

MODERN RACISM BUT OLD-FASHIONED IIED: HOW INCONGRUOUS INJURY STANDARDS DENY “THICK SKIN” PLAINTIFFS REDRESS FOR RACISM AND ETHNOVIOLENCE

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“To be a Negro in this country and to be relatively conscious is to be in a rage almost all the time.” -James Baldwin

I. INTRODUCTION

On March 4, 2000, Delois Turner wanted a donut and a cup of coffee. Ms. Turner, a fifty-seven year old Black woman from New York, entered Nancy Wong’s donut shop to purchase her pastry and beverage.¹ Unfortunately, the donut Wong gave Ms. Turner was stale, so Ms. Turner asked Wong for a fresher donut.² Wong refused, insisting her donuts were baked fresh daily; Ms. Turner responded that she did not doubt that was the case, but her donut was nonetheless stale and refused to pay for the stale donut.³

But, instead of providing Ms. Turner a fresher donut, Wong repeatedly called Ms. Turner a “black nigger from Philadelphia.”⁴ Wong then went on a tirade laden with racial invectives in front of the other shop patrons, all of whom were White.⁵ She railed, “you black niggers come in here, give me a hard time. White people don’t give me a hard time. White people nice people.”⁶ Wong threatened to call the police and demanded Ms. Turner “get out of [her] store.”⁷

Ms. Turner reported the incident to the police, who charged Wong with an indictable bias crime and brought Wong in for processing that same day; while at the station being booked, Wong filed a complaint against Ms.

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¹ Turner v. Wong, 832 A.2d 340, 345 (N.J. Super. Ct. App. Div. 2005).

² *Id.* at 346.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Wong, 832 A.2d at 346. Wong ultimately did not call the police on Ms. Turner after Wong’s son stepped in to smooth things over, voided the donut, and asked Ms. Turner to just pay for the coffee, which she did. *Id.*

Turner for theft of the donut.⁸ The county prosecutor dismissed the theft complaint against Ms. Turner; but the municipal judge convicted Wong of a petty disorderly offense of harassment and fined her \$250, finding “that defendant had used the word ‘nigger’ several times in a loud voice and had accused black people of giving her a hard time, that defendant’s son even tried to quiet her down, and that the words were uttered intentionally to cause [Ms. Turner] alarm.”⁹

Due to the incident that day, Ms. Turner was “embarrassed, shocked, mortified, hurt, angry and humiliated.”¹⁰ Further, “her self esteem had deteriorated and . . . she viewed herself differently.”¹¹ For reasons unknown, Ms. Turner did not seek therapeutic or psychiatric treatment.¹² She did, however, bring suit against Wong for the tort of intentional infliction of emotional distress (IIED).¹³ To establish a claim for IIED, Ms. Turner needed to show that “[1] the defendant acted intentionally or recklessly, both in doing the act and producing emotional distress; [2] the conduct was so outrageous in character and extreme in degree as to go beyond all bounds of decency; [3] the defendant’s actions were the proximate cause of the emotional distress; and [4] the distress suffered was so severe that no reasonable person could be expected to endure it.”¹⁴ Ms. Turner alleged in her suit that “proof of [her] humiliation, embarrassment and disbelief, caused by racial slurs, was sufficient to establish a prima facie case of [IIED].”¹⁵

The court, however, dismissed her claim in summary judgment on the sole basis that Ms. Turner did not suffer “severe emotional distress,” and the appellate court affirmed the dismissal: Ms. Turner “merely claimed that she felt humiliated and mortified because of the racial insults,” and “humiliation and indignity . . . fall far short of sustaining a cause of action for the intentional tort.”¹⁶ The appellate court found that since Ms. Turner “offer[ed no] medical or expert proof to corroborate her feelings of lost self-esteem or anger,” and since her “claimed distress never manifested itself physically or objectively by way of headaches, loss of sleep, inability to perform her daily functions, or any condition that was professionally diagnosed,” there was no genuine issue of material fact regarding the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Wong*, 832 A.2d at 346.

¹⁴ *Id.* at 347 (citing *Buckley v. Trenton Sav. Fund Soc’y*, 544 A.2d 857, 863 (1988)).

¹⁵ *Id.*

¹⁶ *Id.* at 349.

sufficiency of Ms. Turner's emotional distress.¹⁷ Ms. Turner was therefore entitled to no redress for the damaging racial epithets hurled against her.

Many targets of racism and ethnoviolence, like Ms. Turner, seek redress in the courts—not merely to obtain compensatory damages for the physical, mental, and emotional injuries they suffer, but also as a vindication of their dignity and inherent humanity. Many of these searches for compensation and vindication take the shape of IIED claims, as IIED is uniquely situated as a dignitary tort to redress the psychological and emotional harms of racism and ethnoviolence. Unfortunately, however, while racism has evolved to remain insidiously vibrant in the modern United States, IIED law has not. IIED law has not substantively changed in the last several decades, and for targets of racism and ethnoviolence like Ms. Turner, IIED's antiquated nature can impede plaintiffs' pursuit of redress. Thus, while racism and its hateful ilk are not a phenomenon of antiquity—they are alive, thriving, and injuring people of color today¹⁸—their targets are decreasingly able to seek recompense for their injuries in court through IIED suits.

Recent psychiatric scholarship suggests IIED's "severe emotional distress" injury standard can completely bar recovery in racism and ethnoviolence cases. Many people of color, in response to decades of chronic racism, develop "thick skins." Consequently, they will not manifest the mental and emotional injuries of racist incidents in the "right way" to enable them to sue because their experiences do not fit within the rigid confines of pathological disorders. The growing acceptance in the psychological community for reconceiving of the lasting trauma of chronic racism necessitates a consonant reevaluation of the legal IIED injury standard.

¹⁷ *Id.*

¹⁸ For instance, in 2016, there were 3,489 reported hate crime incidents motivated by race. *Incidents, Offenses, Victims, and Known Offenders by Bias Motivation, 2016*, 2016 FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/hate-crime/2016/tables/table-1> (last visited Sept. 13, 2018). This alarmingly high number is doubly troubling because even modest estimates contend less than a quarter of all incidences of racism or ethnoviolence are reported to any authority. RICHARD T. SCHAEFER, *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY* 471 (2008). Further, as of 2017, there are 954 hate groups in America, up from 784 in 2014; from 2016 to 2017 there was a twenty-two percent increase in neo-Nazi hate groups alone; and anti-Muslim groups rose for a third straight year. *Hate Map*, S. POVERTY L. CENT., <https://www.splcenter.org/hate-map> (last visited Sept. 13, 2018). Additionally, in 2017, there were 28,528 charges brought by the Equal Employment Opportunity Commission (EEOC) for race discrimination, with an additional 3,240 on the basis of color; the statistics for race-based charges are consistent with the late 1990s, and those for color-based charges have steadily increased over the last two decades. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017*, U.S. EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 13, 2018).

This Comment proposes that new standard. Part II reviews the development of IIED law and its historical use as a means of redress for racism and ethnoviolence; it also briefly sketches the arc of racial animus from old-fashioned to modern racism in order to better understand how IIED law has or has not evolved to respond to new realities. Part III presents new theories evaluating the psychological and emotional toll of racism and ethnoviolence; it concentrates on literature chronicling the cumulative effect of chronic racism, comparing the injuries of racism against the symptomology of post-traumatic stress disorder (PTSD), and proposing a new theory that the injuries of racism produce a form of traumatic stress distinct from any other form of trauma. Part IV analyzes the ways in which the existing IIED injury standard of “severe emotional distress” can work to the detriment of “thick skin” plaintiffs by failing to accommodate the unique injuries of chronic racism. Part V proposes that incorporating race-based traumatic stress (RBTS) theory into the IIED injury standard in cases involving racism and ethnoviolence can serve to better provide plaintiffs redress by considering the harms of racism to provide a realistic injury standard. Finally, Part VI considers the implications of including RBTS in an IIED injury evaluation, focusing particularly on the potentiality of a floodgates problem.

