that it clearly began as a hostile resistance to lawful and reasonable demands by police.”²³⁶ Unlike the court in *Sallenger*,²³⁷ the *Castillo* court was unwilling to acknowledge that the medical modality would have been preferable. Not even the officers’ failure to resort to the criminal modality—to arrest and jail Castillo—raised the ire of the court. Thus, *Castillo* can be understood as judicial acceptance and reinforcement of the expeditious resort to the disciplinary force modality by police when the SIC is negative racialization combined with mental illness.

*Ali v. City of Louisville*²³⁸ presents a similar case to *Castillo* insofar as the plaintiff, who was also a negatively racialized suspect, was shot to death after police escalated the situation.²³⁹ In *Ali*, Mr. Marbly, who was African-American, died of gunshot wounds inflicted by Louisville Metro Police.²⁴⁰ Mr. Marbly was homeless, lived in his car, and was allegedly known by several officers to be mentally ill.²⁴¹ On the day of his death, police were notified that Mr. Marbly was standing in the middle of the street acting as if he was shooting

235. *Id.*

236. *Id.*

237. See *Sallenger v. City of Springfield*, No. 03-3093, 2005 WL 2001502 (C.D. Ill. Aug. 4, 2005), discussed, *supra* notes 182-202 (Recall that the court in *Sallenger* took issue with the amount and timing of force used by police. The court there commented upon the fact that the police policy to treat all mentally ill people as they would treat a non-mentally ill person was inconsistent with the IACP protocols and thus worthy of criticism.). The *Sallenger* case referred to the April 1997 IACP Model Policies for dealing with the mentally ill. That Model Policy stated that:

unless a crime of violence has been committed and/or a dangerous weapon is involved, officers should normally respond to the incident or approach a known mentally ill subject in a low profile manner [and] . . . officers should request backup and any specialized crisis intervention assistance available while taking initial steps necessary to moderate or diffuse a situation.

Sallenger, 2005 WL 2001502 at *2. For an updated policy which specifically addresses law enforcement encounters with persons who are developmentally disabled, specifically autistic, see International Association of Chiefs of Police, *Model Policies*, <http://www.theiacp.org/tabid/486/Default.aspx> (last visited September 29, 2009).

238. 395 F. Supp. 2d 527, 530 (W.D. Ky. 2005). Although the court in never explicitly stated that the deceased plaintiff was African-American, the case received media coverage that highlighted his race. See Megan Woolhouse, *Officers Thought Mentally Ill Man Locked in Car Had a Rifle, Which Turned Out to be BB Gun*, THE COURIER-JOURNAL, Aug. 22, 2002, available at <http://orig.courier-journal.com/localnews/2003/02/23policeshootings/ke022303s370845.htm> (last visited Oct. 13, 2009); see Citizen’s Against Police Abuse, *A Civilian Review Board: Creating Trust And Accountability Through Citizen Monitoring Of Police Activities*, http://www.louisvillepeace.org/CAPA/civilian_review.html (last visited January 12, 2010).

239. see *Ali*, 395 F. Supp. 2d at 530.

240. *Id.*

241. *Id.*

cars.²⁴² A witness reported that when one of the officers approached Mr. Marbly, he “came towards [the officer] with his cane” but that when the officer went to his trunk and removed his shotgun, Mr. Marbly returned to his car.²⁴³

Next, an officer drew his gun on Mr. Marbly as another officer, while pointing a shotgun at Mr. Marbly, screamed, “Get out of the car. Get out of the car.”²⁴⁴ Officers then smashed the rear windows of Marbly’s car, despite the fact that they were under the impression he only had a cane and a flashlight, and they had blocked his car and deflated his tires, which eliminated the possibility that he might flee.²⁴⁵

This escalation of events is precisely what should not be done when dealing with mentally ill individuals; rather, police are to address people who are suspected to be mentally ill calmly.²⁴⁶ Throughout this encounter, Mr. Marbly uttered “stuff about being Jesus Christ” and pointed his little flashlight and keys at officers, stating “this is my phaser” and this is a “tractor beam.”²⁴⁷ Therefore, even without knowledge of an actual history of mental illness, the police had reason to suspect as much from the instant circumstances.

The most provocative comments uttered by Mr. Marbly came when he told the officers “You’re dead” and “I’m Jesus Christ,” whereupon he came out of the back window of his car to strike an officer with his cane.²⁴⁸ Two officers testified that at this point pepper balls were sprayed into the car.²⁴⁹ In addition to the pepper balls, multiple rounds of bean bags and mace were fired into the vehicle.²⁵⁰ At one point in this encounter, several officers alleged they saw Mr. Marbly pull a knife out while in the car.²⁵¹ Other officers thought they saw Mr. Marbly holding a gun in the car, although witnesses did not see a gun.²⁵² Two officers shot Mr. Marbly.²⁵³ One officer shot him twice, after thinking he heard Mr. Marbly say “I got something for you” before reaching towards the passenger seat.²⁵⁴ The police then shot Mr. Marbly at least five more times, but he did not die immediately.²⁵⁵ The police on the scene did not allow Emergency Medical Services (“EMS”) personnel to treat Mr. Marbly until an arriving SWAT team determined that the situation was safe, which may

242. *Id.*

243. *Id.*

244. *Id.* internal quotations omitted).

245. *Ali*, 395 F. Supp 2d. at 530.

246. *Id.* at 534.

247. *Id.* (citation omitted).

248. *Id.* (citation omitted).

249. *Id.* at 531.

250. *Id.*

251. *Id.*

252. *Id.* at 531-532.

253. *Id.* at 532.

254. *Id.* (internal quotations omitted).

255. *Id.*

have taken as long as 45 minutes.²⁵⁶ Subsequently, Mr. Marbly bled to death in his car.²⁵⁷

Despite having barricaded Mr. Marbly in an immobilized car, the police chose not to utilize either of the lesser modalities. Any one of the six police on the scene could have called for medical personnel to assist, given that they were dealing with a mentally-ill person and they should have known this to be the case. Indeed, an amended opinion written to clarify the first decision makes it clear that EMS personnel, who have experience in dealing with mentally-ill patients, were on the scene before Mr. Marbly bled to death.²⁵⁸ Had the medical modality been utilized, either specially trained interveners or the police themselves would have calmly attempted to remove Mr. Marbly from the vehicle in order to ascertain his medical status and secure appropriate psychiatric treatment.

Alternatively, the police could have used the criminal modality. Under this modality, Mr. Marbly might have been extracted from the vehicle (after being tranquilized, for example), read his rights, and charged with any number of crimes, including assault and resisting arrest. Thereafter, assuming mental competence or the ability to be medicated to the point of competence, Mr. Marbly could have been dispensed with pursuant to the traditional criminal justice system. Under this modality, while Mr. Marbly would likely have been incarcerated and in need of mental-health services, he would have remained alive. Instead, the police escalated the situation, which further agitated Mr. Marbly. They failed to seek medical assistance, and instead pursued a forceful strategy despite having recourse to more proportionate, non-lethal options.

In critiquing the conduct of the police, the *Ali* court noted that the “officers’ training and expert testimony demonstrates that persons with mental illness should be handled in [a] calm manner. When officers do not handle them in this manner and use any force, violence between the officers and the person with mental illness will escalate.”²⁵⁹ Escalation produces a destructive cycle, as police might be put in the position of responding to resistance or force that their own behavior has generated. Indeed, “[w]hether the person is mentally ill is a factor to be considered in the reasonableness of force employed.”²⁶⁰

Nonetheless, in rationalizing its dismissal of the excessive-force claims made by Mr. Marbly’s estate, the *Ali* court adhered to the logic of the disciplinary force modality. The court held that “[a] police officer is privileged to use the amount of force that the officer reasonably believes is necessary to

256. *Id.* at 539.

257. *Id.*

258. *Ali v. City of Louisville*, No. 3:05CV-427-R, 2006 WL 2663018 at *1 (W.D. Ky. Sept. 15, 2006).

259. *Ali*, 395 F. Supp. 2d at 534.

260. *Id.* (citing *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004)).

overcome resistance to his lawful authority, *but no more*.”²⁶¹ Despite the potential inability of a mentally-ill person to comport his or her behavior, the police are privileged to use the force necessary to overcome a lack of cooperation. In conjunction with *Castillo* and the following case, *Ali* illustrates the role of police participation in the construction of mental illness (by eliciting or encouraging the outward performance of such illness) and the escalation of a violent suspect encounter, thereby exacerbating the purported need for responsive force.

