Words Still Wound: IIED & Evolving Attitudes toward Racist Speech

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Introduction

A Black woman is driving to the grocery store with her young child. As she turns into a parking spot, another driver angrily honks, believing she has taken his spot. The woman parks, takes out her child, and faces the driver. The driver, who is now hysterical, yells at her, "Learn to drive, damn n*****."[2] The woman is no stranger to racism, but she is shaken. She is particularly disturbed that her young child has witnessed this altercation. Having taken down the license plate number of the driver in the parking lot, she reports the incident to the police. Because the driver did not physically harm her or threaten her bodily safety, the police offer their regrets, but inform her that there is nothing they can do. The driver did not break the law. Despondent, she returns to her errands.

Although she has experienced racism before, weeks pass and she still cannot overcome the incident. She replays it over and over in her mind and ruminates on the long-lasting effects it may have on her young child. She feels helpless, humiliated, and distrustful of white people generally. She has lost weight and feels withdrawn and depressed. She finds herself performing poorly at work and is also concerned about her parenting.

Eventually, she visits a psychiatrist to discuss the altercation. Her psychiatrist informs her that her reaction fits the criteria of "race-based trauma."[3] The psychiatrist prescribes her anti-depressants. After months of anti-depressants and counseling, she is feeling better, but by no means like she was feeling prior to the incident. She is particularly perturbed that the driver left the scene unbothered by any consequences, while she has suffered mentally, physically, and financially.

If the woman in this hypothetical decides to visit a lawyer, she would find no remedies for her distress. If she lives in New York City, she might attempt to bring her complaint to the New York City Human Rights Commission ("NYCHRC"), alleging discriminatory harassment. The NYCHRC would likely condemn the driver's language, but ultimately conclude that private verbal harassment does not implicate equal access to public accommodations, nor does it constitute discriminatory harassment, which requires a threat of force, intimidation, or coercion.[4] In short, the driver's actions

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[2] Throughout this article, I will use or quote ugly and sometimes offensive language. I use this language not to goad or desensitize, but to discuss the real harms of racist language and offer a solution on how to remedy these harms.

[3] Rochaun Meadows-Fernandez, *The Little Understood Mental-Health Effects of Racial Trauma*, The Cut (June 23, 2017), https://www.thecut.com/2017/06/the-little-understood-mental-health-effects-of-racial-trauma.html, *archived at* https://perma.cc/VF5V-F6AB ("Racial trauma is experiencing psychological symptoms such as anxiety, hypervigilance to threat, or lack of hopefulness for your future as a result of repeated exposure to racism or discrimination.").

[4] *See* N.Y.C. Admin. Code § 8-602, Civil Action to enjoin discriminatory harassment or violence; equitable remedies (providing civil remedies for when a person "interferes by threats, intimidation or coercion or attempts to interfere by threats, intimidation or coercion

would not violate even the most expansive local civil rights statutes. This situation highlights a dire gap in American law that requires redress.

This Article argues that the tort of intentional infliction of emotional distress ("IIED")—intentional or reckless conduct that is extreme or outrageous and causes severe emotional harm[5]—is the best vehicle for bringing racial insult claims. Racial insults are defined here as face-to-face private speech that demeans individuals on the basis of their actual or perceived race, color, ethnicity, or national origin.

This Article builds upon scholarship from the last forty years that has proposed remedies for racism's harms. In 1982, Professor Richard Delgado published *Words that Wound*, calling for an independent tort action for racial insults.[6] Delgado argued that the unique harms caused by racism and racial insults to victims, perpetrators, and society as a whole merit civil liability for racial slurs.[7] Delgado examined the inadequacy of other forms of civil liability in addressing the harms of racial insults.[8] These inadequacies led him to conclude that a new tort was wholly necessary.[9] In the same year, Professor Dean M. Richardson published an article noting that the tort of outrage, or IIED, had "great potential as a means of recovery for persons injured by racist conduct and as a method for changing racist beliefs and attitudes."[10] Since the 1980s, courts have widely accepted IIED as a stand-alone tort. However, courts have consistently failed to recognize racial insults as IIED.[11] In 1990, Professor Jean C. Love, upon analyzing some of IIED's deficiencies in protecting against racial and gender harms, recommended "the recognition of a rebuttable presumption that certain categories of discriminatory speech constitute extreme and outrageous conduct."[12]

Although the real harms felt by victims of racial insults were as great thirty to forty years ago as they are today, literature on the psychological harm of racial insults had not yet developed. Since the contributions of Delgado, Richardson, and Love, mental health professionals have recognized race-based trauma as a medical phenomenon. Moreover, societal standards toward racism have steadily progressed to the point where it is uncontroversial to say that racist language is intolerable. Additionally, and importantly, there have been significant developments in First Amendment jurisprudence

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with the exercise or enjoyment by any person of rights" based on the victim's "actual or perceived race, creed, color, [or] national origin.").

[5] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. L. INST. 2011).

[6] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[7] *Id.* at 134.

[8] *Id.* at 149–62.

[9] *Id.* at 134.

[10] Dean M. Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267, 267 (1982).

[11] *See infra* section V.C.

[12] Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 159 (1990).

in the last thirty years, and any remedy for racial insults must grapple with this new body of First Amendment law.

This Article shows that the tort of IIED is designed to counter intentionally assaultive language that causes severe harm. Racist language, which, by its definition, weaponizes a history of oppression, dehumanization, and pernicious stereotypes against racial minorities, is the sort of conduct that IIED was created to address. Additionally, society today largely views the most overt forms of racial insults as "extreme and outrageous." Recognizing racial insults as IIED would merely reflect society's existing standards. Finally, psychologists and psychiatrists are increasingly recognizing the emotional, mental, and physiological harms of racism. Today, the science clearly indicates that racist insults cause severe harm.

This Article also reflects on why IIED has failed to protect those who have been harmed by racist language—namely, because judges have relied on longstanding precedent holding that racist language is neither "extreme" nor "outrageous" enough to merit recovery. Particularly given society's widespread view that racism is intolerable, judges are a step behind societal standards toward racist language, making these precedents ripe for rethought. Moreover, by viewing racial insults as unfortunate but accepted "rough edges of society,"[13] courts further entrench racist language as inevitable conduct that minorities must endure. It is unacceptable that courts have not recognized the deep harms of racial insults to minority communities and have allowed these harms to go without remedy.

Part I of this Article frames the problem of racial insults, highlighting the unique dignitary, psychological, and societal harms they impose. Part II shows that Americans across the political spectrum view overt racism as odious and intolerable, and therefore extreme and outrageous, but that legal responses have been unsuccessful in holding those who use racial insults accountable. Part II goes on to highlight the inadequacies of state and local human rights commissions, along with attempts to criminalize hateful speech. Part III examines the history of IIED to show that IIED is, at its core, designed to counter the harms of racial insult. Part IV grapples with the First Amendment concerns of a racial insult IIED claim, ultimately concluding that the First Amendment does not shield private, racially assaultive language. Part V examines IIED today—its requirements, its use as a tool against racial insults, and its limitations. This section emphasizes the viability of a tort remedy for racial insults, provided that judges recognize society's intolerance for racism. Part VI shows how a court might adjudicate a racial insult IIED claim. This section also shows how employment law has

[13] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1965) ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.").

grappled with claims of racial insult and offers Title VII as a helpful baseline in establishing whether language is racist.

I. Racial Insults: A Harm without a Remedy

To be sure, individuals suffer some level of harm from all insults. However, the harms stemming from racial insults are unique in kind and merit legal redress.[14] Unlike many non-racial insults, racial insults are steeped in a legacy of oppression, harmful stereotypes, and otherization of a group of people. Those invoking racial insults demean based on race and question an entire racial group's value and belonging in society. Racial insults are intended to put their targets "in their place," reducing them to a subordinate position. Racial insults are not just one isolated event, but part of a series of interrelated events in which racial minorities are subordinated and "reinscribed with long histories of vilification that will follow them wherever they go."[15] Racial insults target not only the individual, but also the entire racial group. Further, because they are directed at specific racial groups, racial insults challenge society's commitment to equality and non-racism.

Finally, psychiatrists and psychologists are increasingly recognizing the unique physical, emotional, and mental harms of racism. These harms can stem from systemic institutionalized racism, as well as discrete incidents of racism, which include racial insults. Recent research shows that racial trauma is present and prevalent among groups that have experienced and continue to experience racism in its many forms. The harms of racial trauma are only compounded by the lack of meaningful remedy for these insults.

As later discussions show, other countries have attempted to address historic and systemic racial inequalities in part through punishing racist speech. The United States, however, remains an outlier in its hands-off approach to racist language. By failing to counter racist speech, the U.S. government condones its use. Victims of racist speech then become, in the words of Mari Matsuda, "stateless persons" who must either "identify with a community that promotes racist speech" or "admit that the community does not include them."[16] Despite the passage of time between the present and the United States' wretched history of slavery and Jim Crow, racist speech endures. Due to its history, harms, and implications for equality, racist speech requires legal redress.

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[14] Certainly, gendered, homophobic, transphobic, and other insults based on group identity result in comparable harms. This Article does not foreclose the possibility that other categories of insults should be actionable through IIED. However, given its strong reliance on the psychological harms of specifically race-based trauma, this Article focuses on racial insults.

[15] Richard Delgado & Jean Stefanic, Must We Defend Nazis? 28 (2016).

[16] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2338 (1989).

A. Dignitary Harms

The notion that the harms of racism are unique in kind to other categories of insults is not controversial. In *Race, Racism, and American Law*, Dean Derrick Bell alludes to the *sui generis* dignitary harms of racial discrimination: "[d]amage to the autonomy and freedom of action—the badges and incidents of citizenship—is the threshold damage which always occurs in a race discrimination case, and would merit compensation greater than it has generally received."[17] While all insults assault the dignity of an individual in some way, racial insults are inextricably linked to an individual's belonging, citizenship, and equality. They cannot be divorced from historical legacy and societal prejudices from which they are borne.

In *Words that Wound*, Delgado expands upon Bell's argument that racial insults are dignitary affronts that denigrate the victim's humanity and sense of self. He argues that "[a] racial insult is a serious transgression" of our moral and legal traditions, which recognize the protection of an individual's moral worth and humanity, "because [racial insults] derogate[ ] by race, a characteristic central to one's self-image."[18] Racial insults communicate that "distinctions of race are distinctions of merit, dignity, status, and personhood."[19] While any insult can be interpreted as a dignitary insult, racial insults bind the derogatory statement to the individual's identity as a member of that group, thus implicating the individual's place in society as a result of his or her membership of that group.

In *Understanding the Mark*, Professor R.A. Lenhardt identifies that the harm that derives from racism is "racial stigma."[20] She defines racial stigma as "a problem of negative social meaning, of dishonorable meanings socially inscribed on arbitrary bodily marks [such as skin color], of spoiled collective identities."[21] Racial stigmatization, as opposed to mere insults or even the denial of an opportunity because of one's race, requires "becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community."[22] Racial stigmatization questions an individual's common humanity with the other and belonging in society. Further, a racially stigmatized person is devalued in society, and his or her ability to

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[17] Derrick Bell, Race, Racism, And American Law 321 (5th ed. 2004).

[18] Delgado, *supra* note 6, at 144. Notably, Delgado proposes that the dignitary harm of a racial insult alone is sufficient to warrant recovery; plaintiffs would not need to show emotional harm, as "the affront to dignity" is "an indisputable element of harm." *Id.* at 166.

[19] *Id.* at 136.

[20] R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 803 (2004).

[21] *Id.* at 809 (citing Glenn C. Loury, The Anatomy of Racial Inequality 59 (2002)) (internal quotations omitted).

[22] *Id.*

partake in society as a full citizen is "fundamentally compromised by the negative meanings associated with his or her racial status."[23]

Even the wealthiest or most educated minority who is on the receiving end of a racial insult experiences dignitary harms. In 2005, a salesperson at the luxury Hermès store in Paris prevented media mogul Oprah Winfrey from entering the store.[24] Oprah later described, "Anybody who has been snubbed because you were not chic enough, or not thin enough, or not the right class, or the right color or whatever, I don't know what it was, you know that it is totally humiliating."[25] Those who employ racist insults evoke and reinforce societal histories of oppression and subjugation. A racial minority's wealth, education, or even celebrity status is no shield to these insults.

Because racial insults condemn an individual on the basis of his or her race, racial insults are also an indictment of entire racial groups. In choosing to weaponize a racial insult, the user intends to both ostracize his or her target on the basis of race, as well as ascribe a negative meaning to an entire racial group.[26] Professor Paul Brest's 1976 article, *In Defense of the Antidiscrimination Principle*, acknowledges that racial and gender insults are more pernicious than other insults because "they are often premised on the supposed correlation between the inherited characteristic and the undesirable voluntary behavior of those who possess the characteristic."[27] Victims of racial insults internalize these words and attribute them to both themselves and the group to which they belong.[28] They can become self-hating, believing that their racial attributes are in fact a flaw.[29]

The Supreme Court and the federal circuits have long recognized the dignitary harms of racism.[30] The most widely-recognized inquiry into dis-

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[23] *Id.* at 818 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 19 (1963)).

[24] Alessandra Stanley, *Oprah, No Diva She, Accepts Hermès Apology on the Air*, N.Y. TIMES (Sept. 20, 2005), https://www.nytimes.com/2005/09/20/arts/television/oprah-no-diva-she-accepts-hermes-apology-on-the-air.html, *archived at* https://perma.cc/3V4H-CGN9.

[25] *Id.*

[26] An additional argument in favor of a race-based IIED claim is that racial insults invoke a specific vulnerability of their victims. In choosing to employ a racial insult, the defendant is purposefully exploiting this vulnerability to cause emotional harm. IIED recognizes that exploiting an individual's specific vulnerability can be outrageous. *See, e.g.*, Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 487 (Cal. Ct. App. 2009) (holding that plaintiffs' vulnerability, and defendants' knowledge of that vulnerability, is relevant in determining whether defendants acted outrageously).

[27] Paul Brest, *The Supreme Court, 1975 Term-Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10 (1976).

[28] *See* Jennifer Crocker et al., *Social Stigma*, *in* 2 THE HANDBOOK OF SOC. PSYCHOL. 517 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

[29] Lenhardt, *supra* note 20, at 842.

[30] *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (upholding hate crime enhancement statute because, among other factors, such crimes "inflict distinct emotional harms on their victims."); Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 (3d Cir. 1995) (per curiam) ("[A] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw." (quoting Mardell v. Harleysville

crimination's harms to an individual's self-worth is likely *Brown v. Board of Education*.[31] In *Brown*, plaintiffs put forward extensive psychological studies showing that segregation resulted in Black school children having low self-esteem and feeling inferior to white children.[32] The Court found this persuasive, with Chief Justice Earl Warren concluding that segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[33]

In *Heckler v. Matthews*, the Supreme Court recognized that discrimination itself was a cognizable injury.[34] The Court held that discrimination perpetuates "archaic and stereotypic notions" and "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community," resulting in grave non-economic injuries.[35]

Similarly, in *Hassan v. City of New York*, the Third Circuit addressed the dignitary harms associated with the City of New York's widespread surveillance of its Muslim community.[36] The Third Circuit compared discrimination to a "dignitary tort," noting that the injury in both harms is an "affront to the other's dignity . . . as keenly felt by one who only knows after the event that an indignity has been perpetrated upon him as by one who is conscious of it while it is being perpetrated."[37]

B. Psychological Harms

Increasingly, psychologists have examined the psychological trauma borne from racism. There is a growing consensus that racism results in a unique form of psychological harm. Racism wears away at the psyche and can "result in a cumulative experience of psychological trauma and emotional burnout over time."[38]

Dr. Robert T. Carter of Columbia University uses "race-based trauma" or "racist-incident-based trauma" to describe the psychological impact of oppression based on race.[39] Race-based traumatic stress can be defined as:

Ins. Co., 31 F.3d 1221, 1232 (3d Cir. 1994) (internal quotation marks omitted))); Sandberg v. KPMG Peat Marwick, L.L.P., 111 F.3d 331, 335 (2d Cir. 1997) ("The fundamental concern of discrimination law is to redress the dignitary affront that decisions based on group characteristics represent, not to guarantee specific economic expectancies.").

[31] 347 U.S. 483 (1954).