Although this Comment solely focuses on plaintiffs’ issues satisfying the injury prong of racism- and ethnoviolence-based IIED claims, we cannot overlook that plaintiffs face several additional barriers to bringing a successful claim. Extended consideration of these barriers is outside the scope of this Comment, but briefly acknowledging these structural impediments is valuable context. Firstly, apart from the injury standard, scholars cite the outrageousness requirement as the greatest barrier to plaintiffs’ recovery;¹⁹ for targets of ethnoviolence, the outrageousness requirement can bar recovery because many jurisdictions have held racial harassment alone to be insufficiently atrocious or intolerable in a civilized society to be actionable as IIED.²⁰ Additionally, the First Amendment can

¹⁹ See, e.g., Alexander Brown, *Rethorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 1, 7–8 (2018); Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 943–46 (2005); Dean M. Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267, 277–78 (1982).

²⁰ E.g., *Turley v. ISG Lackawanna, Inc.*, 803 F. Supp. 2d 217, 255 (W.D.N.Y. 2011) (“New York courts have made it clear that the ‘use of religious, ethnic, or racial aspersions to denigrate a person . . . is not sufficiently egregious conduct to state a claim’ of intentional infliction of emotional distress.” (quoting *Graham ex rel. Graham v. Guilderland Cent. School Dist.*, 681 N.Y.S.2d 831, 832 (N.Y. App. Div. 1998))); *Adams v. High Purity Sys.*, No. 1:09cv354, 2009 U.S. Dist. LEXIS 80979, at *26–*28 (E.D. Va. July 2, 2009) (holding that racially disparaging remarks and termination motivated by race are conduct “clearly not outrageous or intolerable to state an IIED claim”); *Jackson v. Lehigh Valley Physicians*

bar recovery: when racism and ethnoviolence is expressed as racial slurs, verbal harassment, or cyber-attacks, defendants may try to avoid IIED liability by claiming their speech was protected. Further, damages calculations can be an impediment. For instance, some scholars query how liability ought to be imposed against a single defendant for injuries resulting from ethnoviolence when the plaintiff was particularly susceptible to such injury due to chronic racism; this question implicates potentially-convoluted damages theories such as multiple causation, joint venture, and eggshell plaintiff.²¹ Although each of these impediments require more than this cursory mention to do them justice, recognizing the potential stumbling blocks of outrageousness, the First Amendment, and damages²² for a plaintiff's claim illustrates the many gatekeepers of IIED beyond merely the injury standard.

II. THE TORT OF OUTRAGE: THE DEVELOPMENT OF IIED AS REDRESS FOR RACISM AND ETHNOVIOLENCE

The gravamen of an IIED injury is recompense for an affront to the plaintiff's dignity. Tort law strongly privileges claims for physical injuries over those for emotional injuries due to historical distrust of "pure" emotional distress claims (i.e., those without a predicate physical injury) as spurious and frivolous.²³ IIED, as a dignitary tort, is the most significant

Grp., No. 08-3043, 2009 U.S. Dist. LEXIS 6936, at *300 (E.D. Pa. Jan. 30, 2009) ("Courts in this District have repeatedly found that racial discrimination alone does not meet the 'extreme and outrageous conduct' standard necessary to state a claim for intentional infliction of emotional distress." (quoting *Hargraves v. City of Philadelphia*, No. 05-4759, 2007 U.S. Dist. LEXIS 31951, at *10 (E.D. Pa. Apr. 26, 2007))). *But see* *Taylor v. Metzger*, 706 A.2d 685, 694–96 (1998) (holding that an employer's reference to a Black employee as a "jungle bunny" could be sufficiently extreme and outrageous to form the basis of an IIED claim).

²¹ See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 168–70 (1982); Nelson, *supra* note 19, at 959.

²² It is also noteworthy that many scholars have expressed concern that the calculation of tort damages can reify institutional discrimination and replicate existing racial hierarchies; for instance, compensatory damages calculating expected lifetime earnings can produce gross disparities along racial lines, given women of color earn only a fraction of every dollar a similarly-situated white man makes. While these disparities are already troubling in the everyday operation of tort liability, they are doubly reprehensible when race-disparate damages calculations are used as remedies for race-disparate treatment or harassment. For a careful analysis of this issue, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017); Jennifer Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. LITIG. 37 (2007).

²³ See Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 1001–05 (2008); Robert L. Rabin, *Emotional Distress in Tort Law*, 44 WAKE FOREST L. REV. 1197 (2009).

exception to this paradigm.²⁴ Dignitary torts protect plaintiffs “against interferences with liberty and personal autonomy; protect[] against speech or conduct that embarrasses, humiliates, or shows blatant disrespect; and protect[] against communications that diminish the regard that others have for the plaintiff.”²⁵ In an IIED claim, “[a]n 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.”²⁶ Thus, IIED is a dignitary tort in that the defendant’s outrageous conduct inflicted emotional distress on the plaintiff which was “demeaning, contemptuous, or disrespectful”;²⁷ and, by making conduct which “deeply call[s] into question the worth—the dignity—of the individual in question actionable as an IIED,”²⁸ the tort protects plaintiffs’ “mental tranquility and peace of mind.”²⁹

Consequently, IIED, as a dignitary tort, is uniquely situated to redress racism and ethnoviolence because prejudice is, fundamentally, an assault on dignity.³⁰ Admittedly, in its early days, IIED was principally used to protect “white racial privilege by allowing claims of white plaintiffs who alleged injury arising from contacts with blacks that they found objectionable”³¹ because the outrageousness element is inherently a

²⁴ Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2144 (2007).

²⁵ Kenneth S. Abraham & G. Edward White, *The Puzzle of Dignitary Torts*, 104 CORNELL L. REV. 319, 354 (2019).

²⁶ RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012).

²⁷ Abraham & White, *supra* note 25, at 356.

²⁸ *Id.* at 377.

²⁹ Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1, 32 (2002).

³⁰ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 677 (1987) (Brennan, J., dissenting) (“Any act of racism doubtless inflicts personal injury. At its core, it is an act of violence—a denial of another’s right to equal dignity.”); see also Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005) (“The struggle for racial justice in America . . . is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color. The concepts of dignity and subordination are powerfully linked. The harm of racial subordination includes not only dignitary harms such as intentional and unintentional racist acts, but material injuries such as diminished health, wealth, income, employment and social status. Racial subordination, however, takes place within and against a framework of dignity. The creation, toleration, or defense of racially subordinating features of society—features that have the effect of entrenching second-class citizenship for members of such socially disfavored groups—are discretionary acts, and each of these discretionary acts rests upon perceptions of humanity and social worth, or dignity.”).