*Reynolds v. City of Little Rock*²⁶² is instructive as it highlights both the importance of recognizing mental illness in negatively racialized populations and the scope of police reactions and responses to persons with mental illness. As we have seen in other cases, it is important that police interaction with a mentally-ill person does not exacerbate the situation to a point where use of police force seems necessary. This case involved John Willie Reeves, “a mentally disturbed black man” who was killed by police as he “advanced toward a police officer [while] waving a pocket knife.”²⁶³ On October 9, 1984, police were called to investigate a burglary at an auto parts supply store.²⁶⁴ Somehow the police came into contact with the attendant of a nearby service station, who told them that “someone had pulled a knife.”²⁶⁵ Shortly thereafter the police came upon John Willie Reeves, who fit the description given by the station attendant.²⁶⁶ Mr. Reeves fled on foot, “periodically waving a pocket knife at the officers.”²⁶⁷ The court noted that “[o]ne officer determined at the time that Reeves was irrational and apparently mentally ill.”²⁶⁸ By this point, there were up to eight police officers surrounding Mr. Reeves, who continued to wave his knife and told the police to “get away.”²⁶⁹ In order to subdue Mr. Reeves one of the officers approached him, at which point Mr. Reeves “advanced, wildly swinging his knife.”²⁷⁰ Next, several of the officers started shooting Mr. Reeves, either with their guns or shotguns.²⁷¹ Mr. Reeves died

261. *Ali*, 2006 WL 2663018 at *8 (emphasis added).

262. *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990). Reather Reynolds, as administratrix of John Willie Reeves' estate, brought this action under 42 U.S.C. § 1983 alleging that police officers used excessive force in shooting Reeves. *Id.* at 1005. Reynolds also alleged that the City had failed to enforce adequate standards for the use of deadly force. *Id.* At trial, the jury found for the defendants. *Id.* On appeal, the court affirmed on those issues, but remanded because it found that *Batson* applied in the civil suit to the exclusion of black people from the jury. *Id.*

263. *Id.* at 1005.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

instantly.²⁷²

The court described this street encounter as “a traumatic episode of a police shooting of a disturbed black man.”²⁷³ We know that at least one of the police officers had it in his mind that Mr. Reeves was mentally ill.²⁷⁴ Indeed, the officer quickly reached this conclusion from the moment he encountered Mr. Reeves, but did not launch a medical intervention. It seems that when the SIC is negatively racialized, some police have difficulty recognizing that mental illness necessitates treatment. So, despite the fact that surrounding Mr. Reeves would likely have the effect of provoking a negative response and further exciting him, up to eight officers surrounded him and several fired their weapons after he began swinging his pocket knife.²⁷⁵ Given what we have learned about mental illness, it is unlikely that the encircling of Mr. Reeves by eight police officers served to de-escalate the situation. I would suggest that even perfectly mentally-competent individuals would respond with heightened anxiety to the prospect of being surrounded by weapon-brandishing police; certainly I think that many black people in America would.²⁷⁶

These officers had choices in the tactics they selected to deal with an admittedly hostile suspect. They could have called for a medical assist. They could have tasered Mr. Reeves, tranquilized him, maced him, used bean bag rounds, or other intermediary restraining techniques (even non-lethal gunshots). Instead, they quickly proceeded to the disciplinary modality by which they elected to seize Mr. Reeves’ person in the most extreme of ways. It is

272. *Id.*

273. *Id.* at 1009.

274. *Id.* at 1005 (“The officers then spotted John Willie Reeves, the man described by the attendant, and pursued him. Reeves fled, periodically waving a pocket knife at the officers. One officer determined at the time that Reeves was irrational and apparently mentally ill.”).

275. *Id.*

276. Indeed, following several high-profile shootings of black men by police and the recent incident with Cambridge police and Henry Louis Gates, black men are now being counseled on how to interact with police. See, e.g., SHAFIQ R. F. ABDUSSABUR, A BLACK MAN’S GUIDE TO LAW ENFORCEMENT IN AMERICA (2009), available at <http://ablackmansguidetolawenforcemen tinamerica.wordpress.com/> (counseling greater communication and thus less interracial anxiety between black men and police); Richard Fausset and P.J. Huffstutter, *Suspicious of Police Bias Haunt Black Men*, BALT. SUN, July 26, 2009, available at http://articles.baltimoresun.com/2009-07-26/news/0907250105_1_gates-home-police-officer-gates-black-men (“They know too well the pivotal moment Gates faced at his Massachusetts home. It was that moment of suspicion when confronted by police, the moment one wonders, in a flash of panic, anger or confusion: Maybe I am being treated this way because I’m black. Next comes the pivotal question: Do I protest or just take it? . . . Such anxiety, deeply rooted in the African-American experience, has endured into the era of the first black president. For many black men, the feeling of remaining inherently suspect never goes away, no matter their wealth and status and the efforts by police forces to avoid abuses in profiling.”); George Mitrovich, *White Police Officers and Black Men*, S.D. SOURCE, July 23, 2009, available at http://www.sddt.com/Commentary/article.cfm?Commentary_ID=184&SourceCode=20090723tzc (“No white person can ever know what it’s like to be a person of color in America. It doesn’t matter how liberal you think you are, or how enlightened, or progressive. You cannot know that experience; which is why every white person owes to every person of color the element of doubt in situations involving law enforcement.”).

enlightening to juxtapose the manner of death in this case and *Ali*,²⁷⁷ both lethal police shootings, against the cases involving mentally-disturbed white people described above. For instance, police did not shoot Mr. Coghlan until he had repeatedly fired his guns at them in two separate instances.²⁷⁸ Similarly, police released Brian Bates, a young and autistic white youth, to his family after he assaulted police officers.²⁷⁹ Yet as we see in the next case, a police officer pepper sprayed and handcuffed a young black autistic girl after she possibly responded aggressively to a novel situation in her new school.

Thus it is insightful to reconsider the response of the police in releasing Brian Bates to the custody of his parents in light of *Banks ex rel. Banks v. Modesto City Schools District*.²⁸⁰ Rosie Banks was a thirteen-year-old autistic junior high school student at the time this incident took place.²⁸¹ Rosie is African-American and had made progress “toward normal functioning on an academic level” despite her “autistic-like-condition.”²⁸²

Upon moving to a new school in which she was “confronted with new sounds, new students and some teasing,” Rosie “may have reacted in an aggressive manner, which is predictable for someone with [her] disability.”²⁸³ Thereafter an aide took Rosie to the school office “where she was mishandled by [the principal and assistant principal], and others.”²⁸⁴ Officer Urquhart, who happened to be in the school office, confronted Rosie as she grew more aggressive.²⁸⁵ At this point, Officer Urquhart pepper-sprayed Rosie Banks in

277. See *Ali v. City of Louisville*, 395 F. Supp. 2d 527, 530-33 (W.D. Ky. 2005).

278. See *supra* notes 110, 111, 118, 119, 120.

279. See *supra* notes 145-47.

280. *Banks ex rel. Banks v. Modesto City Schs. Dist.*, No. CVF046284RECSMS, 2005 WL 2233213 (E.D. Cal. Sept. 9, 2005). This case involved several causes of action brought by the guardian ad litem of a thirteen-year-old girl. *Id.* at *1. For purposes of this Article, I am most concerned with the first cause of action. This involved a section 1983 claim based on violations of plaintiff's rights under the First, Fourth, Fifth, Eighth and Fourteenth Amendments. *Id.* at *3. The plaintiff alleged that defendants “failed to properly train, supervise and otherwise prepare officers employed by the Modesto Police Department to deal with disabled students such as Plaintiff.” *Id.* at *3. There were numerous orders in this case. For my purposes the most important orders were: “To the extent they seek injunctive relief, Plaintiff's causes of action are DISMISSED with leave to amend as to all District Defendants.” *Id.* at *14; “[T]o the extent Plaintiff's first and second causes of action seek injunctive relief and are insufficiently alleged under the Fourteenth Amendment as set forth above, they are DISMISSED with leave to amend.” *Id.* at *13; “As to individual District Defendants sued in their *individual capacities*: to the extent Plaintiff's first and second causes of action are insufficiently alleged under the Fourteenth Amendment as set forth above, they are DISMISSED with leave to amend.” *Id.* at *14; and, “To the extent Plaintiff's first and second causes of action are based on the First Amendment and the substantive due process/equal protection components of the Fourteenth Amendment, District Defendants' motion to dismiss is DENIED.” *Id.*

281. *Id.* at *1.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

her face.²⁸⁶ This was the first incident that formed part of the lawsuit.