[32] *See, e.g.*, NAACP LEGAL DEF. & EDUC. FUND, *BROWN V. BOARD*: THE SIGNIFICANCE OF "THE DOLL TEST," https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/significance-doll-test/, *archived at* https://perma.cc/L8AH-M98D.

[33] *Brown*, 347 U.S. at 494.

[34] 465 U.S. 728, 738 (1984).

[35] *Id.* at 739–40 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

[36] 804 F.3d 277 (3d Cir. 2015), *as amended* (Feb. 2, 2016).

[37] *Id.* at 293.

[38] Anderson J. Franklin et al., *Racism and Invisibility: Race-Related Stress, Emotional Abuse and Psychological Trauma for People of Color*, 6 J. EMOTIONAL ABUSE 9, 14 (2006).

[39] Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 COUNSELING PSYCH. 13, 13 (Jan. 2007); *see also*

> (a) an emotional injury that is motivated by hate or fear of a person or group of people as a result of their race; (b) a racially motivated stressor that overwhelms a person's capacity to cope; (c) a racially motivated, interpersonal severe stressor that causes bodily harm or threatens one's life integrity; or (d) a severe interpersonal or institutional stressor motivated by racism that causes fear, helplessness, or horror.[40]

Professor Erlanger Turner describes the symptoms as including "anxiety, hypervigilance to threat, or lack of hopefulness for your future as a result of repeated exposure to racism or discrimination."[41] Psychologist Anderson Franklin found that continuous microaggressions, or repeated racial slights, can cause mental health problems including race-related stress, chronic indignation, depression and substance abuse, as well as distrust of other races.[42] Race-based trauma also causes the victim to doubt his or her self-worth, resulting in self-doubt and self-hatred.[43]

In addition to psychologists and psychiatrists, social scientists have also discussed the psychological effects of racial discrimination. Feelings of inferiority that result from racial insults are constant, resulting in "the formulation of some chronic feeling of the worst sort of insecurity, and this means that one suffers anxiety and perhaps even something worse."[44] Because they are harmed by an attribute over which they have no control, those harmed by racial insults can become severely guarded in front of others, fearful that they will be targeted again because of their race. Psychologists such as Dr. Carter have also created a "race-based traumatic stress symptom scale" to measure and assess the psychological and emotional stress reactions to racism and racial discrimination.[45]

Racial trauma is distinct from other sorts of depression, anxiety, and other mental health disorders. Some psychologists have compared racial trauma to post traumatic stress disorder ("PTSD"), but differentiate it in that "the trauma and emotional abusiveness of racism is as likely to be due to chronic, systemic, and invisible assaults on the personhoods of ethnic minor-

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Thema Bryant-Davis et al., *The Trauma Lens of Police Violence against Racial and Ethnic Minorities*, 73 J. Soc. Issues 852, 856 (2017).

[40] Thema Bryant-Davis, *Healing Requires Recognition: The Case for Race-Based Traumatic Stress*, 35 Counseling Psych. 135, 135–36 (Jan. 2007).

[41] Meadows-Fernandez, *supra* note 3.

[42] Carter, *supra* note 39, at 72.

[43] *Id.* at 36, 65, 78.

[44] Crocker et al., *supra* note 28, at 516–17; *see also* Lenhardt, *supra* note 20, at 840 ("In other words, racial stigma deprives individuals of the confidence that they are being dealt with in good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals who expressly claim and perhaps even believe that they are nonracist.").

[45] Robert T. Carter et al., *Initial Development of the Race-Based Traumatic Stress Symptom Scale: Assessing the Emotional Impact of Racism*, 5 Psychol. Trauma: Theory, Res., Prac., & Pol'y 1, 1–8 (2013) (discussing measure designed to assess the psychological and emotional stress reactions to racism and racial discrimination).

ities as a single catastrophic event."[46] However, other researchers have categorized racism as "a unique source of stress," injuring mental health in different ways than other life stressors.[47] The term "racial trauma" provides those targeted with the proper nomenclature to describe and view their experiences. Several studies have evaluated triggers and the scope of race-based trauma, noting that typical depression or anxiety diagnoses fail to capture the true harm of racism—when one experiences race-based trauma, she finds that her injury is not due to a preexisting psychiatric diagnosis, but rather is a direct consequence of the racism of another.[48] In other words, the individual experiencing race-based trauma has experienced an injury and is seeking redress.[49]

In the Title VII setting, the Supreme Court has also acknowledged the psychological harms of discrimination. In the course of determining the coverage of Title VII, the Supreme Court has found that Congress was concerned with not only economic effects of discrimination, but also psychological harm.[50] The Court cited a Fifth Circuit decision in acknowledging, "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[51]

Moreover, the perceived inability to resolve the upset from recurring slights can cause mental health problems such as race-related stress, chronic indignation, depression, or substance abuse,[52] supporting the notion that a tort remedy for racism might alleviate some of racism's emotional harms.

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[46] Franklin et al., *supra* note 38, at 16 (citing Janis Sanchez-Hucles, *Racism: Emotional Abusiveness And Psychological Trauma For Ethnic Minorities*, 1 J. EMOTIONAL ABUSE 69 (1998)); *see also* Lisa Spanierman & Paul Poteat, *Moving Beyond Complacency To Commitment: Multicultural Research in Counseling Psychology*, 33 COUNSELING PSYCH. 513, 517–23 (2005) (suggesting that racist incidents are most similar to established conceptualizations of trauma when they are overt, distinct, and experienced directly by an individual); Monnica T. Williams, *The Link Between Racism and PTSD*, PSYCH. TODAY (Sept. 6, 2015), https://www.psychologytoday.com/us/blog/culturally-speaking/201509/the-link-between-racism-and-ptsd, *archived at* http://perma.cc/7BBR-3V38 (explaining how racism can cause PTSD).

[47] Franklin et al., *supra* note 38, at 18.

[48] Robert T. Carter, *Race-Based Traumatic Stress*, PSYCHIATRIC TIMES (Dec. 1, 2006), https://www.psychiatrictimes.com/cultural-psychiatry/race-based-traumatic-stress, *archived at* http://perma.cc/G2E4-EJWR (noting that race-based traumatic stress injuries, as opposed to a general diagnosis of injury or depression, captures that "the person, depending on his interpretation of the encounter, had or is having a racial experience that has contributed to or is related to psychiatric impairment," and that "[t]he 'injury' designation indicates that the rights of the person were unfairly violated and provides an option to seek redress.").

[49] *Id.*

[50] Meritor Savings Bank v. Vinson, 477 U.S. 57, 67–68 (1986).

[51] *Id.* at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)); *see also* Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 515 (8th Cir. 1977) ("Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.").

[52] Franklin et al., *supra* note 38, at 18.

Some psychologists have noted that a major contributing factor to the problem of racism is its effects on mental health and the public's failure to understand the emotional, psychological, and sometimes physical effects on its targets.[53] Acknowledging the harms of racism through a legal remedy could then blunt some of the perniciousness of racism and allow victims of racism an opportunity for redress.

C. Societal Harms

In arguing for a remedy for racist speech, some commentators have highlighted that hate speech does not just harm the individual, but also society as a whole. In *Free Speech and Racism*, David Kretzmer argues for limits on racist speech not because the harm of racism is unique, but because racism itself is uniquely evil and should be quelled.[54] He argues that history has shown the catastrophic consequences of racism and that people of "divergent political and general philosophies" universally despise racism.[55] Moreover, Kretzmer notes that racism is illegal under international law.[56] For these reasons, he argues, racial insults are a unique category of offensive speech that should be minimized for societal benefit.[57]

Similarly, racism is an affront to American ideals of justice and equality. The notion that "[a]ll men are created equal" is enshrined in America's Declaration of Independence.[58] Racist insults, unlike other insults, subjugate whole groups of people on the basis of their group identity, in direct contravention of the American ideal of equality. American society has a communal interest in equality; society can and should take active steps to protect this interest, including punishing racist speech. As long as individuals are targeted on the basis of their race, with no legal redress for these harms, the American ideal of egalitarianism cannot be realized. Put another way, as long as the state rejects a legal remedy for racial insults, the state permits racists to harm minorities without reproach. As Professor Catharine MacKinnon has famously argued, a victory for racist insults anywhere is a victory for racial insults in society in general.[59]

Given the American legal system's stated commitment to equality and fairness, it is surprising that racial insults, which implicate historically disenfranchised groups, do not currently have a legal remedy. Judges' willingness to allow clearly racist and admittedly reprehensible language to go unpunished flies in the face of stated ideals of an equal and just society.

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[53] Carter, *supra* note 39, at 14.
[54] David Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445, 447 (1987).
[55] *Id.* at 458.
[56] *Id.* at 458, 469.
[57] *Id.* at 446–47.
[58] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[59] *See* Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. REV. 1, 4 (1985).

II. Responses to Racial Insults

Perhaps in light of the arguments highlighted in the previous section, American society today, by and large, views racism as odious and intolerable. The law, however, has not kept pace with society's standards. Legal responses to racial insults are either insufficient or ineffective at protecting against the face-to-face private insults that occur outside of the workplace, public accommodations, or schools. Resultantly, face-to-face racially assaulting and harmful language goes unpunished, leaving victims with no viable recourse for their harms.

A. Societal Responses to Racial Insults

In this political moment, it seems almost counterintuitive to suggest that American society views racism as intolerable. A significant sector of the population rallied to elect President Donald J. Trump precisely because of his "anti-PC" and "straight-shooter" rhetoric.[60] While President Trump has managed to toe the line with racially loaded words,[61] those who use more unambiguously and overtly racial insults have not.[62] However, people who weaponize racist language increasingly face major societal repercussions, including loss of jobs, friends, and repute. This trend exists on both the right and the left.[63]

Take Kyle Kashuv, a Marjory Stoneman Douglas High School shooting survivor and gun rights activist. After it came to light that he frequently used

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[60] *See, e.g.*, Jessica Gantt Shafer, *Donald Trump's "Political Incorrectness": Neoliberalism as Frontstage Racism on Social Media*, Soc. Media + Soc'y 1, 2 (2017) ("White supporters . . . seem happy to dismiss the idea of being 'politically correct,' which according to Trump hinders progress and wastes valuable time" and "Trump was able to overcome criticism and emerge in the conservative white sphere as a brash straight-shooter, a neoliberal truth teller—the 'politically incorrect' candidate who was going to get things done.").

[61] *See* Ian Haney Lopez, *Op-Ed: Why do Trump's supporters deny the racism that seems so evident to Democrats?*, L.A. Times (Aug. 13, 2019), https://www.latimes.com/opinion/story/2019-08-13/trump-voters-racism-politics-white-supremacy, *archived at* https://perma.cc/V784-MY4X (arguing that President Trump's supporters do not believe he is racist and that President Trump's coded-language or "dog-whistling" appeals to voters' racial insecurities, while offering them plausible deniability against charges of racism).

[62] *See e.g.*, Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 Case W. Res. L. Rev. 275, 279 (2018) (arguing that "[t]oday, the legal norm according to which speech in our society should generally be free, and the social norm which holds that hate speech is offensive and harmful are misaligned. Twenty years ago, they were not.").

[63] To be sure, microaggressions, more subtle forms of racism, and implicit bias cause real harm to an individual's self-worth and emotional well-being. Regrettably, it is a challenge to fashion a remedy that is able to capture the full scope of emotional harms of racism, both overt and covert. My proposal here is thus limited to outward expressions of racism, as they are the low-hanging fruit of discriminatory behavior—easily identifiable and easiest to classify as morally repugnant.

the n-word and used phrases such as "MY JEWISH SLAVES"[64] with his classmates, he faced backlash from both the right and the left. Turning Point, a nonprofit that promotes conservativism across American high schools and colleges, distanced itself from him, and Kashuv acknowledged that he used "callous and inflammatory language" and resigned from the organization.[65] Harvard University also withdrew his acceptance, citing concerns regarding his "maturity and moral character."[66]

Kashuv is not alone. For example, in May 2018, a video of New York attorney Aaron Schlossberg berating Spanish-speaking employees at a fast-casual restaurant went viral. Schlossberg insulted the manager of the restaurant by remarking that he was on welfare and informed Spanish-speaking employees that his "next call will be to ICE."[67] The response was swift. Schlossberg was assailed on Twitter, outside his office, and in his apartment building. Within a week, he apologized, acknowledging that his behavior was unacceptable.[68]

In response to the white supremacist march in Charlottesville in 2017, the Twitter account "@YesYoureRacist" gained popularity as a mechanism for identifying those in the marches.[69] As a result, one demonstrator's family publicly disowned him.[70] The employers of other marchers were "inundated with inquiries" about the continued employment of white supremacists, resulting in at least one marcher losing his job.[71]

In 2018, comedian Roseanne Barr posted a tweet comparing former Obama adviser Valerie Jarrett (a Black woman) to an ape.[72] Robert Iger, the Chairman of the Walt Disney Company, which owns ABC, swiftly responded by firing Barr.[73] He tweeted his decision, "Roseanne's Twitter statement is abhorrent, repugnant and inconsistent with our values, and we have decided to cancel her show."[74]

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[64] Andrew Marantz, *The Parkland Provocateur Kyle Kashuv Prepares to Graduate*, New Yorker (May 27, 2019), https://www.newyorker.com/magazine/2019/06/03/the-parkland-provocateur-kyle-kashuv-prepares-to-graduate, *archived at* https://perma.cc/Y95S-XV77.

[65] *Id.*

[66] Kyle Kashuv (@KyleKashuv), Twitter (Jun. 17, 2019, 6:00 AM), https://twitter.com/KyleKashuv/status/1140605179311656962, *archived at* https://perma.cc/DA7V-69RG.

[67] Liz Robbins & Maya Salam, *'I Am Not Racist': Lawyer Issues Apology One Week After Rant*, N.Y. Times (May 22, 2018), https://www.nytimes.com/2018/05/22/nyregion/schlossberg-i-am-not-racist-lawyer-issues-apology.html, *archived at* https://perma.cc/NRP5-2Q9V.

[68] *Id.*

[69] Mahita Gajanan, *Can You Be Fired for Being a Racist?*, Time (Aug. 15, 2017), https://time.com/4901200/fired-racist-charlottesville-white-nationalism/, *archived at* https://perma.cc/FL9P-A37U.

[70] *Id.*

[71] *Id.*

[72] Madeleine Aggeler, *ABC Cancels Roseanne After Racist Tweet About Valerie Jarrett*, The Cut (May 29, 2019), https://www.thecut.com/2018/05/roseanne-barr-valerie-jarrett-racist-tweet.html, *archived at* https://perma.cc/77SB-2TS3.

[73] Robert Iger (@RobertIger), Twitter (May 29, 2018, 2:01 PM), https://twitter.com/RobertIger/status/1001523982997143552, *archived at* https://perma.cc/BXP6-XP9V.

[74] *Id.*

Increasingly, individuals who are caught on tape needlessly calling the police on people of color have been named and shamed for weaponizing the police force against African Americans.[75] A woman called the police on Black men because she (incorrectly) believed that they were barbequing in the wrong area of the park.[76] A white student called the Yale campus police on a fellow Black student for falling asleep in a communal study space.[77] Another white woman falsely accused a nine-year-old boy of sexually assaulting her in a New York bodega.[78] As a result of their racially motivated behavior, these women have faced social repercussions.[79] In cities like Grand Rapids, Michigan, lawmakers are considering a measure that would make it illegal to "summon police on people of color" who are "participating in their lives."[80] A lawmaker in Oregon has proposed a bill that would allow victims of "racially-biased 911 calls" to sue the callers in small claims courts for up to $250.[81]

Societal recognition of the immorality of racism has led to social media websites and platforms implementing user agreements that forbid hate speech and can result in the removal of offending content, as well as banning users who violate the terms of service. For example, Facebook bans hate speech because it "creates an environment of intimidation and exclusion and in some cases may promote real-world violence."[82] Twitter prohibits "hateful conduct" or "abuse motivated by hatred, prejudice or intolerance" be-

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[75] Leah Carroll, *A Running List Of White Women Calling The Cops On Black People For Ridiculous Reasons*, REFINERY29 (Oct. 12, 2018), https://www.refinery29.com/en-us/2018/10/213902/white-women-call-cops-on-black-people-for-dumb-reasons, *archived at* https://perma.cc/TF7K-C6KU.

[76] Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops On Black Bbq, 911 Audio Released: 'I'm Really Scared! Come Quick!'* NEWSWEEK (Sept. 4, 2018), https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057, *archived at* https://perma.cc/X2DB-XSH.