³¹ Chamallas, *supra* note 24, at 2115, 2167–68 (“During this period, the protection against racial insult or race-based humiliation was more likely to be afforded to white rather than minority plaintiffs. . . . On issues of race, tort law tended to reinforce white supremacy by providing white claimants damages for the ‘outrage’ of being treated with insufficient

normative determination based on the prevailing social mores of the time.³² After the Civil Rights Era, though, IIED became prominent as a strategy for plaintiffs of color to seek compensation for racial harassment or violence.³³ In 1964, James J. Brown and Carl L. Stern were the first to posit that IIED could remedy the psychological harms of racist hate speech.³⁴ Dean M. Richardson expounded upon the proposal, advocating IIED torts could redress racial discrimination and harassment;³⁵ and Richard Delgado³⁶ and Mari Matsuda³⁷ further popularized the strategy. The 1970s and '80s saw several successful recoveries for victims of racist incidents.³⁸ Indeed, even Justice Marshall suggested in a 1974 Supreme Court opinion that IIED could be used to redress racial discrimination.³⁹ In the last several decades, this strategy has become increasingly popular, and scholars have suggested IIED torts to provide remedy for prejudice in a

deference by black attendants or for mistakenly being assigned to a 'colored' facility.”).

³² Chamallas, *supra* note 24, at 2125–26 (The definition of outrageousness within the meaning of an IIED claim “is extremely fluid and invariably responds to changing cultural sensibilities.”).

³³ Chamallas, *supra* note 24, at 2121.

³⁴ James Jay Brown & Carl L. Stern, *Group Defamation in the U.S.A.*, 13 CLEV.-MARSHALL L. REV. 7, 29–32 (1964) (proposing that IIEDs or their predecessor claims can provide redress for the “mental injury” and “emotional distress” of racially defamatory and derogatory public disparagement).

³⁵ Richardson, *supra* note 19, at 267, 282.

³⁶ Delgado, *supra* note 21, at 134 (proposing a new tort for racial insult that draws from the premise of IIED claims).

³⁷ Mari J. Matsuda, *Public Response to Hate Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2360–61 (1989) (drawing on Delgado's tort, proposing a doctrinal shift away from First Amendment absolutism for hate speech due to its deleterious impact, and suggesting use of torts to combat “racist hate propaganda”).

³⁸ Brown, *supra* note 19, at 7 (citing *Wade v. Orange Cty. Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988) (involving a Black correctional officer suing for emotional distress and humiliation due to continued workplace racial harassment); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 911 (8th Cir. 1986) (involving a Black welder who suffered years of “discriminatory terms and conditions of employment because of his race” which ultimately culminated in his being intentionally fired because of his race); *Wiggs v. Courshon*, 355 F. Supp. 206, 206–11 (S.D. Fla. 1973) (involving a Black family suing for “mental anguish and emotional distress” after a restaurant waitress racially abused them, using the words “black son of a bitch” and “bunch of niggers,” in a dispute regarding a food order); *Agarwal v. Johnson*, 603 P.2d 58, 63–64 (Cal. 1979) (involving a man of Indian descent suing for emotional distress when a supervisor called him a “black nigger” and a “member of an inferior race”); *Contreras v. Crown Zellerbach, Corp.*, 565 P.2d 1173, 1174 (Wash. 1977) (involving a Mexican American man suing his employer for humiliation and embarrassment due to coworkers' racial jokes, slurs, and comments against him)).

³⁹ *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) (“An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that ‘under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.’” (citing C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 961 (2d ed. 1969))).

variety of contexts.⁴⁰

Of course, the Civil Rights Era is also noteworthy as the moment in U.S. history when social attitudes toward racism shifted towards egalitarianism. Rather than disappear, however, racism adapted to a subtler face.⁴¹ The evolution of racism is perhaps best exemplified by Lee Atwater's (President Reagan's campaign strategist's) description of the GOP Southern Strategy:

You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites You follow me—because obviously sitting around saying, "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."⁴²

Although this shift away from overt racism is well-recognized in our collective recollection of history, it is worthwhile to briefly recognize here the extent of the change and the corresponding evolution of academic terminology surrounding race. Racism is a "multilevel system of oppression based on the social categories of race whereby the superordinate group (traditionally whites in the United States) subordinates members of other racial groups using overt and covert methods."⁴³ Ethnoviolence is an

⁴⁰ See, e.g., Smith, *supra* note 29 (redress for hate groups' bias motivated cyber-attacks and online harassment); Meredith B. Stewart, *Outrage in the Workplace: Using the Tort of Intentional Infliction of Emotional Distress to Combat Employer Abuse of Immigrant Workers*, 41 U. MEM. L. REV. 187 (2010) (redress for exploitation of immigrant workers, such as wage theft, abuse and mistreatment, or substandard working conditions); Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996) (redress for Holocaust denial); Aaron Goldstein, Note, *Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots*, 3 J. GENDER RACE & JUST. 689 (2000) (to eliminate Native American mascots because, as a racist caricature, they are analogous to a racial epithet or racist harassment).

⁴¹ W. Carson Byrd, *Conflating Apples and Oranges: Understanding Modern Forms of Racism*, 5 SOC. COMPASS 1005, 1007 (2011); Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731, 731–32 (2005).

⁴² Bob Herbert, *Impossible, Ridiculous, Repugnant*, N.Y. TIMES (Oct. 6, 2005), <https://www.nytimes.com/2005/10/06/opinion/impossible-ridiculous-repugnant.html>.

⁴³ Byrd, *supra* note 41, at 1008. Racism exists at individual, institutional, and cultural levels. Individual racism is interpersonal discrimination; for instance, perpetration of hate crimes against people of color or refusal to rent to an interracial couple. DERALD WING SUE, MICROAGGRESSIONS IN DAILY LIFE 140–41 (2011). Institutional racism resides in the policies and practices of governments, courts, businesses, schools, etc., to subordinate people of color and benefit white communities. *Id.* at 141. Although Black people are no longer legally considered three-fifths of a person, the "separate but equal" doctrine is no longer good law, Asians may own land, and Native Americans may now practice their

act motivated by group prejudice that aims to cause physical or psychological injury;⁴⁴ it can include harassment, intimidation, vandalism, or physical attacks.⁴⁵

Racism and ethnoviolence still exist today, but their manifestations have changed from overt expressions (e.g., hate crimes, racial slurs, etc.) to more invisible and subtle ones, some of which even operate below the level of consciousness.⁴⁶ This represents the transition from old-fashioned to modern racism.⁴⁷ Old-fashioned racism—which defines people of color as biologically inferior and endorses explicit prejudice⁴⁸—is decreasingly acceptable today due to generalized approval of egalitarianism.⁴⁹ This is not to say hate crimes and overt racism are gone—indeed, Ms. Turner’s story was in 2005, and the United States has seen a sharp rise in hate crimes since the 2016 election⁵⁰—but old-fashioned racism is now widely

religions, institutional racism continues in disproportionate incarceration rates, discriminatory bank lending practices, racial profiling, environmental racism that allows factories to pollute minority neighborhoods while preserving the purity of wealthier White neighborhoods, de facto housing segregation, and so on. *Id.* Finally, cultural racism “is the overarching umbrella under which both individual and institutional racism flourish”: cultural racism venerates and propagates a worldview in which one group’s cultural heritage—White Western Europeans’—is superior to all others.’ resulting in the imposition of those “superior” cultural standards upon other groups. *Id.* Thus, cultural racism is how the legacy of Manifest Destiny became a preference for individualism, capitalism, Christianity, the English language, and Eurocentric beauty standards, all of which persists to this day. *Id.*

⁴⁴ RICHARD T. SCHAEFER, *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY* 470 (2008).

⁴⁵ *Id.* Although this definition resembles definitions of hate crimes, social scientists prefer the term ethnoviolence because it is broader: hate crimes have specific legal and statutory definitions, but by divorcing ethnoviolence from those criminological nuances, “ethnoviolence” more directly and simply connects the interpersonal violence it references with race and ethnic relations. *Id.* at 471.