The second incident took place during the same month.²⁸⁷ The school principal and assistant principal took Rosie from her classroom.²⁸⁸ Despite Rosie's pleas that she not be taken to see the police, the principals took her to the office where she again became agitated upon seeing Officer Urquhart.²⁸⁹ "Officer Urquhart proceeded to handcuff [Rosie], which in addition to being humiliating, aggravated the situation."²⁹⁰ Thereafter Rosie was suspended from school.²⁹¹ Later, Rosie's parents complained that she "was being treated differently both because she is disabled and because she is African-American."²⁹² The court had little difficulty in allowing the excessive-force claim to proceed. The court remarked "[t]hat school officials and/or a police officer working with school officials would use pepper-spray and handcuffs to restrain a thirteen year old mentally disabled child is shocking."²⁹³ Interestingly, the court was amenable to the Equal Protection allegation that Rosie "was being treated differently not only because she is disabled but also because she is black."²⁹⁴ Thus this court recognized Foundational Intersectionality.

While I believe this case was rightly decided, and will not delve further into the law, I remain concerned about the facts. The way this young girl, who was thirteen years old, was treated, especially when her mental condition (autism) was known, is appalling. Unlike the larger, older, autistic Brian Bates,²⁹⁵ Rosie Banks was not released to the custody of her parents but was

286. *Id.*

287. *Id.* at *2.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at *10. As this case was neither a claim involving custody nor arrest, the *Graham* Fourth Amendment test was not in order. *Id.* at *9 (citing *Fontana v. Haskins*, 262 F.3d 871, 882 (9th Cir. 2001)). Rather the appropriate Amendment was the Fourteenth, as the threshold question was one of substantive due process and assessment of "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock to contemporary conscience." *Banks*, 2005 WL 2233213, at *10 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

294. *Banks*, 2005 WL 2233213, at *11 ("While this allegation may not be as crystalline as might be desired, given the liberal pleading standards and taking the facts alleged in the Complaint as true, it can be inferred from the statements made by Plaintiff's parents and the facts in the Complaint as a whole that Plaintiff was treated differently based on her race and/or status as a disabled student.").

295. Recall that Brian Bates was described as a "tall, skinny, shirtless teenager" who was seventeen years old. *Bates ex rel. Bates v. Chesterfield County*, 216 F.3d 367, 369 (4th Cir. 2000). The Sergeant in the *Bates* case decided to "release[] Bates to his parents rather than transport[] him to the detention center as the police would normally have done. [The Sergeant] thought that a night in the detention center would be detrimental to Bates given his mental disorder and aggressive behavior." *Id.* at 370. Rosie Banks, on the other hand, was pepper sprayed and ultimately suspended from school. *Banks v. Modesto City Schs. Dist.*, No.

immediately either pepper sprayed or handcuffed, despite her lack of flight or resistance.²⁹⁶ These two cases are difficult to reconcile except on the basis of race and, possibly, gender, although Banks' gender and age might more intuitively be perceived as lessening the likelihood of such escalation. What seems striking, however, is the zeal with which the officer in *Banks* resorted to discipline *qua* force. The officer did not progressively increase the amount of force used as was done with Sallenger²⁹⁷ and Bates,²⁹⁸ nor did the officer proceed with caution as was done in dealing with Tofano²⁹⁹ or Coghlan.³⁰⁰ Instead, Officer Urquhart skipped over the family mode (used with Brian Bates),³⁰¹ bypassed the medical modality (which the police tried to use with Mr. Tofano and Mr. Coghlan),³⁰² sidestepped the criminal modality (which was alternatively used with Donald Winters when mental health facilities were unavailable)³⁰³ and resorted to the forceful disciplining of a 13-year-old black autistic girl. Accordingly, despite involving a child of thirteen, *Banks* is in line with the facts of cases involving police encounters with mentally ill black men. It would seem, therefore, that the use of excessive force is so pervasive when the SIC is black and mentally ill that it is even used with young girls.

The case of *Swans v. City of Lansing*³⁰⁴ is yet another case in which SIC seems to determine the modality selected by police. Mr. Swans, "a middle-aged 5'8, 260-pound African-American man"³⁰⁵ appeared at the Lansing City Jail early one morning alleging that he had been assaulted.³⁰⁶ At the time, Mr. Swans, who was schizophrenic, was likely off his medication, Thorazine, which allowed him to "function normally."³⁰⁷ Police did not believe that Mr. Swans had been assaulted and deemed his complaint "unfounded."³⁰⁸ In all likelihood he wanted shelter for the evening as the wind chill was minus twenty-seven degrees and he was not wearing a shirt, coat, or socks.³⁰⁹ In response to a police officer's query as to how Swans was able to walk three

CVF046284RECSMS, 2005 WL 2233213 at *1-2 (E.D. Cal. Sept. 9, 2005).

296. *Banks*, 2005 WL 2233213, at *1-2.

297. See *supra* notes 192-202.

298. See *supra* notes 125-133.

299. See *supra* notes 79-84.

300. See *supra* notes 108-120.

301. See *supra* notes 134-138.

302. See *supra* notes 79-84.

303. See *supra* notes 163-166, 171-175.

304. *Swans v. City of Lansing*, 65 F. Supp. 2d 625 (W.D. Mich. 1998) (The representative of the deceased arrestee's estate brought these civil rights actions against the City of Lansing, the jail administrators and police officers. The deceased allegedly died as a result of police use of excessive force and a failure to provide medical and psychological care. The jury awarded a multi-million dollar verdict (\$9.8 million for actual damages and \$3.125 million for punitive damages), which was upheld, as the evidence supported the verdict against the police officers.).

305. *Id.* at 632.

306. *Id.*

307. See *id.* at 632-33.

308. *Id.* at 632.

309. See *id.*

miles in the bad weather without proper clothes, Mr. Swans replied, “I have Jesus in my heart.”³¹⁰ Thereafter, Mr. Swans, despite his pleas to “go to jail,” was given a shirt and taken to Volunteers for America (hereinafter “VOA”) for breakfast.³¹¹ The addiction counselor at VOA testified that Swans “reeked of alcohol, was uneasy, anxious, manic, disoriented, irrational and confused.”³¹² Mr. Swans wanted to be taken to the Veteran’s Hospital.³¹³ At 10:15 a.m., however, he left VOA and was not transported to the hospital.³¹⁴

At 11:00 a.m., Mr. Swans wandered into a children’s daycare center to “warm himself” and sought to use their phone.³¹⁵ One of the daycare workers described Mr. Swans as having a “wild look,” with “icicles hanging from his nose,” and no coat.³¹⁶ Swans left the daycare, “picked up a pick-axe and was seen talking to himself.”³¹⁷ A daycare worker called 911 when Swans began knocking at the door with the pickaxe—complaining of a man who was “kind of crazy.”³¹⁸ Mr. Swans was described as a “10-96” over the police radio, meaning it was recognized that he was mentally unstable.³¹⁹ The attending police officers successfully obtained Mr. Swans’ identification from his wallet, which also contained his Veteran’s Administration patient card and instructions to call his wife.³²⁰ There is only one reference in the case to Mrs. Swans and no indication whether she was called. At this point Mr. Swans attempted to run away.³²¹ The police pursued him and, when ordered to stop, Mr. Swans was arrested.³²²

Once back at the jail, Mr. Swans was booked.³²³ It is important to note that Mr. Swans had “several previous contacts with detention staff” and the computer system, which was not checked, indicated that he had a prescription for Thorazine.³²⁴ At the time of booking, Mr. Swans “was handcuffed with his

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* (“Swans during his stop at VOA had contact with case manager Robert Lindley, who described Swans on that day as “not having all his marbles.” Swans apparently desired at that time to be taken to the Veteran’s Hospital in Battle Creek and acted as if a van might be taking him to the hospital, though one was not so scheduled. He left VOA at 10:15 a.m. after the van failed to appear.”).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 632-33 (“The 10-96 code, according to officers of the Department, refers to a mental patient or person who is otherwise ‘whacked out there.’”).

320. *Id.* at 633.

321. *Id.*

322. *Id.* Mr. Swans was arrested for failing to obey lawful order, assaulting an officer, and resisting arrest. *Id.*

323. *Id.*

324. *Id.*

hands behind his back.”³²⁵ He said, “you are going to shoot me” and then stood silent.³²⁶ According to Dr. C. Thomas Gualtieri, M.D., an expert called in the case, Mr. Swans demonstrated “symptoms of schizophrenia and was very, very paranoid when confronted by police. . . . Swans did not understand his situation and was functioning at the mental and emotional level of a three-year-old child.”³²⁷ At this point, resort to a medical modality was in order.