[77] Cleve R. Wootson Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police*, WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police/, *archived at* https://perma.cc/ZKE8-UNCB.

[78] Gina Martinez, *Woman Dubbed 'Cornerstore Caroline' Faces Backlash After Falsely Accusing a 9-Year-Old Boy of Sexual Assault*, TIME (Oct. 16, 2018), https://time.com/5426067/cornerstore-caroline-backlash-sexual-assault-boy/, *archived at* https://perma.cc/485Q-BZYK.

[79] Ashleigh Lakieva Atwell, *'You Can't Imagine The #Pain': Yale Student Who Called Cops On Sleeping Peer Quits Twitter After Sympathy Plea Backfires*, BLAVITY (July 24, 2018), https://blavity.com/you-cant-imagine-the-pain-yale-student-who-called-cops-on-sleeping-peer-quits-twitter-after-sympathy-plea-backfires?category1=news&category2=trending, *archived at* https://perma.cc/T2E8-LFN6.

[80] Reis Thebault & Michael Brice-Saddler, *This City Wants to Make it Illegal to Call 911 on People of Color Who are Just Living Their Lives*, WASH. POST (Apr. 25, 2019), https://www.washingtonpost.com/nation/2019/04/25/last-year-livingwhileblack-went-viral-now-city-wants-make-biased-calls-illegal/, *archived at* https://perma.cc/R2N3-7NYB.

[81] *Oregon Measure Tackles Racially Biased 911 Calls*, ASSOCIATED PRESS (Apr. 23, 2019), https://apnews.com/article/37c5734b8eca496da2ffeb898d498389, *archived at* https://perma.cc/X8WU-UWM5.

[82] Facebook, *Community Standards, 13 Hate Speech*, https://m.facebook.com/communitystandards/hate_speech/, *archived at* https://perma.cc/3NNQ-2FBH (Facebook describes hate speech as "a direct attack on people based on what we call protected characteristics—race,

cause these forms of abuse in particular tend to "silence the voices of those who have been historically marginalized."[83] Twitter also prohibits "hateful images or symbols" in users' profiles.[84] Instagram prohibits "hate speech" and notes, "It's never OK to encourage violence or attack anyone based on their race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, religious affiliation, disabilities, or diseases."[85]

After the May 2020 Minneapolis police killing of George Floyd, protests against police brutality and calling for racial justice erupted around the country[86] and the world.[87] These protests have been credited for changing Americans' attitudes about racial injustices.[88] In the months after George Floyd's death, America experienced a sort of racial "reckoning," one in which everyone from high-level executives who failed to foster an environment of diversity and inclusion in their offices,[89] to the neighborhood woman who called the police on a man of color painting "Black Lives Matter" outside his house,[90] faced social repercussions, including the loss of their jobs and business opportunities.

These are just a few examples of how society has responded to racial insults, both in person and online. As Delgado recently noted, social norms that hold racial insults as offensive have evolved over the last twenty years. While twenty years ago, one could assert, "Joe just said hate speech—what of it?", now one cannot.[91] Today, Joe would face repercussions from his employment, university, and even friends. In short, society has taken the position that racial insults are a condemnable behavior worthy of ostracism.

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ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability.")

[83] Twitter, *Hateful Conduct Policy*, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy, *archived at* https://perma.cc/FE3W-FJKN.

[84] *Id.*

[85] Instagram, *Community Guidelines* (2020), https://help.instagram.com/477434105621119, *archived at* https://perma.cc/L49J-52UA.

[86] Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/article/george-floyd-protests-timeline.html, *archived at* https://perma.cc/3JYS-R33Q.

[87] CNN, *Protests across the globe after George Floyd's death*, (June 13, 2020), https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html, *archived at* https://perma.cc/UN7M-5P2L.

[88] Michael Tesler, *The Floyd Protests will likely change public attitudes about race and policing. Here's why*., WASH. POST (June 5, 2020), https://www.washingtonpost.com/politics/2020/06/05/floyd-protests-will-likely-change-public-attitudes-about-race-policing-heres-why/, *archived at* https://perma.cc/ZZZ4-34AX.

[89] Tarpley Hitt, *Everyone Who's Lost Their Job During the Racism Reckoning of 2020,* DAILY BEAST (June 12, 2020), https://www.thedailybeast.com/everyone-whos-been-fired-during-the-2020-racism-reckoning-from-the-times-james-bennet-to-vanderpump-rules, *archived at* https://perma.cc/XQ4H-EG59.

[90] Ron Dicker, *White Woman Calls Cops On Man Writing 'Black Lives Matter' On His Own Property*, HUFFPOST (June 15, 2020), https://www.huffpost.com/entry/lisa-alexander-james-juanillo-black-lives-matter_n_5ee751b4c5b69f21912152ca?, *archived at* https://perma.cc/479G-7FKT.

[91] Delgado, *supra* note 62, at 279.

B. Legal Responses to Racial Insults

While societal repercussions against racist speech are strong, the law has failed to respond in kind. Some localities have responded through the use of human rights commissions or other local administrative bodies that adjudicate claims of discrimination in the workplace, housing, and public accommodations. These commissions have lacked the teeth to properly adjudicate face-to-face racist diatribe. Alternatively, over the last fifty years, states and localities have attempted to criminalize this sort of conduct through anti-hate speech statutes. By and large, courts have struck down these attempts as unconstitutional.

1. Human Rights Commissions

Some states and cities have turned to human rights commissions to implement their civil rights and anti-discrimination agendas. These commissions are often tasked with enforcing civil anti-discrimination laws, monitoring compliance with local, state, and federal anti-discrimination laws, offering policy recommendations, adjudicating complaints alleging violations of civil rights laws, and fostering positive community relations.[92] Human rights commissions and local government civil rights enforcement offices serve an important role by providing an accessible forum for individuals to bring complaints of civil rights violations. They often have online complaint procedures, practical know-your-rights guidance in multiple languages, and multiple offices throughout each city.[93] Particularly in the wake of the 2016 U.S. presidential election and a corresponding rise in hate incidents, local human rights commissions across the United States have a renewed sense of urgency in response to reports of bias, intimidation, and harassment against visible minorities.[94]

These institutions adjudicate under existing civil rights laws, which include Title II (discrimination in public accommodations), Title VI (discrimination in government programs), Title VII (discrimination in employment), and Title IX (discrimination in education). It is illegal under federal civil rights laws to interfere with an individual's constitutional rights. These rights include accessing public education, participating in government programs, employment, serving on a jury, traveling or using a facility of interstate

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[92] JoAnn Kamuf Ward, *Challenging a Climate of Hate and Fostering Inclusion: The Role of U.S. State and Local Human Rights Commissions*, 49 COLUM. HUM. RTS. L. REV. 129, 134 (2017).

[93] *See, e.g.*, D.C. Comm'n on Human Rights, *About OHR*, https://ohr.dc.gov/page/about-ohr, *archived at* https://perma.cc/TT5M-TU6P; Minnesota Dep't. of Human Rights, *Minnesota's Civil Rights Enforcement Agency*, https://mn.gov/mdhr/about/, *archived at* https://perma.cc/L7A3-Z2F5; Seattle Human Rights Comm'n, *About Us*, https://www.seattle.gov/humanrights/about, *archived at* https://perma.cc/7GVW-UA3X.

[94] Ward, *supra* note 92, at 142.

commerce, and patronizing a place of public accommodation.[95] Federal civil rights laws provide much needed causes of actions for discrimination in both the public and private spheres, including against employers who discriminate against their employees or who fail to stop discrimination in the workplace, restaurants and hotels who refuse service to customers because of their race, and even government branches that enact discriminatory policies.

Federal civil rights laws are, however, limited. There is no private civil remedy against an individual who shouts a racist diatribe at another person on the street. A person who is dining at a restaurant cannot sue another restaurant patron for a civil rights violation because the patron called her the n-word.[96] Because there currently is no federal civil rights remedy for private racial insult, local human rights commissions are not empowered to adjudicate these claims.

New York, for example, has a Human Rights Law intended to eliminate discrimination in the "provision of basic opportunities."[97] The Human Rights Law eliminates "discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions."[98] In New York, it is illegal for a restaurant to deny someone service based on her race, or even to treat someone differently because of her race. It is not illegal, however, for a private individual to racially insult someone at a restaurant. While it is illegal for an employer to racially harass her employees, or even to allow an environment of racial harassment, it is not illegal for that same employer to step outside of the workplace and racially harass an individual she sees at the grocery store.[99]

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[95] 18 U.S.C. § 245(b)(2).

[96] While many have opined on the current lack of a federal civil remedy for sexual harassment, few have explored a federal civil remedy under the Civil Rights Act for private racial harassment. One exception is in the housing context—federal circuits have differed on whether to accept racial harassment claims from neighbors under the Fair Housing Act. Generally, courts express misgivings about adjudicating over neighbors' quarrels, unless the harassment "involves systematic or highly abusive behavior." Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It?*, 61 Case W. Res. L. Rev. 865, 868 (2011). In 2016, the U.S. Department of Housing and Urban Development issued a rule that stated, "hostile environment harassment" could be a violation of the Fair Housing Act if it involves, "unwelcome conduct that is sufficiently severe or pervasive as to interfere with: . . . the use or enjoyment of a dwelling." The HUD rule further states, "[a] single incident of harassment . . . may constitute a discriminatory housing practice, where the incident is sufficiently severe . . . ." Dep't. of Housing & Urban Dev't., "Liability for Discriminatory Housing Practices Under the Fair Housing Act," 81 Fed. Reg. 63054 (Sept. 14, 2016). However, civil remedies outside of the housing context remain under-theorized and, particularly in light of contemporary understandings of the severe harm of private racial harassment, merit further attention.

[97] Koerner v. State, 62 N.Y.2d 442, 448 (1984).

[98] N.Y. Exec. Law § 290 (McKinney).

[99] *See, e.g.*, N.Y.C. Human Rights Comm'n, *Immigration Guidance,* p. 22, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/immigration-guidance.pdf, *archived at* https://perma.cc/QNT4-ZLHJ (providing such examples of disparate treatment in public accommodations as:

While these human rights commissions are often effective advocates for people who have experienced racial harassment in the workplace or while patrons of a restaurant, the commissions are an ineffective remedy against racial insults writ large. Because civil rights laws do not currently provide a remedy against private racial insults, the institutions tasked with enforcing these civil rights laws are impotent to remedy these harms.

2. Criminal Law

In 1989, Professor Mari Matsuda called for criminal and administrative sanctions in response to racist speech.[100] Matsuda's article suggested that government sanctions take into account the story and consciousness of the victim and contextualize the sociopolitical and historical underpinnings of racist speech and conduct.[101] Matsuda suggested that racist speech be punishable if it communicates a message of racial inferiority, directed against a historically oppressed group, and that the message is persecutorial, hateful, and degrading.[102] Matsuda's proposal finds company with similarly situated democracies grappling with free speech concerns in light of pernicious histories of racial oppression.

In the United States, hate crime legislation allows for increased penalties for crimes that are perpetrated because of the victim's actual or perceived color, religion, national origin, sexual orientation, gender identity, disability, or gender.[103] However, no such criminal legislation is in place for hate speech.

Particularly given its long history of racial oppression and violence, the United States is an outlier in its lack of hate speech legislation. Throughout Europe, criminal sanctions for hateful speech are common. In Germany,

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A restaurant host tells a man who is speaking Hindi with his family that they must wait to be seated for a table. One hour passes and the family is still not seated, while the host has seated four English-speaking groups that arrived after the family and do not have reservations.

Classmates repeatedly bully a student who wears a hijab at school, calling her an "illegal" and telling her to "take that off, you're in America now." The student tells her teacher and the school administration that she is being bullied. The teacher and school administration, despite being aware of the conduct, have not taken the usual, mandatory measures to end the behavior.

At a rest stop, a bus driver of a coach bus company voluntarily identifies to federal immigration authorities passengers whom he perceives to be foreign based on their ethnicity and the language they are speaking. He invites the federal immigration authorities to do a search on the coach bus, telling the agent, "Go ahead, round up the 'illegals.'"

A store owner tells two friends who are speaking Thai while shopping in his store to "speak English" and "go back to your country.")

[100] Matsuda, *supra* note 16, at 2331.

[101] *See id.* at 2361–73.

[102] *Id.* at 2357.

[103] *See e.g.*, Hate Crime Acts 18 U.S.C. § 249(a)(2)(A); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act H.R. 2647, 111th Congress (2009); Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993).

prosecutors can pursue charges of "insult," which is aimed at protecting people's honor.[104] In the United Kingdom, harassment is illegal under the Crime and Disorder Act, and if the harassment is racially or religiously motivated, the crime is considered "aggravated," with higher prison terms and fines.[105]

In France, Article R. 624-4 of the penal code forbids "nonpublic racial injuries" toward a person or group for belonging or not belonging to an ethnicity, nation, race, religion, sex, or sexual orientation, or for having a handicap.[106] The French anti-racist speech laws (including prohibitions against public racial injury, public and nonpublic racial defamation, and public and nonpublic provocation to racial hatred) were harmonized into preexisting penal code provisions against insult, defamation, and provocation.[107] By embedding anti-racist penalties into crimes already in existence, French courts were able to draw from preexisting jurisprudence to shape the contours and limitations of the crimes.[108]

In South Africa, *crimen injuria*, or "unlawfully, intentionally and seriously impairing the dignity of another," was used for the first time in 2018 against Vicki Momberg. Momberg, who hurled the racist slur "kaffir" forty-six times in a seven-minute rant directed at Black police officers, was sentenced to three years in prison, with one year suspended.[109] While *crimen injuria* has long been on the books in South Africa, it was rarely applied in criminal suits. Many anti-racist groups applauded the judgment, hoping that it would deter future racist behavior.[110]

Although criminalizing hate speech would have a strong signaling effect, emphasizing the state's commitment to equality and anti-racism, there is

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[104] Erik Kirschbaum, *In Germany, It Can Be a Crime to Insult Someone In Public*, L.A. TIMES (Sept. 6, 2016), https://www.latimes.com/world/europe/la-fg-germany-insult-law-snap-story.html#:~:text=resorting%20to%20four%2Dletter%20words,you%20in%20court%20in%20Germany.&text=A%20man%20who%20unleashed%20a,charges%20from%20the%20state%20prosecutor, *archived at* https://perma.cc/D8CZ-9PQA.

[105] Crime and Disorder Act 1998, c. 37, §§ 28–32 (Eng. & Wales).

[106] Code pénal [C. pén.] [Penal Code] art. R. 624–4 (Fr.).

[107] Erik Bleich, *Historical Institutionalism and Judicial Decision-Making: Ideas, Institutions, and Actors in French High Court Hate Speech Rulings*, 70 WORLD POL. 53, 70 (2018); *see also* James Q. Whitman, *Enforcing Civility & Respect*, YALE L.J. 1279, 1355 (2000) ("In France, the old law of "nonpublic" insult, once used to penalize the sort of expressions of disrespect that gave rise to duels, became, after 1796, a new law involving something very close to the issuance of parking tickets. Such is the form it retains. Today 'nonpublic' insults are defined in the Code as the lowest level of 'police' offense, calling for the imposition of a fine of no more than 250 French francs (about forty dollars) when they have not been 'provoked.'").

[108] Bleich, *supra* note 107, at 70.

[109] Richard Pérez-Peña, *Woman Becomes First South African Imprisoned for Racist Speech*, N.Y. TIMES (Mar. 28, 2018), https://www.nytimes.com/2018/03/28/world/europe/south-africa-racist-speech.html *archived at* https://perma.cc/AL3E-VNH9.

[110] *Id.* ("'Past racists who have come to court have been given very small fines and have been treated very leniently, and it didn't serve any deterrence,' said Neeshan Balton, executive director of the Ahmed Kathrada Foundation, an anti-racism group. 'I think this will be a deterrent.'").

a pressing need to reconsider calls to grow the scope of the carceral state through the expansion of criminal law and criminal sanctions. This Article echoes the critiques of decarceral feminists, who have called for responses to violence against women that reject "increased policing, prosecution, and imprisonment."[111] Responses to racism and racial insults must not embolden the systems of oppression that perpetuate racism.