⁴⁶ SUE, *supra* note 43, at 8–9.

⁴⁷ SUE, *supra* note 43, at 142–43.

⁴⁸ Tarman & Sears, *supra* note 41, at 737.

⁴⁹ Bertram Gawronski, Paula M. Brochu, Rajees Sritharan & Fritz Strack, *Cognitive Consistency in Prejudice-Related Belief Systems: Integrating Old-Fashioned, Modern, Aversive, and Implicit Forms of Prejudice*, in *COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION* 369, 369–71 (Bertram Gawronski & Fritz Strack eds., 2012).

⁵⁰ Rachel Janik, *Hate Crimes Are Up in Major U.S. Cities for the Fourth Year in a Row*, *Study Says*, S. POVERTY L. CTR. (July 5, 2018), <https://www.splcenter.org/hatewatch/2018/07/05/hate-crimes-are-major-us-cities-fourth-year-row-study-says>; Richard Cohen, *Hate Crimes Rise for Second Straight Year; Anti-Muslim Violence Soars Amid President Trump’s Xenophobic Rhetoric*, S. POVERTY LAW CTR. (Nov. 13, 2017), <https://www.splcenter.org/news/2017/11/13/hate-crimes-rise-second-straight-year-anti-muslim-violence-soars-amid-president-trumps>; Aaron Williams, *Hate Crimes Rose the Day After Trump Was Elected, FBI Data Show*, WASH. POST (Mar. 23, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?utm_term=.26bcbe61bfb4.

condemned as “illegal, immoral, and contrary to the democratic ideals we hold.”⁵¹ Comparatively, modern racism operates “in such a manner as to preserve the nonprejudiced self-image of Whites by offering them convenient rationalizations for their actions.”⁵² Modern racists wholeheartedly espouse egalitarianism, sympathize with victims of past racial injustice, and believe they are non-prejudiced; yet, they harbor unconscious negative beliefs and feelings towards people of color.⁵³

One form of modern racism especially relevant here is microaggressions. Microaggressions are “the brief and commonplace daily verbal, behavioral, and environmental indignities . . . that communicate hostile, derogatory, or negative . . . slights and insults to the target person or group.”⁵⁴ They include microinsults (which demean the victim’s racial heritage through stereotypes or insensitivity, often centering around themes such as ascribing victims a lack of intelligence, treating them as second-class citizens or lesser persons, pathologizing the values and communication styles of people of color as abnormal, and/or presuming they are criminal or dangerous because of their race) and microinvalidations (which exclude, negate, or nullify the thoughts, feelings, or experienced realities of people of color).⁵⁵ Microaggressions are emblematic of modern racism in that the communicator does not necessarily *consciously* intend to perpetuate racism because that would contradict their non-racist self-image, but their targets still decisively suffer the psychological and emotional toll of the expressed racism.

III. THE HARM OF RACISM AND ETHNOVIOLENCE

Since at least *Brown v. Board of Education* in 1954, the law has recognized the psychological and emotional injury of racism.⁵⁶ But, even then, the law was nearly a decade behind the findings it was recognizing. And this lumbering pace of recognition has continued so that modern understandings of racism and ethnviolence have yet to see their reflections

⁵¹ SUE, *supra* note 43, at 141.

⁵² SUE, *supra* note 43, at 145.

⁵³ John F. Dovidio, Samuel L. Gartner, Adam R. Pearson, Chris G. Sibley & Fiona Kate Barlow, *Aversive Racism and Contemporary Bias*, in *THE CAMBRIDGE HANDBOOK OF THE PSYCHOLOGY OF PREJUDICE* 267, 270–71 (Chris G. Sibley & Fiona Kate Barlow eds., 2016).

⁵⁴ SUE, *supra* note 43, at 5.

⁵⁵ SUE, *supra* note 43, at 31, 35–39.

⁵⁶ 347 U.S. 483, 494 (1954) (citing a number of empirical psychological studies on the detrimental impact of segregation and finding that “[t]o separate [children of color in grade and high schools] from others of similar age and qualifications solely because of their race 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”).

in the law. Microaggressions, for instance, were first studied in 1970⁵⁷ and became part of the academic mainstream in the 2000s;⁵⁸ as of late 2018, however, only *four* cases have ever, even cursorily, used the term “microaggression”—all in the last three years and none to evaluate whether a plaintiff suffered a cognizable injury.⁵⁹

The scientific community has a fuller history of recognizing the physiological, psychological, and emotional impact of racism. Psychologists have found exposure to racist incidents⁶⁰ heightens physiological reactivity—such as increased heart rate or blood pressure⁶¹—leading to hypertension, coronary heart disease, diabetes, asthma, allergies,⁶² coronary artery calcification, increases in body mass index (BMI), giving birth to lower weight infants,⁶³ and a depressed immune system consequently more susceptible to microbial disease.⁶⁴ The cumulative effect of racism’s chronic stress also directly contributes to

⁵⁷ SUE, *supra* note 43, at xvi.

⁵⁸ Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSP. ON PSYCHOL. SCI. 138, 141 (2017).

⁵⁹ *Kulikowski v. Payscale*, No. 18-cv-00702-MSK-MEH, 2018 WL 3209109, at *1 (D. Colo. June 29, 2018) (involving an employee suing under multiple civil rights acts for post-traumatic stress disorder she alleges was caused by a “microaggression” in a leadership training workshop at work); *Vejo v. Portland Pub. Schs.*, 204 F. Supp. 3d 1149, 1161 (D. Or. 2016) (involving a challenge to an expert witness’s qualifications to testify on the impact of microaggressions on the plaintiff), *Gadling-Cole v. Bd. of Trs. of the Univ. of Ala.*, No. 2:12-CV-2882-SLB, 2015 U.S. Dist. LEXIS 127161, at *52 n.27 (N.D. Ala. Sept. 23, 2015) (involving a professor suing her former employer for allegedly discriminating against her, including engaging in racial microaggressions); *Kiani v. Huha*, No. A18-0157, 2018 Minn. App. Unpub. LEXIS 873, at *10–12 (Minn. Ct. App. Oct. 8, 2018) (involving a plaintiff appealing the lower court’s denial of her relief on the basis that the judge below was biased and engaged in ethnicity-based microaggressions against her).

⁶⁰ Racist incidents are “cognitive/affective assaults on one’s ethnic self-identification. These assaults can be verbal attacks, physical attacks, or threats to livelihood The assaults can be sudden or systematic, intentional or unintentional, or overt or ambiguous and can be perpetrated by an individual (individual racism) or institution (institutional racism) or by cultural hegemony (cultural racism).” Thema Bryant-Davis & Carlota Ocampo, *Racist Incident-Based Trauma*, 33 COUNSELING PSYCHOLOGIST 479, 480 (2005) (citations omitted).

⁶¹ Jules P. Harrell, Sadiki Hall & James Taliaferro, *Physiological Responses to Racism and Discrimination: An Assessment of the Evidence*, 93 AM. J. PUB. HEALTH 243 (2003).

⁶² SUE, *supra* note 43, at 97–98. *See also* Laura Smart Richman, Jolynn Pek, Elizabeth Pascoe & Daniel J. Bauer, *The Effects of Perceived Discrimination on Ambulatory Blood Pressure and Affective Responses to Interpersonal Stress Modeled Over 24 Hours*, 29 HEALTH PSYCHOL. 403, 403, 408 (2010) (finding that individuals who experienced more chronic racial discrimination had more negative daily affect, higher levels of depression and anxiety, and cardiovascular dysregulation putting them at risk for hypertension and coronary heart disease).