According to Dr. Gualtieri, “when confronted with an obviously schizophrenic person, [the police] should have taken Swans for treatment to an emergency room or to the Veteran’s Administration.”³²⁸ If this course had been followed, a simple Thorazine injection would have relieved Mr. Swans’ symptoms in under a half an hour.³²⁹ Dr. Gualtieri’s testimony also shows the counter-intuitive and circular nature of the police actions, and in doing so, reveals the ways in which police behavior might exacerbate or construct mental illness:

[T]he officers’ decision to arrest and restrain Swans instead of taking Swans for medication and treatment was mystifying in that officers chose a course of action which not only was wrong medically for Swans, given his obvious condition, but which also compounded the difficulties of the officers in performing their jobs. . . . Swans’ treatment at the hands of police only aggravated his paranoia³³⁰

When Mr. Swans replied, “No” to an officer’s request that he face in a certain direction, four officers physically “[took] him down.”³³¹ In the process of the “take down,” Mr. Swans’ foot “struck Sgt. Szilagyi in the face.”³³² There is no indication in the case whether this was intentional. At this point, the officer used escalating “pain compliance techniques” to subdue Mr. Swans.³³³ Importantly, unlike the catalyst for the police decision to use such techniques in *Sallenger*, the facts of this case do not indicate that Mr. Swans was offering any intentional physical resistance to the officers.³³⁴ Assuming *arguendo* that the striking of Sgt. Szilagyi was the catalyst for the police use of pain-compliance techniques on Swans, the response, set out below, nonetheless

325. *Id.*

326. *Id.*

327. *Id.* at 635.

328. *Id.*

329. *Id.*

330. *Id.* Further, Dr. Gualtieri indicated that “restraints must be applied conservatively when dealing with mentally-ill persons, such as Swans, due to the risk of injury.” *Id.* The court also stated that, “[t]he opinions of Dr. Gualtieri as to treatment of Swans with Thorazine and similar drugs were echoed by Dr. Harold L. Klawans, M.D., a licensed, board-certified, and world-renowned medical doctor and expert in neurology and pharmacology.” *Id.*

331. *Id.* at 633.

332. *Id.*

333. *Id.*

334. See *supra* notes 206-07, 213.

seems disproportionate.³³⁵ The police use of these techniques is even more inappropriate if Swans' striking of Sgt. Szilagyi was accidental:

Officer Fabijancic used wrist locks, transport wrist locks, hypoglossal pressure (pressure under the chin), mandibular angle pressure (pressure with the thumb behind the ear), bronchial plexus clavical notch pressure (pressure to a nerve around the shoulder blade), and infraorbital pressure (pressure on a nerve near the nose) to obtain compliance.³³⁶

The officers then used a "kick-stop restraint mechanism" on Mr. Swans.³³⁷ This restraint "is a method of restraining a prisoner with legs and arms tied behind the prisoner's back to a strap on the prisoner's waist."³³⁸ Despite the manufacturer's warning that prisoners on whom police use this restraint should not be placed face-down, as there is a risk of suffocation, video tape evidence shows Mr. Swans "face-down as six officers . . . appl[ie]d the kick-stop restraint."³³⁹ The court commented that the videotape evidence showed "six detention officers applying extreme restraints and placing their weight on Swans while he is handcuffed, tied and lying on his stomach" and later "a large officer . . . plac[ing] his foot and the weight of his body on Swans while the other officers tightly bind Swans' feet and arms together."³⁴⁰

Notably, the court found that the video did not show Mr. Swans opposing the police use of force.³⁴¹ The video shows police cutting Mr. Swans' pants off because he had urinated.³⁴² According to one of the doctors that testified, the urination indicated that, "Swans was in the process of dying."³⁴³ The police then left Mr. Swans in his urine as they finished cinching the restraints, one of which broke as it was fastened too tightly.³⁴⁴ The officers then replaced the kick-stop restraint with chains and handcuffs and left the cell.³⁴⁵ At the time the officers departed the cell, Mr. Swans was motionless.³⁴⁶ Mr. Swans died from asphyxiation but was nonetheless moved from the cell and re-manacled in what the court describes as a deceptive attempt by police to "confuse or mask the cause of death."³⁴⁷

335. *See id.*

336. *Id.*

337. *Id.* There is some controversy in the case about whether police also used a restraint chair following these techniques. *Id.*

338. *Id.*

339. *Id.* at 633-34.

340. *Id.* at 634.

341. *Id.* at 634.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 633-34, 650, n. 5.

In reaching its conclusion to deny a new trial for the officers,³⁴⁸ the court referred to the expert testimony of another witness as well. Dr. Emanuel Tanay testified that “the behavior of the officers in restraining Swans was group-oriented torture—conduct which was intended for the infliction of pain.”³⁴⁹ Dr. Tanay also felt that actions in accordance with the medical modality were needed, because “Swans was obviously mentally-ill and should have been directly taken to a hospital for treatment.”³⁵⁰ As will be seen shortly, this assessment tracks Foucault’s theories of the nature of discipline inflicted upon “delinquents.”³⁵¹

Yet another expert supported the need for use of the medical modality. Dr. Leonard Territo, a criminologist with expertise in law enforcement and detention, testified that “it is common and required police procedure to take severely mentally-ill persons to hospital for treatment and that Swans should have been taken for treatment instead of being booked and restrained.”³⁵² The police at all times knew that they were dealing with a mentally-ill person. They themselves used the 10-96 code for mental illness in communicating with the dispatcher.³⁵³ Moreover, Mr. Swans’ physical ability was likely no match for police.³⁵⁴ Dr. Territo testified that simply confining Mr. Swans to his cell would have rendered any need for the “hogtie” unnecessary.³⁵⁵

Ultimately, the court seemed moved by the abundance of evidence and condemned the police use of the disciplinary force modality for Mr. Swans. In noting that “[t]his was almost a case of ‘justice denied,’” the court referred to the “truthful eye of the camera,” which contradicted the police testimony.³⁵⁶ The Chief Judge remarked that,

348. *Id.* at 650. The original damage award, including punitive damages, against the eight officers was \$12,925,000. *Id.* at 631.

349. *Id.* at 635.

350. *See id.*

351. This notion of the delinquent goes beyond the individual commission of a crime by an outlaw. Rather it is the construction of a person as inherently and forever criminal (“The delinquent is to be distinguished from the offender by the fact that it is not so much his act as his life that is relevant in characterizing him.”). FOUCAULT, *supra* note 7, at 251. Footnote reference appears to be correct. The biographical is an essential part of this penology as “it establishes the ‘criminal’ as existing before the crime and even outside of it.” *Id.* at 252.

352. *Swans*, 65 F. Supp. 2d. at 635.

353. *Id.* at 632. “[Dr. Territo] testified that the 10-96 code used by officers refers to an emotionally disturbed individual.” *Id.* at 635.

354. *Id.* at 632 (The court describes Mr. Swans as, “a middle-aged, 5’8”, 260-pound, African-American man with a record of honorable service in the military and an honorable discharge with a partial service-related disability of schizophrenia.”).

355. *Id.* at 635.

356. *Id.* at 650. (“This should cause court observers to wonder how many similar cases went unproved without the awful, but truthful eye of the camera.”).

In the forty years since I graduated from law school, I have participated in many trials as a lawyer and as a judge. *Never have I seen evidence more dramatic than in the instant case.* Instead of the usual contradictory testimony about liability facts, this jury watched (many times) video evidence of the awful events that occurred in the last minutes of Edward Swans' life. In fact this jury apparently watched Swans die.³⁵⁷

These disciplinary force modality cases are noteworthy for the degree—or persistent amount—of force and the nature—or brutal type—of the force used by police. They are also compelling, given the relatively rapid resort to the use of force, which is perhaps demonstrative of a lower level of police compassion or patience with mentally-ill suspects of color. At times, the force used seems disproportionate or unwarranted and at other times the force used seems cruel.