In addition, attempts to criminalize hate speech in the United States have failed on First Amendment grounds. In 1991, in *R.A.V. v. St. Paul*, the Supreme Court struck down a Minnesota ordinance that prohibited symbols and conduct that "arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender."[112] A lower court had upheld the ordinance, finding that it outlawed "fighting words," consistent with the Court's precedent in *Chaplinsky v. New Hampshire*.[113] The Supreme Court disagreed, finding that the ban on only identity-based fighting words was an impermissible content-based regulation.[114] Although the Supreme Court later clarified in *Virginia v. Black* that anti-cross-burning statutes are acceptable if they are drafted in a content-neutral fashion,[115] *R.A.V. v. St. Paul* is widely seen as holding that selective punishment of bigoted words is unconstitutional.[116]

III. IIED: A Subjective Tort to Remedy Emotional Harms

In addition to IIED surviving a content-ban challenge, the tort is an apt remedy for racial insults because IIED was designed to address the harms of racial insults. This section provides the history and evolution of IIED, in order to emphasize that the goal of IIED is to remedy behavior that society views as intolerable and that causes severe harm, which, as the previous section shows, aptly describes racial insults.

Tort law serves a number of purposes. Historically, tort law developed to allow injured parties to implore courts to impose relief, rather than taking

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[111] Victoria Law, *Against Carceral Feminism*, Jacobin (Oct. 17, 2014), https://www.jacobinmag.com/2014/10/against-carceral-feminism, *archived at* https://perma.cc/CYR3-CRHW; *see generally* Mimi E. Kim, *From Carceral Feminism To Transformative Justice: Women-Of-Color Feminism And Alternatives To Incarceration*, 27 J. Ethnic & Cultural Diversity Soc. Work 219, 219–33 (2018).

[112] R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992); St. Paul, Minn., Leg. Code § 292.02 (1990).

[113] 315 U.S. 568, 573 (1942); *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

[114] *R.A.V.*, 505 U.S. at 381.

[115] Virginia v. Black, 538 U.S. 343, 344–45 (2003).

[116] *See e.g.*, Eugene Volokh, *No, There's No "Hate Speech" Exception to the First Amendment*, Wash. Post (May 7, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment, *archived at* https://perma.cc/AZD6-68RN (stating that in *R.A.V. v. St. Paul*, "the Supreme Court held that this selective prohibition [of bigoted fighting words] was unconstitutional.").

the law into their own hands by attempting to wreak vengeance.[117] Today, tort law also admonishes behavior that society has deemed unwanted and compensates victims of that behavior.[118] These aims of tort law can often be accomplished through one legal action, but sometimes only one goal is achieved through the bringing of a claim. The aims intersect and overlap with other goals, such as to punish the tortfeasor as a form of retribution or to deter future misdeeds, to deter others by making an example of the tortfeasor, and to enforce societal norms or redress societal wrongs.

Much of today's tort law is rooted in ancient notions of property, bodily integrity, and honor. IIED stems from the classical Roman law that allowed recovery for outrage or insult as the delict of "*iniuria*."[119] *Iniuria* required the complainant to show an intent to insult and anger resulting from that insult. Intent could be inferred from the facts of the conduct. IIED, like other communicative torts such as defamation and invasion of privacy, is located under an umbrella category of civility rules. These civility rules "protect the integrity of the personality of individual community members, as well as serve authoritatively to articulate a community's norms and hence to define a community's identity."[120]

Despite its ancient roots, IIED is a relatively young tort in the United States. Early commentators assumed that intentional infliction of emotional distress was rooted in an individual's desire for privacy—the right to be left alone free from emotional disturbance, mental pain, and anguish.[121] While IIED does not share the seniority of torts like battery or trespass in U.S. law,[122] for the better half of the last century, IIED has enjoyed a recognized place in common law.

Perhaps the earliest IIED claim in the United States is the 1897 case, *Wilkinson v. Downton*.[123] As a practical joke, the defendant had told the plaintiff that her husband was involved in an accident that broke both of his

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[117] Richardson, *supra* note 10, at 59; *see also* Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. F. 193 (2010).

[118] *See, e.g.*, Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1325 (2017) ("Tort has historically served as a means of determining community norms, encouraging observance of those norms to enhance private cooperation, and stigmatizing those who deviate."); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003).

[119] Contreras v. Crown Zellerbach, 565 P.2d 1173, 1175 (Wash. 1977) (citing W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 295–300 (1936)).

[120] Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 286 (1990); *see also* Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974) (IIED enforces "generally accepted standards of decency and morality").

[121] Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1064 (1936).

[122] To be sure, IIED's youth relative to the torts of battery and assault does not make it unique in the area of tort law. As G. Edward White demonstrates in his *Tort Law in America: An Intellectual History*, tort law in the United States is not static; rather, the body of recognized torts has tracked social, legal, and political trends. *See* G. EDWARD WHITE, TORT LAW IN AMERICA xii (1980).

[123] John J. Kircher, *Four Faces of Tort Law*, 90 MARQ. L. REV. 789, 795 (2017).

legs. As a result, the plaintiff experienced a "violent shock to her nervous system" that manifested in vomiting and "permanent physical consequences at one time threatening her reason."[124] Although the court did not use the terminology of emotional distress, the Court allowed the plaintiff to recover for the physical harm that manifested from her emotional shock.

The first torts restatement, the 1934 *Restatement of the Law of Torts*, did not recognize recovery for emotional injury due to insults unless the defendant's conduct was an otherwise recognized tort.[125] Under the 1934 Restatement, a person could not sue for emotional harm alone; rather, she would have to bring an action for assault, battery, defamation, or trespass. The First Restatement maintained that "the interest in freedom from disagreeable emotions is not . . . sufficiently important to make even its intentional invasion actionable unless the act [alleged] . . . also constitutes an invasion of some more perfectly protected interest."[126] The First Restatement echoed the age-old adage, "[s]ticks and stones may break my bones, but words will never hurt me."[127]

A number of legal articles followed, attacking this premise and noting that several courts had already recognized emotional harm as injury.[128] William Prosser, the twentieth century's authority on torts, wrote in 1939, "[m]edical science has long recognized that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves 'physical' injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye."[129] Similarly, in 1936, Judge Calvert Magruder noted, "the courts have already given extensive protection to feelings and emotions."[130]

Academics' impact on IIED makes the tort unique. While Restatements of the Law usually reflect how courts interpret particular areas of the law,

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[124] Wilkinson v. Downton (1897) 2 QB 57, 58.

[125] RESTATEMENT OF TORTS § 46 (AM. L. INST. 1934) ("[C]onduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom or (b) for bodily harm unexpectably resulting from such disturbance.").

[126] *Id.* at § 46 ch. 2, intro. note, at 26.

[127] However, G. Edward White in *Tort Law in America: An Intellectual History* rebuts the notion that courts were unwilling to recognize emotional harm as a stand-alone tort. White traces the growing recognition of the tort of outrage to changing "attitudes about mental discomfort" that emerged in the 1930s America. Although many earlier courts had described mental injuries as "speculative," as at the time, they were hard to diagnose and measure, White pointed to several states in the nineteenth century that had recognized emotional distress as a standalone tort. As psychology was recognized as a "science," courts increasingly recognized emotional distress as a legitimate legal claim. By the 1920s and 1930s, intentional infliction of emotional distress had become an established doctrine of tort law. WHITE, *supra* note 122, at 103–05.

[128] *See generally id.*; Magruder, *supra* note 121; William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 876–77 (1939).

[129] Prosser, *supra* note 128, at 876.

[130] Magruder, *supra* note 121, at 1067.

Prosser effectively lobbied for the creation of the tort in his scholarship and as Reporter for the Second Restatement of Torts.[131]

Largely as a result of scholars' input, the 1948 Restatement of Torts was the first Restatement to allow damages for IIED without physical harm, stating, "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it."[132] The Second Restatement recognized that one has a right to be free from severe emotional distress and that the invasion of that right is tortious. Further, the First Restatement's Supplement acknowledged that, "[t]he injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests."[133] The right to be free from extreme emotional disturbance was thus cemented.

In 1952, Justice Roger Traynor, of the California Supreme Court, considered *State Rubbish Collectors Association v. Siliznoff*,[134] in which the plaintiff was threatened with physical violence because he was collecting trash in another association member's territory. The Court concluded that a cause of action for IIED is established when one "intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault."[135] Acknowledging the advocacy of legal scholars in favor of the IIED tort,[136] the Court further described IIED as an individual's right to be "free from serious, intentional, and unprivileged invasions of mental and emotional tranquility."[137] However, the exact contours of the IIED tort remained opaque.

In 1957, Professor Prosser redrafted the Restatement "to keep the courts from running wild on this thing."[138] His revisions attempted to delineate boundaries and limitations to the IIED tort. The 1957 Restatement introduced the extreme and outrageous requirement for IIED recovery.[139] By 1965, the Restatement (Second) of the Law provided that, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional dis-

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[131] *See* WHITE, *supra* note 122, at 161.

[132] RESTATEMENT OF TORTS § 46 (AM. L. INST. Supp. 1948).

[133] *Id.* at cmt. d.

[134] 240 P.2d 282 (Cal. 1952).

[135] *Id.* at 284–85.

[136] *Id.* at 285 (citing Herbert Goodrich, *Emotional Disturbance as Legal Damages*, 20 MICH. L. REV. 497, 508–13; Magruder, *supra* note 121, at 1064–67; John Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 81–82).

[137] *Id.* at 286.

[138] Love, *supra* note 12, at 126.

[139] *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST., Tentative Draft No. 1, 1957); *see also* Love, *supra* note 12, at 126 & n.27.

tress, and if bodily harm to the other results from it, for such bodily harm."[140]

IIED became something of a catchall—cruel jokes, blackmail, and witnessing a loved one suffer harm were all "extreme and outrageous" enough to meet the requirements of IIED. As Professor Daniel Givelber put it, "[t]he traits they shared were that the defendants appeared to want the plaintiffs to suffer, and succeeded."[141] In 1982 Givelber noted a trend that some courts had used IIED to "create a form of 'private due process' in dealings between unequals—creditor-debtor, insurer-insured, employer-employee."[142]

In providing some examples of the tort of IIED the Second Restatement of Torts summarized the following cases:

> I. As a practical joke, A falsely tells B that her husband has been badly injured in an accident and is in the hospital with both legs broken. B suffers severe emotional distress. A is subject to liability to B for her emotional distress. If it causes nervous shock and resulting illness, A is subject to liability to B for her illness.
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> II. A, the president of an association of rubbish collectors, summons B to a meeting of the association, and in the presence of an intimidating group of associates tells B that B has been collecting rubbish in territory which the association regards as exclusively allocated to one of its members. A demands that B pay over the proceeds of his rubbish collection, and tells B that if he does not do so the association will beat him up, destroy his truck, and put him out of business. B is badly frightened, and suffers severe emotional distress. A is subject to liability to B for his emotional distress, and if it results in illness, A is also subject to liability to B for his illness.
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> III. A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.[143]

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[140] RESTATEMENT (SECOND) OF TORTS, *supra* note 13, at § 46.

[141] Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 59 (1982).

[142] *Id.* at 43.

[143] RESTATEMENT (SECOND) OF TORTS, *supra* note 13, at § 46.

What emerges is that a wide variety of actions can constitute IIED. Words alone, if they are callous and harmful enough, such as the practical joke in the first example above, can fulfill IIED's requirements. Words, combined with the threat of physical force or threat of economic demise, are also sufficient. Additionally, mere action, without words, such as providing someone with a dissolvable swimsuit that leaves the wearer essentially naked, is actionable as well.

Intrinsic in the application of IIED is the notion that all individuals in society are subject to some level of abuse. A victim can receive relief only when the most extreme emotional abuse causes harm. The concept of outrage, however, is evolutionary. The sort of conduct that would lead the average member to exclaim, "Outrageous!"[144] is not the same today as it was forty years ago. Courts' analyses of extreme and outrageousness should reflect society's understandings of outrage, including current understandings of racial equality and non-discrimination. While racist language might have been tolerable forty or fifty years ago, today, society widely deems this same language intolerable.[145]

IV. IIED Today: First Amendment Concerns

The most vehement arguments against racial insults as a form of IIED likely rest on First Amendment grounds. First Amendment champions might insist that using IIED to remedy the harms from racial insults would unconstitutionally infringe upon individuals' rights to free speech, perhaps arguing that IIED should not police words alone, absent physical conduct, or that this Article's proposal infringes on public discourse. This section attempts to address each of these in turn.

A. IIED Based on Words Alone

Like defamation, libel, and invasion of privacy, it is well settled that IIED allows claims based on words alone. IIED makes no distinction be-

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[144] *Id.* at § 46 cmt. d.

[145] *See* Maria Krysan & Sarah Moberg, U. Ill. Inst. of Gov't. Affairs, A Portrait of African American and White Racial Attitudes 1–2 (Sept. 9, 2016), https://igpa.uillinois.edu/report/portrait-african-american-and-white-racial-attitudes, *archived at* https://perma.cc/5PCA-WJA5 (finding that "whites have shown dramatic increases in support for the principles of racial equality" but acknowledging that this "liberalizing trend may be due to changes in social norms about what kinds of answers should be reported in surveys—so-called social desirability pressures—rather than changes in actual levels of stereotyping and in openness"); Eduardo Bonilla-Silva & Tyrone Forman, *"I am not a racist but . . .": Mapping White College Students' Racial Ideology in the USA*, 11 Discourse & Soc'y 50, 52 (2000) (finding that while there has been a "normative change in terms of what is appropriate racial discourse and even racial etiquette" since the Jim Crow era, white Americans are still tolerant or ambivalent towards white supremacy).

tween words and conduct.[146] The perennial example of a defendant falsely telling someone that her family member has been gravely injured demonstrates the assaultive nature of speech.[147] IIED recognizes that in those instances, words are not just mere words, but are traumatizing conduct inflicted on another, and that courts should allow the victim to recover for these harms.

There are some who believe that IIED based on words alone is constitutionally tenuous and socially fraught. Richard D. Bernstein, for example, wrote in 1985 that IIED based on verbal insults risks stifling unpopular opinions, which are at the core of First Amendment protection.[148] Others, such as Andrew Meerkins, have suggested that the First Amendment bars IIED actions between private figures even when the speech is of a private concern, because distinctions between private and public actors and issues[149] are not clear, and even injurious speech has intrinsic value.[150] Professor Eugene Volokh has also criticized the outrageousness standard of IIED claims based on words alone as too broad and thus impossible to proscribe.[151]

Critics also highlight the intrinsic value of speech, stemmed in a "centuries-old struggle of Western society to free itself from superstition and enforced ignorance" in search of a higher or deeper truth.[152] This viewpoint harkens to the fight for free speech against book censorship, McCarthyism, and even the trial of Socrates. Proponents of this view might also believe that free speech is the bedrock on which all rights stand. Without the ability to voice one's opinion, no matter how unpopular, one has no rights at all.[153] A related argument is that the contours of proscribed language are too opaque—lines are hard to draw when it comes to limiting speech, and when we limit some speech, we open the door to impermissibly limiting other speech, particularly unpopular speech.[154] The right to express one's self, then,

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[146] Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 639 (1990).

[147] *See supra* note 143 and accompanying text; *see also, e.g.*, Brandon *ex rel.* Estate of Brandon v. Cty. of Richardson, 624 N.W.2d 604, 622 (Neb. 2001) (holding a police officer's inappropriate, insensitive, and demeaning questioning of a transgender rape survivor was sufficiently demeaning, accusatory, and intimidating to constitute extreme and outrageous conduct).

[148] Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1750–51 (1985).

[149] *See infra* section IV.C.

[150] Andrew Meerkins, Note, *Distressing Speech After* Snyder–*What's Left of IIED?*, 107 NW. U. L. REV. 999, 1028–29 (2013).

[151] Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, CAR. L. REV. DE NOVO 300, 302 (2010).

[152] Richard Delgado, *Campus Antiracism Rules*, 85 NW. U. L. REV. 343, 346–47 (1991).

[153] *See* Alexander Tsesis, *Free Speech Constitutionalism*, 3 U. ILL. L. REV. 1015, 1020 (2015) ("Freedom of speech was essential for the country's development from a slave state to one committed to the advancement of civil rights, gender equality, and most recently, the gay rights movement. It provided an outlet to individuals committed to social change and was essential for fostering public dialogue about formally taboo subjects.").