⁶³ Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism*, 12 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 9–10 (2012).

⁶⁴ Nelson, *supra* note 19, at 927.

depression and anxiety; “diminishes the quality of life; lowers life satisfaction, happiness, and self-esteem; increases cultural mistrust, feelings of alienation, anxiety, and feelings of loss, helplessness, [paranoia,] and racial rage; and may result in fatigue and exhaustion.”⁶⁵

Further, not only is there widespread consensus that hate crimes can severely traumatize victims to produce PTSD and other DSM disorders, there is also growing consensus that a lifetime of *microaggressions*—a lifetime of the quintessential expressions of modern racism—can have an equally detrimental impact.⁶⁶ Some research even suggests microaggressions are *more* distressing than ordinary stressors because (1) microaggressions occur more frequently and tend to last longer while ordinary stressors are time-limited, and (2) microaggressions are more potent because they are symbols of historic oppression and are often ambiguous where ordinary stressors are easily traceable to a root cause.⁶⁷ In other words, even where one microaggression has minimal effect, the cumulative impact of a lifetime of microaggressions can be destructive enough to produce the same sort of traumatic stress as a hate crime.⁶⁸ Thus, reactions to *both* racial micro- and macroaggressions can include trauma symptoms such as flashbacks and nightmares, loss of memory and concentration, depression, anxiety, hypervigilance, trouble sleeping, decreased appetite, irritability, gambling problems or substance abuse, and isolation.⁶⁹ Indeed, some studies find nearly three-quarters of people who face racial discrimination have lasting psychological effects, many of which are consistent with trauma reactions.⁷⁰

A. Racist Incidents and Post-Traumatic Stress Disorder

Many scholars in the early 2000s advocated to conceptualize racist incidents as a form of trauma⁷¹ in the Diagnostic and Statistical Manual of

⁶⁵ SUE, *supra* note 43, at 99–100, 149.

⁶⁶ SUE, *supra* note 43, at 91–93.

⁶⁷ SUE, *supra* note 43, at 96.

⁶⁸ SUE, *supra* note 43, at 6–7, 51, 150.

⁶⁹ Wahiba M. Abu-Ras & Zulema E. Suarez, *Muslim Men and Women's Perception of Discrimination, Hate Crimes, and PTSD Symptoms Post 9/11*, 15 *TRAUMATOLOGY* 48, 49 (2009); Bonnie Lee, Peter Kellett, Kamal Seghal & Corina Van den Berg, *Breaking the Silence of Racism Injuries*, 14 *INT'L J. MIGRATION, HEALTH & SOC. CARE* 1, 6 (2018) (citations omitted). For further analysis of the physiological, psychological, and emotional harms of racism, see *THE COST OF RACISM FOR PEOPLE OF COLOR* (Alvin N. Alvarez, Christopher T. H. Liang & Helen A. Neville, eds., 2016).

⁷⁰ Carter & Scheuermann, *supra* note 63, at 14 (citations omitted).

⁷¹ “Although trauma is a form of stress, it is distinct in that it is a more severe form of stress understood in terms of both the nature of the stressor(s) and the type of reaction to the stressor(s).” Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 *COUNSELING PSYCHOLOGIST*

Mental Disorders (DSM; the comprehensive codification of all formally recognized psychological disorders), namely through expanding the definition of PTSD. In the most recent edition of the DSM, the DSM-5, PTSD is caused by “exposure to actual or threatened death, serious injury, or sexual violence.”⁷² PTSD leads to intrusion symptoms (e.g., flashbacks, nightmares, and/or intrusive and recurrent memories of the traumatic event(s)), as well as avoidance of stimuli associated with the traumatic event(s) and negative changes in cognition and mood related to the traumatic event(s) (e.g., difficulty remembering the event, self-blame or self-loathing, diminished interest in significant activities, inability to experience positive emotions, feelings of detachment and estrangement, or persistent fear, horror, anger, guilt, shame, or other negative emotional states).⁷³ PTSD also manifests in “marked alterations in arousal and reactivity associated with the traumatic event(s) . . . as evidenced by” (1) “irritable behavior and angry outbursts (with little or no provocation)”; (2) “reckless or self-destructive behavior”; (3) “hypervigilance”; (4) “exaggerated startle response”; (5) “problems with concentration”; and/or (6) “sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).”⁷⁴ Thus, many of the aforementioned psychological and physiological sequelae of racism naturally very closely mimic the symptomology of PTSD. Indeed, a growing body of psychological scholarship documents “a robust link” between racism and trauma, including a substantial amount which conceptualizes racism *as* trauma and suggests the link may be causal, not merely correlational.⁷⁵

13, 19 (2007).

⁷² AM. PSYCHOLOGICAL ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013). PTSD can be caused by directly experiencing the traumatic event, witnessing the same in person, learning that the same happened to a close family member or friend, or “experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).”

⁷³ *Id.* at 271–72.

⁷⁴ *Id.* at 272.

⁷⁵ Terrence A. Jordan II, Experiences of Racism and Race-Based Traumatic Stress 10, 13–21 (Aug. 8, 2017) (unpublished Ph.D. dissertation, Georgia State University), https://scholarworks.gsu.edu/cps_diss/125. See also Cheryl Curie, T. Cameron Wild, Donald Schopflocher & Lory Laing, *Racial Discrimination, Post-Traumatic Stress and Prescription Drug Problems Among Aboriginal Canadians*, 106 CANADIAN J. PUB. HEALTH 382, 386 (2015) (“This study . . . documents a positive association between racism experienced in the past year and PTSD symptoms experienced in the past month that could not be explained by other events such as childhood separation from parents, abuse in childhood and exposure to poverty over the life course. In mediation models, PTSD symptoms explained the association between racial discrimination and prescription drug problems among Aboriginal adults; general psychological stress and distress did not A model that may be derived from these findings posits that racial discrimination results in states of distress and suffering consistent with PTSD symptoms”).

To strengthen the case that racism and ethnoviolence can produce PTSD symptoms, psychologists often draw parallels between the lasting impact of racist incident-based trauma and of accepted sources of PTSD. For instance, scholars note that both racist incidents and childhood sexual abuse, sexual harassment, or rape produce in the victim feelings of shock, betrayal, and powerlessness; a sense that they are “not good enough”; a long-lasting difficulty trusting themselves or others; a distrust and resultant numbing of their emotions; and difficulty discussing the trauma.⁷⁶

Additional parallels can be drawn between the trauma of racism and rape. Both racists and rapists justify their behaviors through the perpetuation of myths that their victims are lesser.⁷⁷ Both produce injuries that are cognitive (e.g., difficulty remembering and concentrating), emotional (e.g., anger, self-blame, and distrust), and psychological (e.g., depression and anxiety) and impact victims’ ability to have healthy relationships.⁷⁸ Survivors of both use denial as a protective mechanism⁷⁹ and may experience shock, numbness, or dissociation during or after the abuse which prevents them from speaking up, responding, or asking for help; and this temporary paralysis can also lead to self-blame, shame, or self-loathing if survivors consider their inability to defend themselves the cause of the abuse.⁸⁰

Parallels can also be drawn between racist incidents and domestic violence. Both manifest as multi-event violations over time, where the termination of one incident does not necessarily establish safety, and a significant likelihood of another violation in the near future produces hyperarousal and anxiety, even though the timing and details of that future violation are indeterminable.⁸¹ Survivors of both racism and domestic violence often experience feelings of “shame, self-blame, powerlessness, fear, and confusion.”⁸² Society tells survivors of both that if they had just been nicer, avoided certain situations or people, said or done the right things, or otherwise modified their behavior, they would not have suffered the abuse.⁸³ Perpetrators of both justify their abuse by claiming their

⁷⁶ Bryant-Davis & Ocampo, *supra* note 60, at 486–87.