The next case, *Culver By and Through Bell v. Fowler* is worthy of study particularly given the nature of the force used.³⁵⁸ It involved a “middle-aged, mentally retarded black male”³⁵⁹ of “medium stature.”³⁶⁰ Since the force used in *Culver* occurred post-arrest while the plaintiff was in custody,³⁶¹ it was analyzed pursuant to the Eighth Amendment right to be free from cruel and unusual punishment.³⁶²

Fred Culver was well known in the City of Sparta, Georgia as a heavy drinker.³⁶³ Police went to a local pool hall and laundromat upon receiving a complaint that Mr. Culver was causing a disturbance.³⁶⁴ Mr. Culver stood up and began walking towards the back of the laundromat when he saw the police.³⁶⁵ Police apprehended Mr. Culver as he attempted to leave the building.³⁶⁶ Police decided to arrest him because he had “slapped at [Officer] Fowler’s arm” as he was ushered to the police car.³⁶⁷

Once at the police station, Mr. Culver refused to empty his pockets or remove his belt.³⁶⁸ At that point an officer “placed Culver up against a wall

357. *Id.* at 650 (emphasis added).

358. *Culver By and Through Bell v. Fowler*, 862 F. Supp. 369 (M.D. Ga. 1994). This § 1983 action was brought on behalf of Mr. Culver alleging a violation of his Eighth Amendment rights. *Id.* at 370-71. While the court granted the City and police chief’s motions for summary judgment, it found that the police officer that injured Mr. Culver had violated his rights. *Id.* at 371, 373. The Court held that the \$25,000 compensatory and \$25,000 punitive damage awards were warranted. *Id.* at 372-73.

359. *Id.* at 370.

360. *Id.* at 372.

361. *Id.* at 370.

362. *Id.* at 371. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

363. *Culver*, 862 F. Supp. at 370.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

and removed the belt.”³⁶⁹ Thereafter the officers escorted Mr. Culver to the cellblock.³⁷⁰ On the way to the cellblock, however, Mr. Culver again “began slapping at Officer Fowler.”³⁷¹ The judge described what happened next as “both barbaric and cruel, particularly when applied to a mentally-retarded and inebriated individual.”³⁷²

Officer Fowler attempted again to “walk Culver up against a wall in an effort to restrain him.”³⁷³ At this point Mr. Culver lunged at Officer Ethridge, who was standing nearby.³⁷⁴ Officer Fowler “stepped in between Ethridge and Culver and brought his knee up into the groin area of Culver.”³⁷⁵ Officer Fowler attempted to restrain Mr. Culver, but he continued to resist and lunged at Fowler once more. In response, Officer Fowler again “brought his knee up into the groin area of Mr. Culver.”³⁷⁶ Mr. Culver was thereby subdued and placed in a cell.³⁷⁷ He was released the next day and taken to the hospital “complaining of swollen testicles.”³⁷⁸ Mr. Culver later underwent surgery to “correct scrotal swelling and bleeding.”³⁷⁹

The court found that the objective component of the Eighth Amendment test had been satisfied, as “the actions of [Officer] Fowler in kneeing plaintiff in the groin violated contemporary standards of decency.”³⁸⁰ It chastised the officer for disregarding his training on how to deal with “a rebellious prisoner,” having instead adopted a method of control “repugnant to the conscience of mankind.”³⁸¹

Similarly, the court concluded that the subjective component of the test for cruel and unusual punishment was easily satisfied. The court first decided that Mr. Culver suffered serious injury.³⁸² The court next evaluated the need for the police to use force in restraining Mr. Culver. While conceding that force was, indeed, necessary, the court took issue with “both the amount of force and the type of force used by Officer Fowler.”³⁸³ This force was “unreasonable in light of the situation faced by Fowler.”³⁸⁴ The court noted that Mr. Culver “is a middle-aged, mentally retarded male of medium

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 371.

373. *Id.* at 370.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 371.

381. *Id.* (quoting *Hudson v. McMillian*, 503 U.S. 1 (1992)).

382. *Id.* at 372. The scrotal injuries may have been exacerbated by a previous medical condition. *Id.* at 370, n.1.

383. *Id.* at 372.

384. *Id.*

stature”³⁸⁵ who was intoxicated at the time of the police encounter.³⁸⁶ Therefore, he did not pose such a threat to the officers that kneeling him twice in the groin was appropriate.³⁸⁷

In contrast to the progressive use of force used by police in dealing with white mentally-ill individuals in other cases,³⁸⁸ the court in this case noted a rapid escalation in the use of force against Mr. Culver. It found that “[Officer Fowler] made no effort to control [Culver] through a more accepted and humane means of physical restraint.”³⁸⁹ Rather, the officer kned Culver in the groin “as an *initial* response to [his] aggressiveness.”³⁹⁰ Thus, the court found that the officers had violated the Eighth Amendment, as the “use of force was not applied in a good-faith effort to maintain discipline, but to maliciously and sadistically cause [Culver] harm.”³⁹¹ In assessing punitive damages, the court noted that “[d]espite a variety of approved prisoner control techniques available to Fowler, he chose to use a method of control that maximizes pain and subjects the prisoner to a high risk of serious injury.”³⁹²

The cases in this section indicate that when police utilize the disciplinary force modality, they exercise their discretion in the harshest of ways. These cases reveal that the disciplinary force modality is the most severe modality. It is a punitive modality, as police appear to resort to the use of force more readily and brutally than they do in the criminal modality. The use of various mechanisms of forceful control and discipline can be understood by reference to Foucauldian theories of punishment. The following section provides a Foucauldian framework for deciphering what is transpiring in the archetypal cases analyzed in section II.

III. MICHEL FOUCAULT: DISCIPLINING THE “DELINQUENT”

Foucault’s *Discipline and Punish* is a study of the economy of punishment and the disparities created within that system.³⁹³ *Discipline and Punish* examines the transformation of punishment schemas from spectacular but discrete occasions of public torture³⁹⁴ to pervasive systems of discipline integrating many societal institutions.³⁹⁵ Notably, however, this shift from

385. *Id.*

386. *Id.*

387. *Id.*

388. In particular, see *supra* notes 77-84 (*Tofano*); 108-119 (*Coghlan*); 126-137 (*Bates*); 161-166 (*Winters*); and 193-202 (*Sallenger*).

389. *Culver*, 862 F. Supp. at 372.

390. *Id.* (emphasis added).

391. *Id.* at 372. The court awarded \$25,000 in compensatory damages, special damages of \$6,012.73 for medical expenses and \$25,000 in punitive damages. *Id.*

392. *Id.* at 373.

393. FOUCAULT, *supra* note 7, at 7.

394. *Id.* at 3-6.

395. These institutions include the prison, hospitals and the education system. *See id.*, at 137-39. “The transition from the public execution, with its spectacular rituals, its art mingled

macabre spectacles of punishment to subtle permutations of disciplinary force has resulted in “stricter methods of surveillance, a tighter partitioning of the population, [and] more efficient techniques of locating and obtaining information.”³⁹⁶ I adopt a Foucauldian approach to characterize the police as disciplinarians increasingly called upon to perform a societal triage function. Police, as Foucauldian disciplinarians, both create and punish difference when they exercise their discretion in operating under one of three modalities: medical, criminal, or disciplinary force.

Foucault centers his analysis on the ways in which power is unevenly, yet intentionally, dispersed throughout society.³⁹⁷ He sees this work as “a genealogy of the . . . scientifico-legal complex from which the power to punish derives its bases, justifications and rules”³⁹⁸ Accordingly, Foucault examines the manifestation of power—what he refers to as the “technology of power”—through its tactical social functions of discipline and punishment.³⁹⁹

In studying these technologies, Foucault examines connections and commonalities in the roles of police, medical experts, and penal institutions. Specifically, Foucault sees the history of penal law and the history of the human sciences as “both [having] derive[d] from a single process of ‘epistemologico-juridical’ formation.”⁴⁰⁰ In particular, Foucault identifies the intersection of policing, psychiatry and the penal system⁴⁰¹ as crucial in utilizing enhanced surveillance and in constructing a class of perpetual suspects.⁴⁰² “[S]o one sees penal discourse and psychiatric discourse crossing each other’s frontiers . . . at their point of junction, is formed the notion of the ‘dangerous’ individual.”⁴⁰³ This is the work of medico-legal dynamics—both medicine and law are essential to the construction of marginalized identities.⁴⁰⁴ Delinquents are a combination of “monster” and “juridical subject” and, as such, form the proper subject matter of the law, questions of justice, and the legal system generally.⁴⁰⁵ This Foucauldian approach supports my theory of SIC. I posit that the police, in their engagement of the disciplinary force modality, have used SIC to construct an offender who personifies these

with the ceremony of pain, to the penalties of prisons buried in architectural masses and guarded by the secrecy of administrations, is not a transition to an undifferentiated, abstract, confused penalty; it is the transition from one art of punishing to another, no less skillful one.” *Id.* at 257.

396. *Id.* at 77.

397. *Id.* at 276.

398. *Id.* at 23.