[154] *See, e.g.*, Volokh, *supra* note 151.

is part of a "never-ending vigilance necessary to preserve freedom of expression in a society that is too prone to balance it away."[155]

Inherent in these arguments is the idea that verbal IIED claims will stifle speech, and speech—no matter how abhorrent—is a civic good. When even the most offensive speech is censored, it prevents a free marketplace of ideas and makes society worse off. Critics warn that verbal IIED claims, especially claims based on racist insults, will open the door to widespread censorship of unpopular ideas, which could even backfire on the vulnerable groups it was designed to protect.[156]

IIED, like other torts, is rooted in the idea that individuals are entitled to emotional tranquility free from intentional interference. Intentional interference can take many forms, including verbal assaults alone. First Amendment defenders put the right to speech on a pedestal and hold that the right to free speech must be protected over all else. However, the First Amendment does not protect those who use extreme and outrageous words to intentionally traumatize others.[157] An individual's right to emotional tranquility supersedes a First Amendment right to demean. Tort law thus regulates speech that intentionally emotionally injures another in defiance of community standards of decency.

Moreover, outrageous speech goes beyond speech that is controversial, unpleasant, or disagreeable. Extreme and outrageous insults "tend to shock those at whom they are directed *and* others who hear."[158] Extreme and outrageous speech "is inconsistent with common canons of decency."[159] Decency is a societal construct, but it is not arbitrary—courts routinely adjudicate over matters relating to societal standards, such as examining whether speech is prurient by community standards and thus obscene,[160] or whether speech is too "vulgar," "offensive," and "shocking" to be broadcast over the radio during the day.[161] Courts determining whether speech is outrageous according to community standards is no different than their determining whether speech is obscene or vulgar.

Another common critique of IIED based on words alone is rooted in the notion that our society is a free marketplace of ideas. In a free marketplace, it is unavoidable that we would run into ideas that we find distasteful and offensive. Professor Jack Balkin compares critiques of First Amendment

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[155] Delgado, *supra* note 152, at 348.

[156] *See* DELGADO & STEFANIC, *supra* note 15, at 58 (referencing the "reverse enforcement" argument).

[157] *See* R. George Wright, Hustler Magazine v. Falwell *and the Role of the First Amendment*, 19 CUMB. L. REV. 19, 23 (1988) ("But if a punch . . . does not amount to speech in the constitutional sense, why must 'written speech' be treated as speech within the meaning of the Constitution if the 'written speech' is nothing more than a surrogate for the punch?").

[158] Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 291 (1990) (original emphasis).

[159] Post, *supra* note 146, at 625.

[160] Miller v. California, 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

[161] F.C.C. v. Pacifica Found., 438 U.S. 726, 728–29 (1978).

doctrine as conceptually similar to critiques of freedom of contract in the 1920s and 1930s.[162] Balkin notes that in cases of racist language, that right to contract is undermined when one party, namely minorities who are subject to racial diatribe, has unequal bargaining power compared to the other.[163] Balkin describes this unequal bargaining power as a form of coercion and that an absolutist free speech position is a "protection of a certain type of coercion, of induced harm, and that we should be more sensitive to the existence of this coercion and this harm in specific and limited contexts—for example, direct face-to-face racial and sexual harassment."[164] The inequality in bargaining power when it comes to free speech challenges whether, in instances of racial insults, there is genuinely a freedom to contract. Absent a viable tort remedy, does someone on the receiving end of a racial insult have equal instruments at their disposal to fulfill the "meeting of the minds" required in a freedom of contract? Moreover, to the extent that the government suppresses a tort remedy for racial insult, the government is actively choosing to "value the expressive liberty of racists over the feelings of their victims," as well as the right of minorities to be free from racial oppression.[165]

Professors Jean Stefanic and Richard Delgado also address the free marketplace argument by arguing that its proponents incorrectly believe that there is a level playing field when it comes to speech—"messages and communications of all sorts supposedly vie on equal terms to establish themselves."[166] Stefanic and Delgado argue that, "there is no correlate—no analog—for hate speech directed toward whites. Nor is there any countering message that could cancel out the harm of 'Nigger, you don't belong on this campus—go back to Africa.'"[167] Racial insults evoke and reinforce histories of oppression; there is no language that counterbalances these subordinating words. Victims of racial insults are unable to speak back with equal force and they risk their own physical safety if they decide to engage with racist vitriol. The playing field is therefore not equal—there are no tools that minorities can effectively weigh against their opponents that have the force of a racial insult. If the playing field is unequal, the marketplace is not free and racist speech constitutes an unfair advantage.

B. Overcoming R.A.V. v. St. Paul *Through IIED*

As raised earlier,[168] the United States' free speech jurisprudence is an outlier from other democracies with similarly pernicious histories of racial

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[162] Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 3 DUKE L.J. 375, 379–81 (1990).
[163] *Id.* at 380–81.
[164] *Id.* at 380–81, 420–21.
[165] *Id*. at 381.
[166] DELGADO & STEFANIC, *supra* note 15, at 94.
[167] *Id*.
[168] *See supra* section II.B.

discrimination. However, the tort of IIED is uniquely situated within the First Amendment, thus overcoming the content-ban questions raised by *R.A.V. v. St. Paul*.

While the Supreme Court held in *R.A.V. v. St. Paul* that punishing only racist fighting words without punishing other forms of fighting words is an impermissible content-based regulation, the Court emphasized that fighting words themselves are outside the First Amendment's protection.[169] Writing for the Court, Justice Scalia reasoned that because the Minnesota ordinance did not outlaw all fighting words, but only "fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance,"[170] it was an impermissible content-based ban. Similarly, the government may proscribe libel, but it cannot only proscribe libel critical of the government. The Court acknowledged that in instances where "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech," those statutes would not be unconstitutional.[171] The Court provided the example of "sexually derogatory 'fighting words,'" which would violate Title VII's prohibition against sexual discrimination in employment, as a class of speech that could be proscribed through a statute directed against conduct.[172] In this example, while the speech stymied is sexually derogatory words, the ban is permissible in order to protect against the conduct of employment discrimination.

One of the reasons IIED is an attractive remedy to racial insults is that it overcomes the content-ban question for this very reason. Recognizing racial insults as a form of IIED is no different than Justice Scalia's comparison to libel—the state can proscribe libel, including libel critical of the government, but it cannot proscribe only libel critical of the government. The government can proscribe IIED. IIED is an umbrella category that encompasses a variety of conduct, including extreme and outrageous verbal conduct that results in severe harm. Accepting racial insults that result in severe harm as IIED is similar to an example of a "particular content-based subcategory of a proscribable class of speech [that is] incidentally within the reach of a statute directed at conduct rather than speech."[173] Unlike a regime that limits libel only to libel critical of the government, the proposal here does not limit IIED claims to only racial insults. As Part III shows, IIED proscribes a large category of extreme and outrageous conduct, and even other verbal nonracial insults can be sufficiently extreme, outrageous, and harmful to merit recovery under IIED. Nor does this proposal proscribe all racial insults; the

[169] R.A.V. v. City of St. Paul, 505 U.S. 377, 393–94 (1992).
[170] *Id.*
[171] *Id.* at 389.
[172] *Id.*
[173] *Id.*

focus is only on those that result in cognizable harm to the victim. These forms of racial insults are constitutionally proscribable content.

In *R.A.V.*, the Court accepted that if St. Paul "singled out an especially offensive mode of expression . . . for example, selected for prohibition only those fighting words that communicate ideas in a threatening . . . manner,"[174] it would likely pass constitutional muster. With IIED claims, only targeted racial insults that cause severe harm are a matter of concern. Not all racial insults will be proscribed and racial insults are not the only conduct targeted.

C. Snyder *& Issues of Public Concern*

Although the Supreme Court has, at times, narrowed the scope of civil tort claims on First Amendment grounds, the Court has repeatedly held that the First Amendment is not a trump card over all forms of civil liability for types of speech. The Supreme Court has maintained that freedom of speech does not protect the right to harass,[175] to be obscene,[176] to defame,[177] to force others to listen,[178] to abuse,[179] or to engage in fighting words.[180] The First Amendment does not give individuals carte blanche to infringe on the personal liberty, mental wellness, and tranquility of others.

In analyzing whether a tort liability from injurious speech runs afoul of the First Amendment's protection of speech, the Supreme Court has come up with three balancing factors that determine the level of constitutional protection for tortious speech: (1) the plaintiff's level of vulnerability and need for state law protection (the public figure/private individual distinction); (2) the nature of the speech as public or private; and (3) the nature of the plaintiff's injury.[181]

In weighing these factors, it appears that a racial insult IIED claim is constitutionally sound.

The public versus private figure distinction originated in *Gertz v. Robert Welch, Inc*.[182] In *Gertz*, the Supreme Court held that public figures have less need for state protection from defamatory speech and thus must show actual malice when bringing defamation cases.[183] Public figures have access to the media, can control their narrative, and protect their reputation. Moreo-

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[174] *Id.* at 393.

[175] Boos v. Barry, 485 U.S. 312, 312 (1988).

[176] Roth v. United States, 354 U.S. 476, 485 (1957).

[177] Beauharnais v. Illinois, 343 U.S. 250, 264–67 (1952).

[178] Frisby v. Schultz, 487 U.S. 474, 485 (1988) (stating "[t]here simply is no right to force speech into the home of an unwilling listener.").

[179] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("[P]ersonal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.").

[180] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[181] Sacks, *supra* note 117 (summarizing Gertz v. Welch, Hustler Mag., Inc. v. Falwell, New York Times Co. v. Sullivan, and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.).

[182] 418 U.S. 323, 351–52 (1974).

[183] *Id.* at 349.

ver, most public figures took affirmative steps to be in the public spotlight and therefore assumed the risk of public scrutiny and even attacks on their reputation and integrity. Since private individuals did not intentionally thrust themselves into the public spotlight, they are afforded greater torts protection in the event that they are defamed.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court distinguished private speech from speech of public concern, finding that private speech was "less important" for the purpose of the First Amendment and was of "reduced constitutional value" if it did not potentially interfere with a free and robust debate on public issues.[184] The Court has defined issues of public concern as "any matter of political, social, or other concern to the community."[185]

The concept of speech of public concern became more complicated in 2011 when the Supreme Court decided *Snyder v. Phelps*. In *Snyder*, the father of a deceased marine sued the Westboro Baptist Church for protesting 1000 feet away from his son's funeral. The group displayed signs stating, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."[186] The protesters were on public land and protested for about thirty minutes before the funeral began.[187] Albert Snyder only saw the tops of the signs on his way to the funeral and did not know what the signs said until he watched the news later that evening.[188] Snyder sued the church for IIED, intrusion upon seclusion, and civil conspiracy. At trial, Snyder described the severity of his emotional harm. He testified that he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often [became] tearful, angry, and physically ill when he [thought] about it."[189]

In an 8-1 decision, the Supreme Court dismissed Snyder's IIED claim, finding that the First Amendment shielded the church's actions because they were matters of public concern legally voiced in a public place. The signs were outward facing—intending to critique the "political and moral conduct of the United States and its citizens."[190] The speech was not directed at Snyder specifically, and the church's protesting at his son's funeral did not transform the speech from a matter of public to private concern. Moreover, the

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[184] 472 U.S. 749, 758, 761 (1985).

[185] Connick v. Myers, 461 U.S. 138, 146 (1983); *see also* City of San Diego. v. Roe, 543 U.S. 77, 83–84 (2004) (defining public concern as "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public").

[186] Snyder v. Phelps, 562 U.S. 443, 448 (2011).

[187] *Id.* at 448–49.

[188] *Id.* at 449.

[189] *Id.* at 450.

[190] *Id.* at 454.

Court could not interpret "Westboro's use of speech on public issues" to be "in any way contrived to insulate a personal attack on Snyder from liability."[191]

The Supreme Court also balances First Amendment interests against state law interests in protecting against specific tortious conduct.[192] In *Snyder*, the Court held that the importance of public protest and picketing outweighed the emotional pain and suffering of a grieving family. In other cases, the Court has weighed competing state interests over the First Amendment.[193]

First Amendment evangelists would argue that an IIED claim based on racial insults is little different from *Snyder*. Discussions of racism, they would argue, are a matter of public concern and protected from liability by the First Amendment. Moreover, while racism is deplorable, protesting at the funeral of a soldier is even more extreme and outrageous.

However, the racial insults described herein are markedly different from the public protests seen in *Snyder.* The interactions that are actionable under IIED are interpersonal ones—words exchanged from one individual directly targeted at another. These are not public insults conveyed over a loudspeaker or targeted toward the news. Nor are they expounding on current events or issues of politics—they are merely racist words directed at one or a small group of individuals with the intent to demean or denigrate them on the basis of their group identity. In *Snyder*, the plaintiff did not witness the protest directly, nor did the Court view the words as targeted at him—rather the Court viewed them as political speech expressing genuinely held beliefs on public issues. In examining whether the First Amendment shields racial insults, a judge must only inquire whether they are on issues of public concern and in finding that they are not, judges can put the elements of the IIED claim to the jury.[194] Most racial insults are interpersonal interactions and are not a matter of public concern, and thus are not shielded by the First Amendment.

It is worth highlighting Justice Alito's impassioned dissent in *Snyder*, in which he argued that the Westboro Baptist Church's protests were not protected speech and were actually an "intentionally inflict[ed] severe emotional injury on private persons" and "vicious verbal attacks that make no contribution to public debate."[195] In Justice Alito's view, the Church's words and actions were undoubtedly outrageous and an intentional attack on Matthew Snyder and his family. Justice Alito pointed out that the Church did not

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[191] *Id.* at 444.

[192] Florida Star v. B. J. F., 491 U.S. 524, 533 (1989).

[193] *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (holding that the *Sullivan* actual malice standard did not apply when the state seeks to protect the plaintiff's property interests, as opposed to merely "feelings or reputation"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (holding that a magazine publishing a stolen copy of Gerald Ford's memoirs was not protected by the First Amendment).

[194] *Harper & Row*, 471 U.S. at 556.

[195] *Snyder*, 562 U.S. at 464 (Alito, J. dissenting).

contest the outrageousness of their members' speech, but rather the Church's defense rested exclusively on First Amendment grounds. The Church's speech—protesting at military funerals and funerals of child victims of mass shootings—was a publicity stunt to draw more attention to their fringe views. Even if the motivation behind the Church's conduct was to publicly opine on political issues, the Church's means of doing so—attacking Snyder's memory and his family—rendered their actions unprotected. In Justice Alito's view, the intentional wounding of Snyder's family and friends was a strategic decision because "it is expected that respondents' verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief."[196] Moreover, Justice Alito highlighted the personal nature of the intentional attacks on Snyder and his family; even after the protest, the Church posted online statements about the Snyder family, chastising them for their Catholic faith and implying that Matthew Snyder was gay. In Justice Alito's view, the Church's actions were not public speech, but rather directed and personal attacks intended to wound for publicity. Regardless of its motivation, this intentionally harmful speech is at the core of IIED liability.

In the majority's view, audience matters. If the speech's intended audience is the public at large, then the speech is protected. For Justice Alito, it does not matter if the speaker hopes that her words reach the entire world—if the victim is a private actor and the speech intentionally wounds the victim, then there is a case for IIED.[197] In both views, however, private, targeted racist speech that results in severe harm is not protected by the First Amendment.

Broader political speech that advocates for racist policies, however, would not meet the criteria for IIED. For example, if a speaker invited to a college campus admits to a minority student in a one-on-one encounter that she supports eugenics, her speech would be reprehensible, but it would not be of the personal nature required to fulfill an IIED claim.

In the present political climate, it is easy to imagine fringe racist political groups using the First Amendment as a cover to intimidate, disparage, and denigrate minority individuals. Depending on the words used, the nature of the speech (such as the setting and how targeted the speech is), and the emotional harm caused, it is possible that such speech could meet the criteria for IIED.[198]

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[196] *Id.* at 467.

[197] In recent years, as protests over university speakers and racist statements by the President have become commonplace, Justice Alito's dissent in *Snyder* has a new relevance.

[198] *See, e.g.*, Gersh v. Anglin, 353 F. Supp. 3d 958, 966 (D. Mont. 2018) (finding that blog posts on Daily Stormer news blog attacking a realtor, her husband, and her son with anti-Semitic slurs and encouraging others to reach the realtor and her friends were not protected by the First Amendment and plaintiffs could proceed in an IIED claim).