⁷⁷ People of color are deemed uncivilized, criminal, and untrustworthy; rape survivors are accused of being liars, teasers, and untrustworthy. Bryant-Davis & Ocampo, *supra* note 60, at 487.

⁷⁸ Bryant-Davis & Ocampo, *supra* note 60, at 487–88.

⁷⁹ Denial for rape survivors may sound like “maybe he didn’t hear me say no,” or “at a certain point men can’t stop”; for targets of racism, it may be outright denial that discrimination even occurred. Bryant-Davis & Ocampo, *supra* note 60, at 488.

⁸⁰ *Id.*

⁸¹ Bryant-Davis & Ocampo, *supra* note 60, at 492.

⁸² *Id.*

⁸³ *Id.*

victim deserved it (whether by burning the food, flirting, or arriving home late in the case of domestic violence; or in the case of racism, acting dangerously or suspiciously so that the racist was allegedly protecting themselves or others by their abuse).⁸⁴ And society responds to both forms of abuse with heavy doses of victim-blaming, saying that survivors of domestic violence should “just leave” rather than “choosing” to stay and that people of color should “lift themselves up by their bootstraps.”⁸⁵

Thus, identifying these parallels—and the resulting similarities in the psychological and emotional scars suffered—scholars advocated the definition of PTSD ought to be broadened to better encompass the injuries of racism. But they were met with significant resistance. Foundationally, the psychological community has traditionally disfavored expanding definitions of mental disorders for fear of diluting the meaning of a diagnosis or demoting the status of legitimate victims; even the inclusion of domestic violence and sexual assault in PTSD (which had previously been limited almost exclusively to war-related trauma) came only after extensive lobbying and advocacy.⁸⁶ Consequently, the DSM continues to define trauma as originating only from incidents that could have caused physical injury or death to oneself or others, and still excludes traumatic symptoms from verbal or emotional abuse, denial of resources, or social alienation.⁸⁷ Additionally, some may find it problematic that recognizing racist incidents as trauma could have direct implications on perpetrator accountability (particularly financially as compensatory damages)⁸⁸ and on victims who may be stigmatized if racism is pathologized as trauma.⁸⁹ Because of these barriers, modern racism remains largely outside the scope of PTSD.⁹⁰

⁸⁴ Bryant-Davis & Ocampo, *supra* note 60, at 493.

⁸⁵ Bryant-Davis & Ocampo, *supra* note 60, at 493–94.

⁸⁶ Bryant-Davis & Ocampo, *supra* note 60, at 485.

⁸⁷ *Id.*

⁸⁸ Bryant-Davis & Ocampo, *supra* note 60, at 485–86.

⁸⁹ *Id.* at 486.

⁹⁰ Robert T. Carter & Jessica M. Forsyth, *A Guide to the Forensic Assessment of Race-Based Traumatic Stress Reactions*, 37 AM. ACAD. PSYCHIATRY & L. 28, 36–37 (2009); Monnica T. Williams et al., *Cultural Adaptations of Prolonged Exposure Therapy for Treatment and Prevention of Posttraumatic Stress Disorder in African Americans*, 4 BEHAV. SCI. 102, 103 (2014). Under the DSM-5 definition of PTSD and its potential origins, PTSD can result from racism or ethnoviolence in the form of a direct cataclysmic event which threatens the victim’s bodily safety with death or serious injury because of their racial or ethnic identity group or in the form of vicarious cataclysmic events (e.g., witnessing a direct cataclysmic event against another member of one’s racial or ethnic identity group. Janet E. Helms, Guerda Nicolas & Carlton E. Green, *Racism and Ethnoviolence as Trauma*, 18 TRAUMATOLOGY 65, 68 (2012). Excluded from that list, however, are the ambiguous microaggressions which sap mental energy and produce chronic fear, vigilance, or paranoia but do not produce the sort of threat of physical injury necessary to permit a PTSD diagnosis. See *supra* notes 65–70 and accompanying text.

B. Racist Incidents and Race-Based Traumatic Stress

In response to the torpid evolution of the DSM, some scholars have proposed an entirely new theory to understand the injury of racism and ethnoviolence. Most notable is Robert T. Carter's race-based traumatic stress theory. Carter first proposed the theory in 2007 as a non-pathological model of the psychological distress resulting from racism and discrimination in order to aid counseling and psychological assessments,⁹¹ though he also had an eye to its forensic applications—namely, evaluating psychological distress and emotional damages in legal claims, particularly federal civil rights cases.⁹² Thus, rather than mental health professionals diagnosing targets of racism with depression, anxiety, acute stress reactions, or other generalized diagnostic categories of psychological stress not specific to racism, Carter sought to develop a framework to understand “the unique aspects of racial experience” so mental health professionals can “know how to manage the emotional and psychological effects [of racist experiences] and how these effects may be manifested.”⁹³

Carter conducted a meta-analysis of dozens of studies which demonstrated the high rate at which people of color experience racial discrimination and the extent to which it is a stressor producing physiological arousal and psychological and emotional distress.⁹⁴ Notably, Carter identified a well-established correlation between race and trauma whereby, when exposed to the same trauma, people of color developed higher rates of PTSD than their White counterparts,⁹⁵ suggesting racism *itself* is a stressor.⁹⁶ Further, Carter notes there are few stress models which adequately consider an individual's race or culture,⁹⁷ and he posits that part of the difficulty may be that racism neither wholly falls within the category of stress from “everyday events” nor the category of “extraordinary and more severe” stress from uncommon events.⁹⁸ Accordingly, he concludes racism has deeper psychological and emotional ramifications than merely

⁹¹ Carter, *supra* note 71.

⁹² Robert T. Carter, *Clarification and Purpose of the Race-Based Traumatic Stress Injury Model*, 35 COUNSELING PSYCHOLOGIST 144, 145 (2007).

⁹³ *Id.* at 146.

⁹⁴ Carter, *supra* note 71, at 42–57. Particularly notable: a 2005 study of 323 people of color's experiences of racial discrimination which found that 89% of participants reported racist encounters, and 74% had “lasting psychological and emotional effects, many of which reflected traumatic reactions.” *Id.* at 43–44 (citing Robert T. Carter, Jessica Forsyth, Silvia Mazzula & Bryant Williams, *Racial Discrimination and Race-Based Traumatic Stress*, in HANDBOOK OF RACIAL-CULTURAL PSYCHOLOGY & COUNSELING 447 (Robert T. Carter, ed., Vol. 2, 2002)).

⁹⁵ Carter, *supra* note 71, at 38–41.

⁹⁶ Carter, *supra* note 71, at 73.

⁹⁷ Carter, *supra* note 71, at 28–31.