399. *Id.*

400. *Id.*

401. Foucault states that disciplines provide “general formulas of domination.” *Id.* at 137.

402. *Id.* at 281.

403. *Id.* at 252.

404. *Id.* at 254. “[T]his delinquency . . . must be known, assessed, measured, diagnosed, treated when sentences are passed. It is now this delinquency, this anomaly, this deviation, this potential danger, this illness, form of existence, that must be taken into account when codes are rewritten.” *Id.* at 255.

405. *Id.* at 256.

Foucauldian subjects. The negatively-racialized and mentally-ill suspects discussed in section II are constructed as the “delinquents,” “monsters,” and “anomalies” of whom Foucault speaks.

By constructing and responding to marginalized identities, i.e., those deemed negatively racialized and mentally ill, the police in the disciplinary force modality cases punitively manage Foucauldian delinquents. As evidenced by their rapid resort to force and brutal and disproportionate response to resistance, the police discipline and punish these individuals due to their perceptions of heightened dangerousness and their attendant fear of these suspects. Suspects at the intersection of negative racialization and mental illness are deemed dangerous as much for who they are as for what they have done.

Such identities, according to Foucault, are not created by happenstance. Police, together with psychiatrists, psychologists, magistrates, and educators, form a powerful component in the penal economy—they are disciplinarians who wield the technologies of power to construct suspect identities based upon ideologies of difference.⁴⁰⁶ For example, medical experts regularly employ their “new knowledge . . . to define [the actions of marginalized individuals] ‘scientifically’ *qua* offence and above all the individual *qua* delinquent.”⁴⁰⁷ In turn, the construction of these negative identities allows for heightened disciplinary policing practices.

Rather than enhance humanity’s awareness, awakening, or enlightenment, this “knowledge” only serves the technologies of power.⁴⁰⁸ The combination of medical and penal knowledge thus conspire to label these marginalized groups as “dangerous” and requiring the use of disciplinary force. Police believe that power must be exercised to control even *potential* offenders. This truism is most starkly demonstrated by the *Banks* case in which Rosie Banks

406. *Id.* at 90, 251-252, 256. (Foucault also refers to this individual as a “monster,” a “delinquent,” or “the dangerous individual.”)

407. *Id.* at 254. This operation is not a sporadic occurrence but rather an integrated system of overlapping processes throughout society. *See id.* at 138 (making specific reference to the role of secondary education, the hospital and the military in the crafting of a political anatomy). The police are but one element with one function. But to Foucault, whether one assesses the role of the psychiatric hospital, the role of secondary education or the role of the military, the goal is the same—the production of obedience through disciplining. In the penal economy the role of police in meting out discipline is primary.

408. In knowing who should be cast as enemy, traitor, or monster, we look to the sciences. Foucault did not confine his theorizing to the realm of an individual discipline. Instead he recognized the many ways in which discipline takes place. Even the family sphere does not escape. Foucault noted that, “one day we should show how intra-familial relations, essentially in the parents-children cell, have become ‘disciplined,’ absorbing since the classical age external schemata, first educational and military, then medical, psychiatric, psychological, which have made the family the privileged locus of emergence for the disciplinary question of the normal and the abnormal[]; or by apparatuses that have made discipline their principle of internal functioning, . . . or finally by state apparatuses whose major, if not exclusive, function is to assure that discipline reigns over society as a whole (the police).” *Id.* at 215-16.

could not seriously be seen as a dangerous criminal, but rather was constructed as belonging to a subclass, based upon her race and mental status, whose identity excites a forceful response. SIC, like Foucauldian logic, explains how police decisions are contingent upon racialized epistemologico-juridical dynamics of power;⁴⁰⁹ the ways in which police come to “know” a suspect are informed by racialized theories of knowledge and beliefs about suspect that are held to be justifiable. The notion of SIC furthers an understanding of the reinforcing circularity of marginalization; disciplinarians, specifically police officers, both create and punish difference.

Throughout my analysis of the case law above I have sought to understand the choices made by police as they encounter people with mental illnesses. Foucault’s recognition that remnants of earlier “gloomy festival[s] of punishment”⁴¹⁰ have been increasingly enveloped by the “non-corporal nature of the penal system” is helpful in understanding police discretionary use of disciplinary force against certain segments of society as a vestige of gratuitous punishment schemas.⁴¹¹ Given the increased number of poor, mentally-ill, and negatively-racialized people on our streets, police increasingly have contact with individuals whose SIC is negatively racialized and mentally ill.⁴¹² Accordingly, “the power of judging has been transferred, in part, to other authorities than the judges of the offense,”⁴¹³ thereby allowing police to function as “subsidiary authorities” or “parallel judges.”⁴¹⁴ Such decentralization has meant that “the whole penal operation has taken on extra-judicial elements and personnel.”⁴¹⁵ “[C]ontrols become more thorough, penal interventions at once more premature and more numerous”⁴¹⁶ extending

409. *See id.* at 23.

410. *Id.* at 8.

411. *Id.* at 16.

412. *See* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT, THE SECOND ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS iv (2008), <http://hudhre.info/documents/2ndHomelessAssessmentReport.pdf> (“*Homelessness disproportionately affects minorities, especially African Americans.* Minorities constitute one-third of the total U.S. population and about half of the poverty population, but about two-thirds of the sheltered homeless population. African-Americans are heavily overrepresented in the sheltered homeless population, representing about 44 percent of the sheltered homeless population but 23 percent of the poverty population and only 12 percent of the general population. . . . *A significant proportion of the sheltered homeless population is disabled.* Sheltered homeless adults are more than twice as likely to have a disability when compared to the general U.S. population. Approximately 38 percent of adults who used a shelter between January 1 and June 30, 2006 had a disabling condition compared to 30 percent of the poverty population and 17 percent of the total U.S. population.”); National Coalition for the Homeless, *Who is Homeless?*, <http://www.nationalhomeless.org/factsheets/Why.pdf> (estimating that of the sheltered homeless population 42% is African American, 38% is white, 20% is Latino/a, 4% is Native American and 2% is Asian; and noting that “persons with severe mental illness represented 26 percent of all sheltered homeless persons”).

413. FOUCAULT, *supra* note 7, at 22.

414. *Id.* at 21.

415. *Id.*

416. *Id.* at 78.

beyond the criminal law to form a “carceral archipelago”⁴¹⁷ by which society becomes transformed and organized around a panoptic schema providing for heightened surveillance.⁴¹⁸

Thus, the evolution of punishment schemas is not indicative of an increase in relational freedoms, but rather indicates “an extension and refinement of punitive practices” throughout society.⁴¹⁹ The effect is that discipline has become a general formula for domination of disabled individuals.⁴²⁰ This “trace of torture” is most evident in the cases falling within the disciplinary force modality.

As can be seen in the cases above, police play a significant role in extending the presence of such punitive practices throughout society. Unfortunately, police often perform that role in a manner that results in a disproportionate impact on marginalized groups. Foucault recognizes and critiques the creation of marginalized bodies as appropriate targets of punitive exercises of power.⁴²¹ Not only do we define the crime, but we also define the criminal as an outsider existing separate and apart from the crime.⁴²² Thus, the delinquent is a criminal element, a type of person who must constantly be watched and ultimately punished as he “falls outside the pact, disqualifies himself as a citizen and emerges, bearing within him as it were, a wild fragment of nature; he appears as a villain, a monster, a madman, perhaps, a sick and, before long, ‘abnormal’ individual.”⁴²³ One can use this lens to examine the decisions and behaviors of police in the disciplinary force modality cases discussed above.

As I argued above, certain individuals appear more likely to be the subject of forceful exercises of police power within the penal economy. These disparities reveal the ways in which the mechanisms of power operate to frame the lives of individuals in numerous ways, by “placing under surveillance their everyday behavior” and ultimately their identity.⁴²⁴ Thus emerges “a tendency

417. *Id.* at 297.

418. *Id.* at 205, 209, 214 (“The Panopticon, on the other hand, must be understood as a generalizable model of functioning; a way of defining power relations in terms of the everyday life of men. . . . The movement from one project to the other, from a schema of exceptional discipline to one of a generalized surveillance, rests on a historical transformation: the gradual extension of the mechanisms of discipline . . . the formation of what might be called in general the disciplinary society . . . what was registered in this way were forms of behaviour, attitudes, possibilities, suspicions—a permanent account of individuals’ behaviour.”).

419. *Id.* at 775 (“[T]he shift in illegal practices is correlative with an extension and a refinement of punitive practices.”).

420. *Id.* at 137.