D. Hustler *& Public Figures*

Snyder makes clear that the First Amendment shields outward-facing speech on public matters from IIED claims. In the case of *Hustler Magazine v. Falwell*, the Supreme Court put additional restrictions on the use of IIED, namely the requirement that IIED claims brought by public figures show that the offending statements were false and made with "actual malice."[199]

In 1983, the pornographic magazine *Hustler* featured a parody advertisement of the televangelist minister Jerry Falwell admitting to incest with his mother. Falwell sued the magazine for libel, invasion of privacy, and IIED. In his majority opinion, Chief Justice William Rehnquist emphasized that criticism of public figures is at the core of a robust political debate.[200] Citing to early cartoons lampooning George Washington, Abraham Lincoln, and the Roosevelts, the Court noted that cartoons have played a valuable role in American political discourse.[201] While the Court acknowledged that the *Hustler* parody was different in kind from the parodies that have long held a place in the American political and social landscape, the Court refused to allow the outrageousness standard to dictate issues of public concern. Rather, the Court concluded:

> 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[202]

The Court did not prohibit public figures from recovering from IIED wholesale, but rather required that they show that the statement was false and made with actual malice. The Court determined that the ad, which was clearly a parody, was not "reasonably believable" and thus was not a false statement about Falwell.[203]

Hustler v. Falwell established a new test for verbal IIED claims against public figures, requiring that the words be examined not on whether they are extreme and outrageous, but rather whether they are false and show actual malice. However, not all verbal IIED claims neatly fit the *Hustler* test. Not every instance of assaultive language can be proven false—how would one disprove the falsity of a racial insult?

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[199] 485 U.S. 46, 56 (1988).

[200] *Id.* at 52.

[201] *Id.* at 55 ("From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without [political cartoons].").

[202] *Id.*

[203] *Id.* at 57.

Two possible theories emerge from *Hustler*. The first view is that *Hustler* only applies to parodies, satires, and other sorts of political or social cartoons and commentaries that can be "reasonably believed" or proven false. The Court in *Hustler* was consumed with allowing a free flow of political discourse, including hard-hitting satire, even if it was insulting and offputting to the public figure and the public at large. Racial insults are not political or social commentary, nor can they be proven true or false. *Hustler* does not apply to racially assaulting language that neither progresses the public or social discourse nor expresses an opinion. Calling a public figure the "n-word," for example, does not expand political debate, and censuring someone from using the "n-word" is unlikely to chill free debate. Moreover, while public figures have opened themselves up to criticism, public ridicule, and even defamatory statements, racial insults are different in kind. No individual, private or public, should be subjected to them.

An alternative view is that to the extent that a public figure, such as a politician, journalist, or actor, hopes to bring a racial insult IIED claim, they would be subject to a heightened standard under *Hustler*. Under this theory, the First Amendment value of holding public figures to account, even by distasteful or offensive means, is so strong that even instances of racial insult against public figures should be examined under a more strenuous standard. While a public figure cannot prove the truth or falsity behind the use of a racial epithet, they would perhaps have to show actual malice or greater evidence of severe harm. Due to the dearth of IIED claims by public figures, who tend to sue for defamation or invasion of privacy rather than IIED, courts have not articulated a standard by which to assess public figures' verbal IIED claims.

Racial insults harm both public and private figures, and *Hustler*'s potential restrictions on public figures' ability to bring racial insult IIED claims is an unfortunate limitation to this remedy. However, for private figures, who do not have to overcome the heightened *Hustler* standard, IIED remains an effective and worthwhile remedy for claims of racial insult.

E. Interpreting the First Amendment in Connection with the Thirteenth Amendment

The First Amendment is a crucial safeguard for fundamental rights and liberties. However, it does not exist in a vacuum and should be interpreted in light of other constitutional commitments and values. Professor Akhil Amar argues that the Reconstruction Amendments and the case law interpreting them should inform First Amendment analyses of speech relating to race.[204] Particularly regarding *R.A.V. v. St. Paul*, a case that struck down a state law outlawing cross burning on First Amendment grounds, Amar notes that the

[204] Akhil Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 146 (1992).

Thirteenth Amendment authorizes governmental regulation in order to abolish the "badges and incidents of the slavery system."[205] Amar notes that viewing *R.A.V.* only as a First Amendment case ignores historical context and even perhaps the purpose of the Thirteenth Amendment.

While the First Amendment protects free speech, racist speech is different, and certainly the conduct in question in this case—the burning of a cross in an African American family's backyard—has a particular historical backdrop that sets it apart from other sorts of speech and conduct. Amar notes that the Supreme Court has held that putting "For Whites Only" on a residential "For Sale" sign is unconstitutional because the words are "swept up incidentally within the reach of a statute directed at conduct rather than speech,"[206] i.e. private racial discrimination in housing. Since refusal to deal with another on the basis of race can constitute a badge of servitude, Amar then argues, certainly the intentional racial harassment of African Americans would also constitute a badge of servitude.[207] Thus, the burning of a cross with the intention to intimidate, degrade, and dehumanize an African American family should also violate the Thirteenth Amendment's proscription against all badges and incidents of slavery.[208]

I propose taking Amar's argument a step further—racist language, like cross burnings, are a badge and incident of slavery. Racist language stems from historic stereotypes and prejudices against racial groups. In the case of African Americans, much of this language and stereotyping is directly linked to the dehumanization of enslaved Black persons. One of the reasons slavery lasted as long as it did in the United States is the pernicious stereotypes and falsities about African Americans—viewing them as animalistic, barbaric, and less than human. The legacy of these tropes lingers today in racist language, stereotypes, and even microaggressions. Indeed, even the power of racist words directed at a Black American replicates the power dynamics of slavery. The purpose of this language is to dominate and denigrate; it is weighted by a history of Black victims lacking legal personhood and being wholly subservient to their white masters. Taking the purpose of the Thirteenth Amendment seriously would then require courts to unequivocally condemn racist speech and affirm their commitment to removing all badges and incidents of slavery. Finding liability for racist speech is an affirmative step toward doing so.

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[205] *Id.* at 156 n.176 (citing The Civil Rights Cases, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting)).

[206] R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

[207] Amar, *supra* note 204, at 157 (citing Jones v. Alfred Mayer Co., 392 U.S. 409, 437–44 (1968)).

[208] *Id.* at 157–59.

V. IIED Today

A. IIED in Practice

The Third Restatement of Torts ("the Restatement") states, "an actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."[209]

IIED is in many ways a unique tort. The harm can be wholly emotional, and thus uniquely difficult to prove, and the conduct must be "extreme and outrageous," a societal standard that allows great leeway for interpretation.[210] What might be extreme and utterly reprehensible to one judge could be mildly offensive to another. This subjectivity allows for varying results across courts, with judges playing a larger gatekeeping role than in other torts.

IIED is an intentional tort, requiring that the defendant acted either intentionally or recklessly. The plaintiff must prove that the defendant knew that her conduct was substantially certain to cause emotional harm, or that the defendant acted with reckless disregard for whether the plaintiff would suffer harm.[211] However, the intentionality or recklessness of the act is rarely at dispute in IIED cases. IIED cases almost exclusively turn on the extremity and outrageousness of the conduct, rather than the intentionality or recklessness.[212] In fact, the Reporters for the Restatement found only one case in which a court held that while extreme and outrageous conduct existed, the defendant did not show requisite intent.[213] In short, as long as the defendant acted extremely or outrageously, courts are inclined to find that the defendant also acted intentionally or recklessly.

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[209] Restatement (Third) of Torts, *supra* note 5, at § 46.

[210] Restatement (Third) Of Torts: Liability For Physical And Emotional Harm § 46 cmt. c (Council Draft No. 6, 2006) (noting that the outrageousness element is the most crucial piece in screening cases and does "most of the important normative work"); Snyder v. Phelps, 562 U.S. 443, 458 (2011) (second and third alterations in original) (citations omitted) (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55 (1988); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510 (1984)) ("'Outrageousness,' . . . is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'").

[211] Restatement (Second) of Torts, *supra* note 13, at § 46 cmt. i ("The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.").

[212] Bernstein, *supra* note 148, at 1750–51 ("In practice, however, the element of extreme and outrageous conduct is the central if not the sole element of the tort.").

[213] Restatement (Third) of Torts, *supra* note 5, at § 46 cmt. d (citing Spackman v. Good, 54 Cal. Rptr. 78, 85 (Ct. App. 1966)).

IIED also requires that the plaintiff suffered severe harm. Courts have described emotional harm as an injury to emotional tranquility, which could be evidenced by sorrow, despondency, anxiety, humiliation, and depression.[214] Distinctions between physical and emotional harms are not precise and the two can blend into each other. Like the intentionality prong, sometimes the outrageousness of the defendant's conduct suffices to demonstrate the severity of the harm.[215] Similarly, the distinction between harm and "severe harm" is neither precise nor scientific. In applying Louisiana law, the Fifth Circuit has described severe harm as "unendurable."[216] A Maryland court interpreted severe harm as a "severely disabling emotional response."[217] In Virginia, a plaintiff who had "difficulty managing her day-to-day activities," suffered severe emotional distress.[218] Since the early twentieth century, as science on mental health has expanded and been accepted by the wider public, courts have grown more sympathetic to claims of emotional injury.[219] However in light of the wide variety of psychological and psychiatric diagnoses, it remains to be seen whether courts will at some point reverse this trend.[220]

In IIED cases, judges first examine whether, based on the alleged facts of the case, the specific conduct could be considered extreme and outrageous and the harm sufficiently severe to warrant liability. This inquiry is essentially whether "reasonable minds may differ" on the extremeness and outrageousness of the conduct.[221] If so, the court then submits the case for the jury to determine whether the defendant engaged in sufficiently extreme and out-

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[214] *See, e.g.*, *In re* Sundquist v. Bank of Am., 566 B.R. 563, 589 (Bankr. E.D. Cal. 2017), *vacated in part sub nom. In re* Sundquist, 580 B.R. 536 (Bankr. E.D. Cal. 2018) ("Emotional harm refers to impairment or injury to a person's emotional tranquility.").

[215] Givelber, *supra* note 141, at 47 ("Proof that the defendant behaved outrageously vis a vis plaintiff may provide the evidence to support a finding that plaintiff suffered severe emotional distress" and citing the Second Restatement for the proposition that, "severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.")

[216] Smith v. Amedisys Inc., 298 F.3d 434, 450 (5th Cir. 2002).

[217] Harris v. Jones, 380 A.2d 611, 616 (Md. 1977).

[218] Pennell v. Vacation Reservation Ctr., LLC, 783 F. Supp. 2d 819, 824 (E.D. Va. 2011) (citing Almy v. Grisham, 639 S.E.2d 182, 188 (Va. 2007)) ("'[e]very aspect of [her] life [was] fundamentally and severally altered, such that she had trouble even walking out of the front door' were sufficient to survive demurrer on the fourth element of an IIED claim.")

[219] *See* WHITE, *supra* note 122 and accompanying text; Post, *supra* note 146, at 622 (noting the "strong tendency to assume that 'the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed,' so that the element of 'severe' emotional distress is generally satisfied by a plaintiff's simple recitation that he has been upset" (internal citations omitted)).

[220] *Cf.* Scott A. Johnson, *Societal Acceptance of Crime & Rape: Blaming the Victims and Excusing the Behavior of the Offender*, 1 J. FORENSIC SCI. & CRIM. INV. 001, 001 (2017) (arguing that mental health professionals incorrectly proffer that violent offenders' behaviors are out of their control despite a lack of any tangible evidence to support this opinion).

[221] Hansson v. Scalise Builders of S.C., 650 S.E.2d 68, 72 (S.C. 2007) ("In order to prevent claims for intentional infliction of emotional distress from becoming 'a panacea for wounded feelings rather than reprehensible conduct,' . . . the court plays a significant gatekeeping role in analyzing a defendant's motion for summary judgment.").

rageous conduct and whether the plaintiff suffered severe emotional harm. In essence, the tort of IIED allows judges the opportunity to determine on a case-by-case basis what conduct is socially reprehensible enough for a jury to examine.[222]

In light of the subjectivity inherent in IIED claims, the Restatement has attempted to offer clarity on what constitutes extreme and outrageous conduct. The Restatement emphasizes that the "extreme and outrageous" requirement is designed to limit the tort to a "very small slice of human behavior."[223] The Restatement emphasizes that the harms of the conduct may play a role in whether it is extreme and outrageous. Liability is limited to the most severe circumstances—instances when "no reasonable [person] could be expected to endure it."[224] These harms have also been described as, "wounds that are truly severe and incapable of healing themselves."[225] The Restatement further notes that some degree of emotional harm, such as ordinary insults and indignities, must be expected in social interaction and tolerated without legal recourse, but "extreme and outrageous" conduct goes "beyond all possible bounds of human decency [as to be] utterly intolerable in a civilized community."[226]

In determining whether behavior is extreme and outrageous, courts have considered the duration of the harm; the intensity of the conduct; and whether there is a power differential between the parties, such as between an employer and an employee. They have also examined whether the plaintiff had a particular type of vulnerability and if the defendant was aware of this vulnerability and attempted to exploit it.[227] The Restatement requires proof of harm, but in many cases, the defendant's actions, if outrageous enough, can be evidence of harm.[228] If the harm is severe because the plaintiff is especially vulnerable, then recovery might not be possible unless the defendant was aware of this vulnerability. Courts will generally inquire whether a person of ordinary sensitivities in the same circumstances would suffer severe harm.

Despite the Restatement's efforts and one hundred years of attempts through common law to define the bounds of IIED, the subjectivity in determining what conduct is extreme and outrageous enough leaves room for interpretation. It is not surprising, then, that IIED case law is neither consistent nor predictable when applied to race-based IIED claims.

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[222] Givelber, *supra* note 141, at 43.

[223] RESTATEMENT (THIRD) OF TORTS, *supra* note 5, at § 46 cmt. a.

[224] *Id.* at § 46 cmt. j.

[225] Figueiredo-Torres v. Nickel, 584 A.2d 69, 75 (Md. 1991).

[226] RESTATEMENT (THIRD) OF TORTS, *supra* note 5, at § 46 cmt. d.

[227] *Id.* at § 46 cmt. d (citing Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 487 (Ct. App. 2009) (holding vulnerability of plaintiff and defendants' knowledge of that vulnerability relevant in determining whether defendants acted outrageously)).

[228] RESTATEMENT (SECOND) OF TORTS, *supra* note 13, at § 46 cmt. j ("[S]evere distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.").

B. Limited Recovery for Racial Insults in IIED

The idea that IIED can be a successful tool to hold those who engage in racist conduct accountable is not new and has, on limited occasions, worked. However, as the instances discussed below show, courts most often find the defendants' actions were extreme and outrageous when they were in a position of power. This most typically occurs in the context of employment.