⁹⁸ Carter, *supra* note 71, at 30–31.

ordinary stress, but the rigid restrictions of PTSD are too narrow to appropriately address racism.⁹⁹

Instead, Carter proposes that traumatic stress provides the best framework to understand the harms of racism. Traumatic stress was developed in 1997 to expand the range of traumatic events to those which are psychologically and emotionally threatening, even when not *physically* threatening; and it considers the cumulative effect of a lifetime of traumatic events rather than only the immediate effects of isolated incidents.¹⁰⁰ For an incident to produce traumatic stress, it must be (1) perceived as negative (causing emotional pain); (2) experienced as sudden; and (3) experienced as uncontrollable.¹⁰¹ The core reactions associated with traumatic stress are *avoidance* or psychic numbing (e.g., avoiding thoughts, feelings, places, or people related to the event); *intrusion* or reexperiencing (e.g., intrusive thoughts and memories of the event, flashbacks and nightmares); and *arousal* or hyperactivity (e.g., hypervigilance, difficulty concentrating, irritability, anger or rage, sleeplessness, etc.).¹⁰²

Using this traumatic stress framework, Carter concluded that racism produces “psychological and emotional pain or injury [that] is part of a nonpathological process and set of reactions that have associated with them symptom clusters and reactions that can impair a person’s functioning”: RBTS.¹⁰³ Racism—whether manifesting as the denial of access to certain services or opportunities, as physical or verbal assaults or stereotyping, or as workplace isolation and denial of promotions—can produce a traumatic stress injury by which the victim experiences the event as negative, sudden, and uncontrollable, and has symptom manifestations of avoidance, intrusion, and arousal.¹⁰⁴ Thus, racism can produce traumatic stress which manifests as “anxiety, anger, rage, depression, compromised self-esteem, shame, . . . guilt, . . . irritability, hostility, poor social and interpersonal relationships, lack of trust in people, self-blame, or various combinations of all these reactions”¹⁰⁵—symptoms which directly align the aforementioned empirically-shown harms of racism with the essential definition of traumatic stress. Additionally, Carter expressly noted chronic stress can

⁹⁹ Carter, *supra* note 71, at 33. For instance, a PTSD diagnosis requires a traumatic incident that created a threat of death or serious physical injury, but racism and other forms of emotional abuse often fall outside those parameters. Robert T. Carter & Carrie Muchow, *Construct Validity of the Race-Based Traumatic Stress Symptom Scale and Tests of Measurement Equivalence*, 9 *PSYCHOL. TRAUMA* 688, 688 (2017).

¹⁰⁰ Carter, *supra* note 71, at 34.

¹⁰¹ Carter, *supra* note 71, at 34–35.

¹⁰² Carter, *supra* note 71, at 36.

¹⁰³ Carter, *supra* note 71, at 83.

¹⁰⁴ Carter, *supra* note 71, at 84, 90.

¹⁰⁵ Carter, *supra* note 71, at 90, 92.

produce trauma where “a ‘last straw[‘] encounter or experience . . . increases the level of stress to the threshold of trauma.”¹⁰⁶ Thus, the “severity” of a racist incident is not the overtness or potential lethality of the racism encountered therein, but the “strength and intensity of the person’s reaction and the symptom cluster that emerges” therefrom, meaning even microaggressions can produce traumatic stress.¹⁰⁷

In 2013, Carter published a standard to “recognize and assess [RBTS] reactions,” the Race-Based Traumatic Stress Symptom Scale (RBTSSS).¹⁰⁸ Developed over five years, the RBTSSS was the first instrument to specifically assess racism-related trauma.¹⁰⁹ It measures RBTS resulting from specific encounters with racism and discrimination in which victims answer a series of yes or no statements to identify if they perceived the specific incident as negative, sudden, and uncontrollable (i.e. whether the incident could qualify as a stressor for traumatic stress) and the extent to which victims experienced symptoms of traumatic stress (namely, depression, intrusion, anger, hypervigilance, physiological arousal, low self-esteem, and avoidance or dissociation).¹¹⁰ For RBTS to exist, the experience must have been negative, sudden, *and* uncontrollable; and the individual must report the presence of at least two of the three reactions demonstrating the presence of traumatic stress (i.e. arousal/hypervigilance, intrusion/reexperiencing, and avoidance/numbing).¹¹¹ Carter has since demonstrated the potential for use of the RBTSSS in clinical settings as a means of evaluating emotional pain based on “whether, and to what extent, the client was affected by [a racist incident], and [the] treatment or . . . evaluation [needed] to assist the person to relieve the experienced stress.”¹¹² Further, in subsequent empirical studies, Carter and others have affirmed the validity of the RBTSSS.¹¹³

IV. MODERN RACISM BUT OLD-FASHIONED IIEDS

The Third Restatement of Torts intentionally sets the injury standard of severe emotional distress very high to prevent plaintiffs from bringing

¹⁰⁶ Carter, *supra* note 71, at 84.

¹⁰⁷ Carter, *supra* note 71, at 88–90.

¹⁰⁸ Robert T. Carter et al., *Initial Development of the Race-Based Traumatic Stress Symptom Scale: Assessing the Emotional Impact of Racism*, 5 PSYCHOL. TRAUMA 1, 2 (2013).

¹⁰⁹ Carter & Muchow, *supra* note 99, at 693.

¹¹⁰ Carter & Muchow, *supra* note 99 at 689.

¹¹¹ Robert T. Carter & Sinéad M. Sant-Barket, *Assessment of the Impact of Racial Discrimination and Racism: How to Use the Race-Based Traumatic Stress Symptom Scale in Practice*, 21 TRAUMATOLOGY 32, 33 (2015) (internal citations omitted).

¹¹² *Id.* at 38.

¹¹³ Carter & Muchow, *supra* note 99, at 689, 694.

IIED suits for mere inconveniences; in practice, however, the standard is so high it operates as a nearly-complete bar to even genuinely severely injured plaintiffs. The Restatement reads: “complete emotional tranquility is seldom attainable in this world, and some degree of emotional harm, even significant harm, is part of the price of living in a complex and interactive society.”¹¹⁴ Thus, “as a matter of policy, even if emotional harm is inflicted for no purpose other than to cause such harm, some degree of emotional harm must be expected in social interaction and tolerated without legal recourse.”¹¹⁵ The severe emotional distress requirement consequently makes it so that “the law intervenes only where distress inflicted is so severe that no reasonable [person] could be expected to endure it.”¹¹⁶ A diagnosed DSM disorder, like PTSD, is in many ways a paradigmatic IIED injury; indeed, some jurisdictions like Tennessee expressly counsel that “[e]vidence that the plaintiff sought medical treatment [and] was diagnosed with a medical or psychiatric disorder such as post-traumatic stress disorder” should “inform the analysis and [is] pertinent to support a plaintiff’s claim that he or she has suffered a serious mental injury.”¹¹⁷

In many jurisdictions, however, this sets the bar for “severe emotional distress” so high that even deeply emotionally-harmed plaintiffs are unable to satisfy it, often resulting in the dismissal of their suit at summary judgment. For instance, Iowa has held “evidence that [the] plaintiff was so angry he felt physical pain, was sleepless, could only think about the event, felt cheated by the legal system and did not trust lawyers or anyone else, was haunted by fears that occupied his waking moments, interrupted his sleep, and prevented him from enjoying life” was insufficient to establish a claim of emotional distress.¹¹⁸ Iowa has also held that an event that was the “‘worst thing’ that ever happened to [the] plaintiff” and which produced confusion and upset the plaintiff “fell far short” of the proof necessary for a prima facie case;¹¹⁹ that a plaintiff who “‘quivered’ when the subject came up” had shown insufficiently severe emotional distress;¹²⁰ and that a plaintiff who “suffered destruction of his career and reputation in the community, anxiety and high blood pressure requiring medication, nightmares, headaches, dizziness, and loss of enthusiasm” suffered only

¹¹⁴ RESTATEMENT (THIRD) OF TORTS § 46.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting cmt. j).

¹¹⁷ *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 209–10 (Tenn. 2012).

¹¹⁸ *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1218 (N.D. Iowa 1994) (citing *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 261 (Iowa 1991)).