421. *Id.* at 101 (“At the point of departure . . ., one may place the political project of rooting out illegalities, generalizing the punitive function and delimiting, in order to control it, the power to punish. From this there emerges two lines of objectification of crime and of the criminal.”).

422. *Id.* at 78 (following on this mapping of the body “controls become more thorough, penal interventions at once more premature and more numerous”).

423. *Id.* at 101.

424. *Id.* at 77-78.

towards a more finely tuned justice, towards a closer penal mapping of the social body”⁴²⁵ and ultimately towards racial profiling and the criminal profiling of the mentally ill.

Importantly, Foucault recognizes the ways in which law and medicine conspire to construct “juridical objects.”⁴²⁶ He asserts that juridical objects “are . . . judged by the interplay of all those notions that have circulated between medicine and jurisprudence”⁴²⁷ Foucault describes the insinuation of psychiatry into the penal economy as the “scientifico-legal complex.”⁴²⁸ This is the mechanism by which we define individuals, by which we create SIC. Accordingly, by naming these outcasts “perverts,” “monsters,” or “maladjusted,” we participate in stereotyping which renders supervision easier.⁴²⁹ My utilization of Foucault thus centers this constitutive circularity. As disciplinarians, police participate in the construction of SIC, thereby creating a sub-class, or underclass of criminality, while simultaneously participating in the corollary parsing of criminalization, discipline, and punishment to a subset of suspects therein. In some ways this represents the economy of policing; without a supply of criminals there would be no demand for police services.

Disciplinarians therefore create schemas of coercion that tend to be focused disparately on some communities and individuals than upon others.⁴³⁰ Thus only some people are subject to such “strict subjection,” and not all bodies are disciplined equally.⁴³¹ Like other disciplinarians, police order “human multiplicities” based upon the varied identities of individuals in

425. *Id.*

426. *Id.* at 17.

427. *Id.* at 18.

428. *Id.* at 23.

429. *Id.* at 18 (“Psychiatric expertise, but also in a more general way criminal anthropology and the . . . discourse of criminology, find one of their precise functions here: by solemnly inscribing offences in the field of objects susceptible of scientific knowledge, they provide the mechanisms of legal punishment with a justifiable hold not only on offences, but on individuals; not only on what they do, but also on what they are, will be, may be.”).

430. *Id.* at 169 (noting that disciplinarians construct “elaborat[e] procedures for the individual and collective coercion of bodies.”).

431. *Id.* at 138 (“What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviour. The human body was entering a machinery of power that explores it, breaks it down and rearranges it Thus discipline produces . . . practiced bodies, ‘docile’ bodies In short, it dissociates power from the body; . . . it reverses the course of the energy, the power that might result from it, and turns it into a relation of strict subjection.”). Foucault describes this “‘micro-physics’ of power” as permeating throughout society in both large and small ways. “Small acts of cunning endowed with a great power of diffusion, subtle arrangements, apparently innocent but profoundly suspicious, mechanisms that obeyed economies too shameful to be acknowledged, or pursued petty forms of coercion” *Id.* at 139. Part of this subjection is “unceasing observation” which allows for the collection of data. For instance, police create and catalogue reports on criminality, thereby creating “police texts.” *Id.* at 214. To Foucault this “complex documentary organization” becomes a “permanent account of individuals’ behaviour.” *Id.*

society.⁴³² As such, police profile potential suspects based upon their attributions of identity and their consequential societal meanings. Pursuant to my analysis of the cases discussed above, police construction of and response to SIC has implications for their modality selection. This too is a way of managing the varied identities of individuals in society.

Constant discipline produces juridical subjects, in this case, criminal subjects. The subject most compatible with the SIC of negatively racialized individuals suffering from mental illness is “the delinquent,” or the inherently criminal, “the monster.” “The delinquent is to be distinguished from the monster by the fact that it is not so much his act *as his life* that is relevant in characterizing him.”⁴³³ As seen above, the facts triggering use of one modality in preference to another do not turn upon significant factual distinctions, but upon distinctions of identity. Bates⁴³⁴ and Banks⁴³⁵ were both autistic youngsters (Bates assaulted multiple officers,⁴³⁶ Banks was thought to be “aggressive”⁴³⁷); Coghlan⁴³⁸ and Marbly⁴³⁹ both had guns (Coghlan had multiple guns including a shotgun,⁴⁴⁰ Marbly had a BB gun⁴⁴¹); Sallenger⁴⁴²

432. *Id.* at 218.

433. *Id.* at 251 (emphasis added).

434. *Bates v. Chesterfield County*, 216 F. 3d 367, 369 (4th Cir. 2000) (“Bates . . . has been autistic since birth.”).

435. *Banks v. Modesto*, No. CVF046284RECSMS, 2005 WL 2233213, at *1 (E.D. Cal. Sept. 9, 2005) (Rosie had “been diagnosed with autism or an “autistic-like condition.”).

436. *Bates*, 216 F. 3d at 369-370 (“Bates then pushed Officer Genova . . . Genova attempted to grab Bates, but Bates fought him off. During the struggle, Bates used his fingernails to scratch Genova’s left arm Bates resisted, spit on Genova Bates also bit Genova, drawing blood from the officer’s left forearm The two officers then grappled with Bates The four officers wrestled with Bates and were able to handcuff his arms behind his back He kicked Officer Biller hard directly in the groin”).

437. *Banks*, 2005 WL 2233213, at *1 (“Plaintiff was in a new classroom and was confronted with new sounds, new students and some teasing. Plaintiff may have reacted in an aggressive manner, which is predictable for someone with Plaintiff’s disability.”).

438. *Coghlan v. Phillips*, 447 F. Supp. 21, 25 (S.D. Miss. 1977) (“While awaiting a response from the radio operator, [Deputy] King returned to the patrol car and told [Deputy] W.D. that the decedent had threatened to shoot him if he did not immediately remove himself from the front porch. Gene Coghlan then shouted that if the deputies did not get out of his yard he would shoot them, and he immediately fired between four and ten shots at them with a .38 calibre [sic] pistol.”).

439. *Ali v. City of Louisville*, 395 F. Supp. 2d 527, 532 (W.D. Ky. 2005).

440. *Coghlan*, 447 F. Supp. at 25 (“These guns consisted of two automatic 12 ga. shotguns, one 30.06 and one 22 mag. rifle, and numerous ammunition.”).

441. *Ali*, 395 F. Supp. 2d at 537 (In segmenting the events that transpired with Mr. Marbly, the court found that, “In this case, in the moments right before the shooting, Mr. Marbly raised a gun, which was later discovered to be a BB gun, at the officers, and it was reasonable for them to believe that their lives were in danger, necessitating the officers’ use of deadly force.”).

442. *Sallenger v. City of Springfield*, No. 03-3093, 2005 WL 2001502 at *28 (C.D. Ill. Aug. 4, 2005) (“When Sergeant Zimmerman returned with Oakes’ hobble, Andrew’s torso was still on the bed, with his knees on the floor and his body in a kneeling position. Officer Oliver was partially on the bed, with his right knee on Andrew’s right shoulder area, his right hand pressing on Andrew’s left shoulder, and his left hand pulling up on the handcuff chain to keep Andrew from slipping the handcuffs or jerking at them. Officer Oakes was still trying to control Andrew’s

and Swans⁴⁴³ were both hog-tied (Sallenger only after significant physical resistance,⁴⁴⁴ Swans after verbal resistance⁴⁴⁵); and Tofano⁴⁴⁶ and Culver⁴⁴⁷ were both physically restrained by police (Tofano after significant violent resistance,⁴⁴⁸ while Culver was kned in the groin twice after refusing to follow an officer's request⁴⁴⁹). Interestingly, Castillo stands alone as he had a beer bottle, but was nonetheless perceived as dangerous and was justifiably "attacked" by an officer.⁴⁵⁰ In *Bates*, *Coghlan*, *Sallenger* and *Tofano* the SIC is white and mentally ill, while in *Banks*, *Marbly*, *Swans*, *Culver* and *Castillo*, the SIC is black or brown and mentally ill.

Once the locus of criminality is shifted from the act to the actor, society requires a new framework or "script" through which to view the delinquent. Foucault refers to this script as "the biographical."⁴⁵¹ This is the assessment of criminality that is attributed to certain types of people depending on their identity; this is the creation of the inherently criminal subjects which exist prior to the commission of a crime. Foucault's recognition of the exponential construction of "danger" when the criminal biographical is intersected with psychiatric discourse undergirds my thesis—when badness and madness intersect there is an exponential criminal encounter. This is SIC in its theoretical form. The biographical, or SIC, with which police are dealing in the disciplinary force modality is that of the delinquent who personifies "the

feet. Sergeant Zimmerman and Officer Oakes then placed the hobble on Andrew.").