In *Alcorn v. Anbro Engineering, Inc.*, Manuel Alcorn, a Black truck-driver, sued his employer because his superintendent yelled at him, "You goddam niggers are not going to tell me about the rules. I don't want any niggers working for me. I am getting rid of all the niggers; go pick up and deliver that 8-ton roller to the other job site and get your pay check; you're fired."[229] Alcorn was sick for many weeks after the incident, was unable to work, and experienced shock, nausea, insomnia, and emotional and physical distress.[230] Alcorn emphasized that African Americans are "particularly susceptible to emotional and physical distress" from racist speech.[231] The California Supreme Court held that the particular harms of racism, paired with the power differential between the plaintiff and defendant, were sufficient to uphold the complaint.[232]

In *Contreras v. Crown Zellerbach*, the Washington Supreme Court specifically stated that racial slurs were outrageous enough to maintain the tort of outrage.[233] David Contreras sued his former employer alleging that, "he was subjected to continuous humiliation and embarrassment by reason of racial jokes, slurs and comments," throughout his employment.[234] His co-workers also wrongfully accused him of stealing from the business.[235] The court upheld the claim, emphasizing the racial animus behind the slurs: "As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as 'mere insulting language.' Changing sensitivity in society alters the acceptability of former terms."[236]

In *Turley v. ISG Lackawanna, Inc.*, the sole African American employee at a steel plant was subjected to racial insults, intimidation, and deg-

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[229] 468 P.2d 216, 217 (Cal. 1970).
[230] *Id.*
[231] *Id.* at 217–18.
[232] *Id.* at 218–19 ("Thus, according to plaintiff, defendants, standing in a position or relation of authority over plaintiff, aware of his particular susceptibility to emotional distress, and for the purpose of causing plaintiff to suffer such distress, intentionally humiliated plaintiff, insulted his race, ignored his union status, and terminated his employment, all without just cause or provocation. Although it may be that mere insulting language, without more, ordinarily would not constitute extreme outrage, the aggravated circumstances alleged by plaintiff seem sufficient to uphold his complaint as against defendants' general demurrer.").
[233] 565 P.2d 1173, 1176–77 (Wash. 1977).
[234] *Id. at* 1174.
[235] *Id.*
[236] *Id.* at 1177.

radation over a period of more than three years.[237] His co-workers called him "boy," "boon," "ape," and "gorilla." They also called him "that fucking nigger" and put up a "dancing gorilla" sign at his work station. At one point, one of the co-workers told Turley, "When I see your black nigger ass on the outside, I'm going to fucking shoot you." This incident left Elijah Turley visibly traumatized and he was taken to the hospital.[238] He was diagnosed with post-traumatic stress disorder, depression, and panic disorder.[239] The Second Circuit found that the boss's dismissal of Turley's complaints, despite the malicious and pervasive culture of the harassment, was enough to hold the boss liable for intentional infliction of emotional distress. A jury awarded Turley $260,000 for his IIED claim. The court presented IIED as a gap filler tort—citing an opinion out of the Texas Court of Appeals, the court noted, "The tort's clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct that might otherwise go unremedied."[240]

In *Brown v. Manning*, the owner of a damaged car sued an insurance investigator for assault and intentional infliction of emotional distress after he used the n-word against him.[241] Among the statements the defendant made were, "[t]hat's what's wrong with you niggers now, you don't follow orders," and "I don't give a damn about you, I don't give a damn about your car; and furthermore, you can suck my long white dick, nigger."[242] The court found, "vulgarity of the [defendant's] language above goes beyond mere insult or acts which are inconsiderate or unkind, particularly given the relationship between the parties."[243]

In *Dominguez v. Stone*, a city councilman stated that the "plaintiff was not suited for her employment with the Village of Central because she was a Mexican."[244] The defendant further stated that the program director of the Village of Central Senior Citizens Program should not be Mexican because the program is funded by American tax dollars. As a result, the plaintiff experienced, "great grievous mental suffering, anguish and anxiety and suffered severe shock to her nerves and nervous system."[245] The Court of Appeals of New Mexico overruled the lower court's grant of summary judgment to the defendant, determining that the jury could determine whether the defendant's conduct was sufficiently extreme and outrageous.

However, the results in these cases are not the norm. The weight of cases examining intentional infliction of emotional distress for racist lan-

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[237] 960 F. Supp. 2d 425, 433–34 (W.D.N.Y. 2013), *aff'd in part*, *vacated in part*, 774 F.3d 140 (2d Cir. 2014).
[238] *Id.*
[239] *Turley*, 774 F.3d at 163.
[240] *Id.* at 159 (citing Young v. Krantz, 434 S.W.3d 335, 344 (Tex. Ct. App. 2014)).
[241] 764 F. Supp. 183, 184–86 (M.D. Ga. 1991).
[242] *Id.* at 185.
[243] *Id.* at 187.
[244] 638 P.2d 423, 424 (N.M. Ct. App. 1981).
[245] *Id.* at 426.

guage, particularly when the plaintiff is not an employee of the defendant or in a special relationship with the defendant, is against recovery. This trend is even more pronounced when the claims relate to racial insults alone, as opposed to insults joined with action (such as the firing of an African American employee or putting derogatory signs on an employee's work station, as discussed above).[246] Judges have continuously held that racist language and racial allusions do not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress.

C. Courts' Failures to Recognize Racial Insults

More often than not, courts refuse to recognize racial insults as extreme and outrageous. They often condemn the language, but do not find it sufficient to merit recovery. While the above examples show that some judges may be more likely to find extreme and outrageous conduct when the plaintiff and defendant are in a special relationship, and/or when the racial insults are paired with discriminatory actions, most plaintiffs requesting recovery for emotional harms due to racial insults have found courts unsympathetic to their claims.

In some cases, plaintiffs have sought recovery for race-based language that is contextually alienating and racist but does not have the overtness of a racial epithet. For example, in *Gaiters v. Lynn*, Ceasar Gaiters served as a crowd controller at a Loretta Lynn concert. Upon seeing Gaiters, a Black man, in the crowd, Lynn said to the audience, "If you people don't know what coal looks like, here is somebody who knows what coal is all about." She added, "Black is beautiful, ain't it honey."[247] A spotlight narrowed in on Gaiters in response to Lynn's comments and the audience laughed at him. Because he was working as a crowd controller, Gaiters was unable to leave his post. After the incident, others mocked Gaiters. The embarrassment from the incident and subsequent derision from his peers led him to drink heavily and experience sexual impotence. He sued Lynn for IIED. The Fourth Circuit affirmed a dismissal of Gaiters' claim, concluding that, "As with other admittedly hurtful conduct, racial allusions may be found not actionable as at worst 'mere insult,' or actionable as 'intolerably atrocious conduct,' depending upon the context."[248] The Court described Lynn's statements as "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," and "not manifestly disparaging or demeaning of either race or color," nor "convey[ing] the suggestions of incompetence or inferiority

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[246] *See also* Ledsinger v. Burmeister, 318 N.W.2d 558, 562 (Mich. Ct. App. 1982) (finding that calling the plaintiff "n*****" while in the process of throwing the plaintiff out of a place of business "presents not merely that name-calling that one might be expected to endure, but slurs in the course of a discriminatory act" and reversing a lower court's finding of summary judgment for IIED case).

[247] Gaiters v. Lynn, 831 F.2d 51, 52 (4th Cir. 1987).

[248] *Id.* at 53.

sometime evident in sly innuendo."[249] The Court sympathized that Lynn's words were not in the best of taste, but nonetheless concluded that the harm Gaiters suffered was due to the "rough edges of our society," which people must endure with no judicial remedy.[250] The Fourth Circuit's opinion, however, does not foreclose the possibility of bringing an IIED case when the racial insult "manifestly [disparages] or [demeans] on the basis of either race or color."[251]

Similarly, in *Graham ex rel. Graham v. Guilderland Central School District*, a New York State Court grappled with whether racial language without intent to discriminate is recoverable under intentional infliction of emotional distress.[252] In response to a "Homosexual Awareness Assembly" held earlier in the day, a student at Guilderland Central High School asked his English teacher, "Why not call them faggots? That's what they are!" The English teacher then turned to Elizabeth Graham, the only African American student in the room, and asked, "Why not call Liz a 'nigger' because that's what she is? Liz, why not tell us what it feels like to be called a 'nigger'?"[253] Graham and her parents sued the teacher and the school district for intentional infliction of emotional distress, noting that her youth, her being the only African American in the class, and her teacher having a heightened duty as an authority figure rendered Graham particularly vulnerable to derogatory attacks. The New York Supreme Court disagreed, however, finding that the teacher's assertions "were plainly intended to convey his strong disapproval of such epithets, by exemplifying—perhaps, too effectively—the pain they can cause."[254] Because the language served an instructive purpose, the Court concluded, it could not be characterized as "utterly reprehensible."[255] The Court thus concluded that since the teacher only intended to teach a lesson and not to harm the student, the words were not recoverable, despite the harm they might have caused. The dissent aptly pointed out that the teacher's comments were designed to invoke a response from Graham, exacerbating the harm caused, and that teachable lessons should not come at the cost of one's emotional well-being.[256]

In other cases, the defendant used overtly racist language, but the courts determined that the racial epithets, while offensive, were alone not enough to

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[249] *Id.* at 53–54.
[250] *Id.* at 53.
[251] *Id.* at 54.
[252] 681 N.Y.S.2d 831, 832–33 (N.Y. App. Div. 1998).
[253] *Id.* at 832.
[254] *Id.*
[255] *Id.* at 832–33.
[256] "[T]he fact that the remarks were used in the context of a classroom discussion allegedly for the purpose of spurring conversation about prejudice does not render them less objectionable. Although I agree with the majority that an open exchange of ideas should be encouraged in a classroom setting, that goal must yield to the protection of one's emotional well-being. Simply stated, I cannot conclude under the unique circumstances herein that plaintiffs have, as a matter of law, failed to state a cause of action for intentional infliction of emotional distress." *Id.* at 833.

merit recovery. In *Leibowitz v. Bank Leumi Trust Co. of New York*, Alma Leibowitz sued the bank where she worked after her employer repeatedly called her "Hebe" and "kike." The Supreme Court of New York condemned the language, but also dismissed the impact of the words on Leibowitz as merely "annoying."[257] The Court concluded that, "the occasional use of such derogatory and demeaning remarks reflects a certain level of narrowmindedness and meanspiritedness, [but] this is not a case 'where severe mental pain or anguish [was] inflicted through a deliberate and malicious campaign of harassment or intimidation.'"[258]

Indeed, a general survey of cases examining race-based claims of IIED shows that courts are loathe to find racist language recoverable, even in instances when the plaintiff is the defendant's employee.[259] Many courts dismiss IIED claims because they believe that the tort of IIED should be used sparingly. While they do not condone racism, these courts simply view IIED as something of a nuclear option to be used only in the most drastic of circumstances.[260] Certainly, the history of IIED reflects that the tort should be used cautiously, but judges must recognize that racism is harmful and drastic enough to merit recovery under IIED.

When judges dismiss racist language as merely off-color remarks not outrageous enough to deserve recovery, they signal to victims of racism that harms to their sense of citizenship, belonging, and mental health are not

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[257] Leibowitz v. Bank Leumi Tr. Co. of New York, 548 N.Y.S.2d 513, 521 (N.Y. App. Div. 1989).

[258] *Id.* (quoting Nader v. Gen. Motors Corp., 255 N.E.2d 765 (N.Y. 1970)).

[259] *See, e.g.*, Walker v. Thompson, 214 F.3d 615, 628 (5th Cir. 2000) (finding that employer's describing employees' hair as nappy and resembling that of a cat or dog, using the word "n*****" in African Americans' presence, and comparing them slaves and monkeys did not rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress under Texas law); Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 686–88 (10th Cir. 2007) (subjecting employee to insults about his Mexican ancestry over a period of four years was not sufficiently outrageous to sustain a claim of intentional infliction of emotional distress); Lopez v. Target Corp., 676 F.3d 1230, 1236–37 (11th Cir. 2012) (refusing to serve a Hispanic customer based on his race and publicly humiliating him by turning him away from the register in a loud and rude tone did not meet the extremely high standard required to state a claim for IIED under Florida law); Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (holding that the supervisor's reference to the plaintiff as a "Mexican" and a "wetback" did not support a claim for intentional infliction of emotional distress); McCray v. DPC, Indus., Inc., 875 F.Supp. 384, 391 (E.D. Tex. 1995) (holding that the plaintiff's claim that co-workers made racial slurs and jokes did not rise to the level of extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress); Dawson v. Zayre Dep't Stores, 499 A.2d 648, 649 (Super. Ct. Pa. 1985) (calling plaintiff "n*****" was derogatory and offensive, but "does not amount to the type of extreme and outrageous conduct which gives rise to a cause of action"); Lay v. Roux Labs., Inc., 376 So.2d 451 (Dist. Ct. App. Fla. 1980) (a white male supervisor calling a Black employee "n*****" and threatening to fire her for parking in the wrong spot was reprehensible but not outrageous enough to permit recovery).

[260] *See, e.g.*, Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1388 n.8 (10th Cir. 1991) (noting the narrow standard of IIED claims); Banks v. Fritsch, 39 S.W.3d 474, 481 (Ky. Ct. App. 2001) (IIED is only appropriate where traditional common law actions are not); Vamper v. United Parcel Serv., Inc., 14 F. Supp. 2d 1301, 1306 (S.D. Fla. 1998) (IIED is "sparingly recognized by the Florida courts.").

important enough to merit recovery. Ignoring the unique harms of racist language and allowing them to persist creates a world where minorities are forced to bear the scars of these harms with no judicial remedy. Additionally, IIED is supposed to reflect society's consensus on what is acceptable behavior.[261] There is a major disconnect between how courts view racist language and how society views them—courts have not kept pace with society's evolving norms toward racism and racial insults.[262] Perhaps much of the language cited in these cases was once tolerable in America's past; however, it is no longer bearable by today's standards. By continuing to rely on precedents that view racial insults as merely unpleasant language, courts are failing to interpret the "extreme and outrageous" prong in light of what society today views as intolerable. Courts must recognize racial insult as IIED because 1) it reflects society's view of overt racism, and 2) racial insults cause severe harm.

VI. Fashioning a Racially Conscious IIED Remedy

The extreme and outrageous prong is the most central element of an IIED claim.[263] Determining whether a racial insult constitutes IIED thus largely turns on whether the insult is extreme and outrageous. Certainly, not all instances of racist language will be extreme and outrageous; two close friends who have a history of affectionately calling each other offensive names might not meet the criteria for intentional infliction of emotional distress, as there is likely no intent to dehumanize or degrade. An individual unfamiliar with the history of a marginalized group who unknowingly uses a racist trope similarly might not fit the bill.[264] And then there is the question of microaggressions, which descend from harmful stereotypes, but are often subtle and thus more difficult to directly connect to racism.

Thus, a remedy needs to take into account context as well as the intention of the speaker. Civil rights statutes, such as Title VII of the Civil Rights Act, offer a sixty-year history of grappling with racist language and racist intent. The racial harassment cases under Title VII, in particular, offer some

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[261] Restatement (Third) Of Torts (Council Draft No. 6), *supra* note 210, at § 46 cmt. c (defining "extreme and outrageous" as "intolerable in a civilized community").

[262] To be sure, societal standards towards racism are not stagnant, nor are they consistent nationwide. While the harms of racial insults are deeply felt no matter their geography, societal understanding of when racist language is extreme and outrageous might differ from state to state. This Article, does, however, posit that the most overt forms of racist speech, such as the use of the "n-word" and other unambiguous racist language is extreme and outrageous nationwide.

[263] *See supra* notes 210–12 and accompanying text.

[264] Arguably, this situation could be defined as negligent infliction of emotional distress. If intentionally discriminatory behavior meets the threshold of IIED claims, a negligent infliction of emotional distress might be met when an individual knew or should have known that their words would result in emotional distress to the plaintiff. This Article does not propose the tort of negligent infliction of emotional distress as a remedy for racial insults.

illustrative examples of how racist language can be parsed and analyzed in the courtroom.

A. Racist Remarks in Title VII

Courts are no strangers to grappling with whether language is racist. Title VII's racial harassment cases offer some insight into how courts have parsed language that a plaintiff views as racist. Title VII is illustrative because it shows the range of racist language that can be recoverable, covering the use of insults within the same racial group, the use of stereotypes and slurs, and demeaning comparisons.

To succeed on a Title VII racial harassment claim, a plaintiff must show that the defendant's conduct is "so deeply and unambiguously offensive as to create a hostile work environment."[265] Moreover, the conduct must be so severe and pervasive that a reasonable person would find the work environment abusive or hostile.[266] A single utterance of racial epithets is not enough to result in liability.[267]

For many racial harassment cases, the inquiry is relatively straightforward. In cases where the defendants repeatedly used overtly racist language against the plaintiff, the question of whether racial harassment occurred is unambiguous. For example, in *EEOC v. Pioneer Hotel, Inc*., a hotel was ordered to pay six Latino or brown-skinned men a total of $150,000 because they were "subjected to a barrage of highly offensive and derogatory comments about their national origin and/or skin color since 2006."[268] The men were called slurs such as "taco bell," "bean burrito," and "f****** aliens."[269] In *EEOC v. Rugo Stone*, a stone contracting company was ordered to pay an assistant project manager of Pakistani origin $40,000. The company's employees compared the project manager's skin to the color of human feces. Additionally, the project manager was told that his religion (Islam), was "f****** backwards" and "f****** crazy," and was asked why Muslims are such "monkeys."[270] In racial harassment cases, a reviewing court is well equipped to hear the plaintiff's allegations, examine the pattern and context of the offensive words, and determine whether those words constituted racial harassment creating a hostile work environment.[271]

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[265] 48 Am. Jur. 3d *Proof of Facts* § 4.7 (1998).