443. *Swans v. City of Lansing*, 65 F. Supp. 2d 625, 635 (W.D. Mich. 1998).

444. *Sallenger*, 2005 WL 2001502 at *5 ("Andrew continued to struggle despite the handcuffs, trying to pull his hands apart and telling the officers to remove the handcuffs or he would kill them. In the course of this struggle, Andrew kicked Officer Oakes several times. Officer Oakes was trying to control Andrew's legs while Officer Oliver held Andrew's shoulders down. Both Officers Oakes and Oliver used additional force, beyond open-hand control, on Andrew to prevent him from struggling after the handcuffing.").

445. *Swans*, 65 F. Supp. 2d at 633 ("Swans was told by Officer Diaz to face either the booking counter or the cage behind him. When he shook his head 'no,' Diaz grabbed his arm and attempted to move him toward the booking counter. In the process, Swans was moved against the cage. Detention Officers Kevin Moore, William Fabijancic, and Sergeant Miklos Szilagyi then entered the booking area and with Diaz responded to an order of one of the officers to 'take him down.'").

446. *Tofano v. Reidel*, 61 F. Supp. 2d 289, 293 (D.N.J. 1999) ("Tofano continually kicked [Officer] Devine until [Officer] Stitz rejoined the group and managed to secure Tofano's legs.").

447. *Culver v. Fowler*, 862 F. Supp. 369, 370 (M.D. Ga. 1994) ("Officer Fowler attempted to walk Culver up against a wall in an effort to restrain him.").

448. *Tofano*, 61 F. Supp. 2d at 293 ("Devine rushed in to help and Tofano again swung his right arm, slashing Devine's neck with the handcuff, and creating a cut that later required five stitches. Tofano then started to run and Reidel tackled him from behind. After Tofano threw Reidel off him, Reidel informed the other officers that he was going to use pepper spray to try to subdue Tofano. Reidel sprayed Tofano in the face and frontal area with the pepper spray but it had no effect on him.").

449. *Culver*, 862 F. Supp. at 370.

450. *Castillo v. City of Round Rock*, No. 98-50163, 1999 WL 195292, at *1 (5th Cir. March 15, 1999).

451. *Id.* at 252. The "introduction of the 'biographical'" is essential to establishing the "'criminal' as existing before the crime and even outside it." *Id.*

strange manifestation of an overall phenomenon of criminality.”⁴⁵² As the embodiment of criminality, those individuals at the intersection of negative racialization and mental illness “make it possible to draw up a network of causality in terms of an entire biography and present a verdict of punishment-correction”⁴⁵³ on those seen as simultaneously bad (due to race) and mad (due to mental disability).

This preexisting “biographical” of untamed criminality is helpful in deconstructing the police interactions with those people of color who had not offended, or who had committed minor crimes at the moment of their encounter with police. For instance, the biographical construction of Castillo, Marbly, Swans, Reynolds, Culver and Banks situate them as criminals irrespective of the severity of their crimes, their inability to flee, their stature, and their relative powerlessness. The police force used against them can be theorized not as the aberrant behavior of undisciplined random actors, but as an aspect of the penal economy, the systemic and forceful disciplining of “the criminal [whose] typology . . . is both natural and deviant.”⁴⁵⁴ If disciplinarians come to view people of color with mental illnesses as inherently criminal “delinquents,” they will adopt extreme measures of interaction in light of their misguided notions of “dangerousness.”⁴⁵⁵ Thus, for those who are thought to “display a pathological gap in the human species,” the use of excessive force becomes routine, not only for police, but for other disciplinarians as well.⁴⁵⁶

CONCLUSION

This Article has focused upon the relevance of the interaction of race and mental status for policing. The first installment of a larger project, the Article focused upon Foundational Intersectionality to highlight the socio-political exercise of police discretion at the site of race and mental illness. SIC was explored as a way to conceptualize the exercise of Foucauldian notions of scientifico-judicial discretion by police disciplinarians. These power dynamics revealed a sliding scale of restraint, coercion, force and violence unequally deployed against juridical bodies made knowable by scientific-judicial biographicals (e.g. negatively-racialized individuals with mental

452. *Id.* at 253.

453. *Id.* at 252. Foucault also defines the delinquent as “the strange manifestation of an overall phenomenon of criminality.” *Id.* at 253.

454. *Id.* at 253.

455. In articulating the alienation of these “monsters” who often emerged from the “bottom rank of the social order,” Foucault stated that nonetheless, “it is not crime that alienates an individual from society, but that crime is itself due rather to the fact that one is in society as an alien, that one belongs to that ‘bastardized race.’” *Id.* at 275-76.

456. Recall that *Banks* took place physically within a school building. Not only were police involved in the “disciplining” of Rosie Banks but teachers, school administrators and even the school principals took part in this collective effort. *Banks v. Modesto*, No. CVF046284RECSMS, 2005 WL 2233213 at *1 (E.D. Cal. Sept. 9, 2005).

illness).

This Article has explored the “dangerous intersection,” of race and mental status, as one that attracts heightened police scrutiny and which disparately leads to excessive use of police force. I have employed a Foucauldian reading of the relevant case law to theorize the operative modalities. It is my view that Foucault articulated several prescient hypotheses in “writing the history of the present.”⁴⁵⁷ Particularly insightful are his theories with respect to the construction of madness as a mechanism of containment,⁴⁵⁸ as well as surveillance and discipline as technologies of juridical control.⁴⁵⁹ Through this reading, I identified three management modalities that depend on the SIC constructed by police in interacting with individuals who are thought to have a mental illness: the medical modality, the criminal modality and the disciplinary force modality.⁴⁶⁰ It appears from the case law that the selection of a modality is largely dependent upon the racialization of the alleged offender. Thus, as Foucault would posit, in the move from “offender” to “delinquent” police become less concerned with acts and more concerned with identity.⁴⁶¹ These theories are helpful in explaining the criminalization of the mentally ill and the disparate police use of excessive force in dealing with negatively-racialized individuals with mental illness.

At this stage, I anticipate further study and exploration of two additional theories of race and mental status in my later scholarship. Moving beyond Foundational Intersectionality, the second theory emanates from cases of negatively-racialized suspects experienced by police as defiant or deviant. These individuals are often constructed as “crazy”⁴⁶² notwithstanding their lack of an actual mental illness. This phenomenon exposes a “racing” of disability and a corollary disabling by race. It also suggests that the Americans with

457. FOUCAULT, *supra* note 7 at 31.

458. *See id.* at 18 (“Psychiatric expertise, but also in a more general way criminal anthropology and the repetitive discourse of criminology, find one of their precise functions here: by solemnly inscribing offences in the field of objects susceptible of scientific knowledge, they provide the mechanisms of legal punishment with a justifiable hold not only on offences, but on individuals; not only on what they do, but also on what they are, will be, may be.”). For a more detailed discussion of the social construction of madness, *see* MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1961).

459. FOUCAULT, *supra* note 7, at 22-31.

460. Thus, my methodology was to read cases, as opposed to police reports, in order to understand police behavior and to understand when judges are inclined to defer to police assessments of their encounters with either actually or seemingly mentally disordered individuals.

461. *See* FOUCAULT, *supra* note 7, at 251 (“The delinquent is to be distinguished from the offender by the fact that it is not so much his acts as his life that is relevant in characterizing him.”).

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

Disabilities Act (“ADA”) category of “regarded as”⁴⁶³ disabled may be a fruitful lens through which to view the manner in which identity is constructed in this context.

The third theory which I intend to explore is perhaps the most challenging and troublesome. In a disturbing number of cases, even in the absence of a mental illness, diagnosable or constructed, the negative racialization of the suspect alone appears to be disabling. Thus, during a police encounter, racial construction itself can become the societal impairment that actively disables an individual. This hypothesis suggests a possible rethinking of the ways in which attorneys, judges, and scholars conceptualize rights discourse. It counsels reconsideration of discrimination as consequential marginalization. If racialization constructs impairment, should the gaze of rights discourse not be refocused upon its effects? If so, discrimination is a methodology of social disability that should be studied in this broader sense. The implications of this aspect of my project are large and will be left for later exploration. For now, I have taken the first step by starting with an exploration of the consequences of Foundational Intersectionality of race and mental status for policing.

463. 42 U.S.C. § 12102(3)(A) (2009) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”).