[266] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

[267] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

[268] Significant EEOC Race/Color Cases (Covering Private and Federal Sectors), EEOC, https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors#hiring, *archived at* https://perma.cc/U7RG-4YBB (discussing EEOC v. Pioneer Hotel, Inc., No. 2:11-cv-01588-LRH-GWF (D. Nev. June 17, 2015)).

[269] *Id*.

[270] *Id.*

[271] *Id.* (discussing EEOC v. Family Dollar Stores, Inc. No. 1:07-cv-06996 (N.D. Ill. 2008) (*settled* Feb. 17, 2009) (ordering a dollar store to pay $7,500 to an African American employee after her light skinned African American manager told another employee that she looked as "Black as charcoal" and repeatedly called her "charcoal" until she quit)).

These overt examples of racial harassment are quite similar to racial insult IIED claims. In both instances, an individual is verbally abused on the basis of his or her race or ethnicity. The abuse is unambiguous, overt, and severe. Although one instance of racial harassment is not enough to succeed in Title VII, both claims result in psychological trauma. Psychologists examining racial harassment claims through a social science lens have described an abusive work environment as "altering the conditions of employment" in ways that are essentially psychological.[272] Although a showing of psychological harm is not necessary in a racial harassment claim, psychologists testifying in racial harassment cases have similarly described the harms of harassment as the "chronic stress of being demeaned, devalued, and disadvantaged."[273]

Despite the similarity between racial harassment claims and racial insults as IIED, courts have shown a curious unwillingness to accept racial harassment as IIED. While this is sometimes due to IIED being a "gap-filler tort" in some states, which can only be used in the absence of any other remedy, other state courts have explicitly stated that what is illegal in the employment context is not per se extreme and outrageous. Take *Walker v. Thompson*, a Texas case, where an employer racially harassed his Black employees.[274] The employer described the employees' hair as nappy and resembling that of a cat or dog, compared them to slaves and monkeys, and used the n-word in African Americans' presence. A judge ruled that this behavior was not extreme and outrageous enough to find IIED liability. When the Fifth Circuit affirmed the decision, they noted, "conduct that is illegal in the context of employment does not necessarily constitute extreme and outrageous conduct."[275] In *Walker*, the judges were confronted by unambiguously racist language—there was no question that the employer weaponized racial insults against his employees to such a degree that it constituted racial harassment. However, the court determined that the racial insults were not extreme and outrageous. While the employer's speech was illegal racial harassment, meaning that the conduct was so unbearable that it rendered the work environment hostile, it was not beyond all possible bounds of decency. By dismissing the IIED claim, the *Walker* court ultimately held that prolonged racial harassment in the workplace is illegal and actionable under Title VII, but still falls within the scope of conduct that is permissible in society. The *Walker* decision signals that outside the workplace, minorities must suffer tangible emotional and physical harms from racism with no meaningful remedy to hold those who harm them accountable. There is a disconnect between a judiciary that is supposedly committed to principles of

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[272] Nancy L. Baker et al., *Chapter 10: Assessing Employment Discrimination and Harassment*, *in* 11 HANDBOOK OF PSYCHOL. 225, 261 (Irving B. Weiner, ed., 2d ed. 2012).

[273] *Id.* at 271.

[274] Walker v. Thompson, 214 F.3d 615, 628 (5th Cir. 2000).

[275] *Id.* (citing Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993)).

equality and antiracism but that refuses to condemn harmful and racist behavior as "intolerable in a civilized community."[276]

Title VII, as well as the remedy for racial insults envisioned in this Article, were designed to protect against the most overt forms of discrimination.[277] Subtle, implicit, or subconscious forms of racism are not captured through Title VII or a racial insult IIED claim.[278]

B. Defining Extreme and Outrageous Racial Insults

Having established the potential for racial insults to harm their targets,[279] it is necessary to establish some guidelines and contours for when racial insults are extreme and outrageous and thus rise to the level of intentional infliction of emotional distress.

In discussing the immorality of discrimination, Professor Deborah Hellman establishes a useful framework for distinguishing when discrimination is wrong, which can also be applied to determine when racial insults meet the threshold of extreme and outrageous. Under this framework, discrimination is wrong when it intends to demean, which she defines as, "to put down—to debase or degrade. To demean thus requires not only that one express disrespect for the equal humanity of the other but also that one be in a position such that this expression can subordinate the other."[280] Absent clearly racist language—e.g. racial slurs or demeaning references to skin color—a court would inquire whether the language was insulting and what non-racial justifications can be given for the defendant's language. At the summary judgment phase, a judge would inquire whether the alleged language is racially demeaning and the facts as plead show severe emotional harm. If the plaintiff survives summary judgment, the jury then determines whether the defendant has used racially insulting language that caused the plaintiff severe emotional harm. If the defendant can show other reasons for uttering an alleged racial insult that are not discriminatory, then there is no finding for racial insult and the language is not extreme and outrageous.

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[276] For a longer description of Thirteenth Amendment implications, see discussion *supra* section IV.E.

[277] Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 60–61, 60 n.83 (2012) (citing the legislative history of Title VII as supporting a limited definition of discrimination). Moreover, Courts have often not recognized racist remarks as proof of discriminatory intent under Title VII and have instead referred to them as "stray remarks" unrelated to employment decisions. *See* Jessica Clarke, *Explicit Bias*, 113 NW. L. REV. 505, 542–43 (2018) ("The stray remarks doctrine screens out remarks based on context (how close in time or related was the remark to the employment decision?), speaker (was it the decision-maker?), and content (how biased was the remark?). . . . Sometimes courts screen out statements of explicit bias because those statements were not made in the context of the particular employment decision or about the particular plaintiff.").

[278] *See* Henson, *supra* note 277, at 60–61.

[279] *See supra* sections I.A–B.

[280] DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 35 (2008).

Inquiries into whether language is racist must be grounded in historical and societal understandings. The harms of racist speech are largely a result of historical and societal racism and the experience of individuals in that society's interactions with these manifestations of racism.[281] Derogatory remarks about a racial group in a society that has no history of racism or antagonism toward that group likely would not result in race-based emotional harm. For example, calling someone a "dumb white" would not necessarily meet the criteria for intentional infliction of emotional distress, as white people have not historically been viewed as intellectually inferior or less intelligent due to their whiteness. A race-based insult that was grounded in historical stereotypes or other tropes, such as connecting Italian Americans with the mob or crime bosses, could succeed if the plaintiff experiences emotional harm and the defendant is not able to show a reason for using this comparison that does not pertain to the plaintiff's ethnicity or race. Thus, racist remarks against white people and non-minorities can be actionable. Further, as shown in the Title VII context, racist remarks between parties of the same race (such as disparaging comments about skin tone), are also actionable.

C. Application of Racial Insults as IIED

This Article proposes that courts examining alleged racial insults must inquire whether language was racially demeaning and, in the absence of overtly racist language, what non-racial justifications there were for the choice of language. This inquiry is not always clear or easy to decipher.

Recall *Walker v. Thompson*, where an employer referred to his African-American employees' hair as nappy and compared them to slaves and monkeys.[282] Rather than examining whether the defendant's statements were extreme and outrageous, a judge would question whether the defendant's language was a racial insult. In finding that the defendant intentionally weaponized racially discriminatory words and comparisons, the court would be obligated to find that the defendant's conduct was extreme and outrageous.

It is also worth revisiting *Gaiters v. Lynn*, discussed above.[283] Loretta Lynn shone a spotlight on Gaiters, a man employed at her concert. She stated, "If you people don't know what coal looks like, here is somebody who knows what coal is all about."[284] She added, "Black is beautiful, ain't it honey."[285] On one hand, this case could be viewed as a straightforward, unambiguous insult. In the original case, the Fourth Circuit ruled that while Lynn's words were racial allusions, they were "not manifestly disparaging or

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[281] Kretzmer, *supra* note 54, at 465.
[282] 214 F.3d 615, 619–21 (5th Cir. 2000).
[283] *See supra* notes 247–50 and accompanying text.
[284] Gaiters v. Lynn, 831 F.2d 51, 52 (4th Cir. 1987).
[285] *Id.*

demeaning of either race or color."[286] However, Title VII case law takes us in a different direction. If this were a Title VII case, a court would likely find that this language was overtly racist in nature and that referring to a Black man as coal is inherently demeaning. These references harken back to a history of dehumanizing and simultaneously fetishizing and objectifying African Americans. In *EEOC v. Family Dollar*, a plaintiff was awarded damages when her manager compared her skin-color to charcoal.[287] The parties thus recognized that such language was inherently discriminatory and merited damages in the employment setting. Putting aside that Gaiters was the target of racist language while at his workplace, it is unclear why courts are willing to recognize specific language as racist in an employment setting and permit recovery under Title VII, but not when pursuing IIED claims.

However, an allegation of a racial insult is sometimes murky, such as with microaggressions and more subtle forms of racial slights. Take, for example, the case of an African American student who is the valedictorian of her graduating class. On graduation day, a professor approaches her and beams, "We are so proud of you. You are a true credit to your people." It takes a moment for the impact of the professor's words to dawn upon her—this professor views her racial group as inferior and her hard work to become valedictorian somehow uplifts her entire race. At first blush, the professor possibly meant no harm, and even thought he was praising the student. He did not use any racist language and the term "people" could ostensibly describe any group to which the student belongs—her classmates, her gender, even her family.

I posit that the professor's words to the valedictorian are not actionable under IIED. What sets IIED apart from its less stringent cousin, negligent infliction of emotional distress, is that IIED would require that there is no ostensible reason behind one's language besides racism. Even if the professor's words imply that the student is less intelligent because of her race, his language is not overtly racist. IIED casts a narrow net; most who are on the receiving end of a microaggression know that racism and racial stereotypes are underlying these interactions. However, absent overt racial animus, subtle or even implicit racist interactions are challenging to prove and adjudicate.[288] Moreover, while I am not dismissing the substantial harms of implicit bias, that is beyond the focus of this piece.

Now, if the professor had said, instead, "Congratulations! I would have never thought a Black like you would come this far!" the student's case would be stronger. In this instance, she could point to him specifically assuming that she was less intelligent because of her race. Further, the meaning of his words do not appear complimentary—he is not congratulating her

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[286] *Id.*

[287] *See* EEOC, *supra* note 268.

[288] *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 *passim* (1987).

on her excellence, but rather on her exceeding his low expectations of her and her race. Additionally, the power dynamic between a professor and a student would support a finding of IIED.

Graham ex rel. Graham v. Guilderland Central School District, the case where a teacher referred to the only African American student in the classroom as a "n*****" in order to "convey his strong disapproval of such epithets" is also a murkier case of IIED liability.[289] Undoubtedly, the teacher would not have used a racial epithet against the student if not for her race. Additionally, the term "n*****" is inherently demeaning and rooted in the subordination of African Americans.[290] However, an inquiring court might be reluctant to impose liability on the teacher, for although his language was racist, perhaps he did not use it with racist malice. Alternatively, a court might view that all uses of the term "n*****" are inherently offensive. A possible third option might be a finding of negligent infliction of emotional distress—i.e. even if the teacher did not intend to cause emotional harm, he *should have known* that his words would cause harm.

The inquiry into racial insults as IIED is not a panacea—covert forms of racism, such as microaggressions and unconscious biases might not be recoverable. However, the most blatant forms of racial insults, which courts have largely failed to recognize as extreme and outrageous, would necessitate damages.

D. Severe Harm

Even in instances of clear, unambiguous racial insult, plaintiffs must still show severe emotional harm to recover from their trauma. Emotional harm can be measured through the race-based traumatic stress symptom scale developed by Dr. Robert Carter of Columbia University. Dr. Carter's scale differs from similar scales measuring post-traumatic stress disorder by requiring a traumatic racial encounter that is experienced as "sudden, out of one's control, and highly negative (emotionally painful)," and causes a "symptom cluster" that "must include intrusion, arousal and avoidance, as well as anxiety, anger, depression, low self-esteem, shame, and guilt."[291] Dr. Carter's study suggested that the scale could be used as a legal instrument "to investigate the experiences and emotional impact of targets of racial dis-

[289] 681 N.Y.S.2d 831, 832 (N.Y. App. Div. 1998).

[290] Ndjuoh MehChu, *Trademark Registrations of the N-word in the Wake of* Matal v. Tam (forthcoming); *see generally* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF THE TROUBLESOME WORD (2002); Jacquelyn Rahman, *The N Word: Its History and Use in the African American Community*, 40 J. ENGL. LING. 137 (2012); Calvin D. Fogle, *The Etymology, Evolution and Social Acceptability of "Nigger," "Negro," and "Nigga"* (2013), https://ssrn.com/abstract=2326274, *archived at* https://perma.cc/8LVV-S825.

[291] *See* Carter et al., *supra* note 45, at 1–9.

crimination," when individuals lodge legal or employment related complaints.[292]

Other proposals for civil liability for racist speech have called for solutions that would not require an objective showing of harm. For example, Delgado has argued that the dignitary harm of a racial insult is enough to warrant recovery and that no proof of emotional damage is necessary.[293] Alexander Brown has also described the harms of racial insults as dignitary harms, which he describes as complex harms that can be subconsciously held, i.e. the target of racial insults can only be made aware of them when asked.[294] He therefore proposes a test that captures the "metaphysical dimensions" of degradation and humiliation stemming from racist speech, and "subjective elements which can target the psychological dimensions, whilst at the same time reflecting more abstract ideas of human dignity and civic dignity as well as the relevant social context."[295] To recover for degradation, Brown suggests that the plaintiff must "have a feeling or sense that they were degraded" that is a direct result of the racial insult and that "the plaintiff experienced, even if momentarily, a lapse in, or failure of, dignified bearing."[296] While these prongs would likely address the emotional harms of racial insults, allowing judges to adjudicate over the subjective feelings of victims of racial harms could hinder recovery. As previous sections have shown, judges are quick to dismiss the harms of racial insults as regrettable, but not serious enough to impose liability. Requiring that judges take into account a plaintiff's subjective feelings on dignity might allow judges substantial leeway to disregard plaintiffs' harms. A scientifically grounded and peer reviewed race-based traumatic stress symptom scale, in contrast, would limit judges' ability to cast aside the genuine harms of racial insults.

Conclusion

In the age of mass incarceration, endemic police brutality, entrenched economic inequalities, and other symptoms of systemic racism, it is reasonable for participants in the anti-racism project to question whether energies are best-expended pursuing racial insult IIED claims. The harms of racial insults are undoubtedly acute, but the remedies are individualized and private, impacting one plaintiff at a time, and are therefore unlikely to result in systemic change. And certainly, only those with means will pursue an IIED claim against those who use racist speech, thus limiting the ability of the tort to improve the lives of the most vulnerable members of society.

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[292] *Id.* at 8.

[293] Delgado, *supra* note 6, at 143–45.

[294] *See* Alexander Brown, *Hate Speech as Degradation and Humiliation*, 9 Ala. C.R. & C.L. L. Rev. 1, 28 (2018) (noting the complex nature of dignitary harms and acknowledging that these harms can be "only dimly conscious and only become conscious when asked").

[295] *Id.* at 29.

[296] *Id.* at 35–36.

Yet, there is an expressive function behind a legal remedy for racist speech. Recognizing racist speech as an IIED "announces or signals a change in social norms unaccompanied by much in the way of enforcement activity."[297] Professor Cass Sunstein describes the expressive function of law as, "reconstruct[ing] norms and the social meaning of action. . . . [resulting] in large scale changes in behavior."[298] Legal acknowledgement of the harms of racism can elevate our understanding of them as severe, pernicious, and lasting, and perhaps the threat of legal action will be enough to stymie targeted racist vitriol. Law has the power to shape social mores, impacting culture and behavior. To be sure, recognizing racist speech as IIED will not result in widespread vindication in the courts for all victims of racism, but perhaps it will shift the norms of society from one that recognizes racist language as not just reprehensible, but also worthy of legal reprimand.

So, while words' wounds are neither the most severe nor pressing racist harm of our time, a legal remedy for racial insults can alter societal behavior and make racist language not just worthy of ostracism, but also legally consequential.

Finally, the status quo, which determines that racism is neither intolerable nor outrageous, entrenches and emboldens racism as acceptable and inevitable conduct that minorities must exclusively endure. Accepting racial insults as a form of IIED signals to the American populace that gone are the days when racially harassing and harmful speech can go unpunished.

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[297] Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021, 2032 (1996).

[298] *Id.* at 2032–33.