¹¹⁹ *Id.* at 1218 (citing *Tappe v. Iowa Methodist Medical Ctr.*, 477 N.W.2d 396, 404 (Iowa 1991)).

¹²⁰ *Id.* (citing *Bethards v. Shivvers, Inc.*, 355 N.W.2d 39, 44–45 (Iowa 1984)).

symptoms which were “uncomfortable or disconcerting, [but] *not* ‘so severe that no reasonable [person] could be expected to endure it.’”¹²¹ Similarly, New Jersey found that a plaintiff who was nauseous, upset, and hysterical; suffered from depression; had nightmares; and “no longer enjoy[ed] her activities the way she used to” lacked “distress . . . [rising] to the required threshold level” because she still played bingo, had friends, and tried to keep herself busy, meaning that, by law, she lacked a “dramatic impact on her every-day activities or on her ability to function daily.”¹²² Minnesota has held a plaintiff’s symptoms of “insomnia, crying spells, a fear of answering the door and telephone, and depression necessitating treatment [were] not sufficiently severe.”¹²³ Illinois has held that neither feeling “‘fright, horror, grief, shame, humiliation and worry,’” nor feeling “‘appalled, annoyed, aggravated, disgusted, offended, upset, embarrassed, uncomfortable, belittled and self-conscious” was severe emotional distress within the meaning of IIED.¹²⁴ Furthermore, Nevada has held that a plaintiff who “had ‘great difficulty in eating, sleeping, and [who] suffer[ed] outward manifestations of stress and [was] generally uncomfortable” did not have severe emotional distress¹²⁵ and that “feelings of inferiority, headaches, irritability, and loss of ten pounds are insufficient evidence of distress *as a matter of law*.”¹²⁶ Additionally—perhaps even more troubling for plaintiffs than the litany of symptoms they are evidently expected to be able to endure—are some courts’ sweeping pronouncements that distress must be entirely debilitating in order to be actionable: New Jersey, for instance, requires emotional distress be “disabling” to be considered sufficiently severe to support an IIED claim,¹²⁷ and Minnesota has stated that any distress of the type “people commonly encounter and endure in their lives” should not so much as be submitted to a jury.¹²⁸

¹²¹ *Rouse*, 866 F. Supp. at 1218–19 (emphasis added).

¹²² *Lascurain v. City of Newark*, 793 A.2d 731, 748–49 (N.J. Super. Ct. App. Div. 2002).

¹²³ *Jensen v. Walsh*, 609 N.W.2d 251, 254 (Minn. App. 2000), *rev’d on other grounds* 623 N.W.2d 247 (Minn. 2001) (citing *Elstrom v. Independent Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. App. 1995)).

¹²⁴ *Cheatham v. City of Chi.*, No. 16 C 3015, 2018 U.S. Dist. LEXIS 76440, at *19–20 (N.D. Ill. May 7, 2018) (first citing *Lovi v. Vill. of Arlington Heights*, 62 F. Supp. 3d 756, 769 (N.D. Ill. 2014); and then citing *Ponticello v. Amark Unif. & Career Apparel Servs., Inc.*, No. 05 C 1137, 2006 U.S. Dist. LEXIS 66977, at *13 (N.D. Ill. Sept. 19, 2006)).

¹²⁵ *Igbinovia v. Catholic Healthcare West*, No. 2:07-cv-01170-RCJ-PAL, 2010 U.S. Dist. LEXIS 144702, at *15 (D. Nev. March 4, 2010) (citing *Churchill v. Barach*, 863 F. Supp. 1266, 1276 (D. Nev. 1994)).

¹²⁶ *Id.* (citing *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993) (emphasis added)).

¹²⁷ *Sweeten v. Middle Twp.*, No. 04-3512, 2007 U.S. Dist. LEXIS 92186, at *38 (D. N.J. Dec. 14, 2007).

¹²⁸ *Lee v. Metropolitan Airport Com.*, 428 N.W.2d 815, 823 (Minn. Ct. App. 1988)

To the extent, then, that racism is a daily occurrence to which people of color become too accustomed to directly react, scholars worry the requirement that IIED plaintiffs suffer emotional distress that is so “disabling” and uncommon that it hinders them from carrying out daily activities effectively bars “thick skin” plaintiffs—who do not find even outrageous racial abuse to be debilitating—from justice.¹²⁹ Consider, for instance, a particularly telling illustration Dean M. Richardson used to demonstrate how too high an injury standard for racial harassment may act as a complete bar to recovery. Two Black Harvard students search together for an apartment; one comes from a more privileged background and was “raised by his refined, wealthy family to recognize his intelligence and his responsibility to be a leader,” and the other “was raised in poverty and has had to struggle against insurmountable odds” all his life.¹³⁰ During the search, they encounter an explicitly racist landlord who refuses to “rent to ‘niggers,’” “curses them with gutter language, warns them against renting in his neighborhood if they value their necks, and slams the door in their faces.”¹³¹ The wealthy student is outraged and physically trembles for hours in internalized rage.¹³² But, the poor student “has lived through so many similar encounters that this incident touches him only slightly.”¹³³ That is, the poor student, as a result of chronic exposure to virulent bigotry, has too thick of skin to manifest severe emotional distress.¹³⁴ This mirrors the case of Ms. Delores Turner, who suffered sincere psychological distress but no “inability to perform her daily functions” and was consequently denied redress.¹³⁵

Additionally, little legal literature exists which specifically examines the psychological effects of racism, and many jurisdictions strenuously

(citing *Cafferty v. Garcia’s of Scottsdale, Inc.*, 375 N.W.2d 850, 853 (Minn. Ct. App. 1985)).

¹²⁹ *E.g.*, Robert T. Carter, Jessica M. Forsyth, Bryant Williams & Silvia L. Mazzula, *Does Racism Predict Psychological Harm or Injury? Mental Health and Legal Implications*, 7 LAW ENFORCEMENT EXECUTIVE F. 131, 139 (2007); Nelson, *supra* note 19, at 945–46; John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 694–97 (1994); Richardson, *supra* note 19, at 270–75. *See also* Carter & Forsyth, *supra* note 90, at 30–31 (2009) (noting that courts are wary of allowing plaintiffs to prevail on racial harassment claims unless they were exposed to “particularly severe and overt racial discrimination or harassment,” which has made it particularly difficult for victims to seek legal redress, especially in modern times when overt discrimination is less common than subtle or microaggressive racism).

¹³⁰ Richardson, *supra* note 19, at 270–71.

¹³¹ *Id.*

¹³² Richardson, *supra* note 19, at 271.

¹³³ *Id.*

¹³⁴ Richardson, *supra* note 19, at 275.

¹³⁵ *See supra* text accompanying notes 10–17.

emphasize only diagnosed mental disorders as a sufficient injury.¹³⁶ Consider again the case of Ms. Turner: her mortification, anger, and humiliation¹³⁷ were in many ways paradigmatic, prototypical reactions to racist incidents which wholly fit into the trauma or traumatic stress framework;¹³⁸ however she was denied legal relief on the basis she had an insufficient injury.¹³⁹ The court focused in part on the fact that she sought no professional medical, psychiatric, or therapeutic treatment and therefore could not prove “any condition that was professionally diagnosed.”¹⁴⁰ But, because her encounter with Wong did not threaten death or serious physical injury,¹⁴¹ even if Ms. Turner *had* sought treatment, it is unlikely she could have obtained a DSM diagnosis.¹⁴² And she consequently *still* would have been denied relief under the extremely high bar of “severe emotional distress.”¹⁴³ This heavy-handed preference for pathological diagnoses disadvantages plaintiff targets of racism and ethnoviolence, since “psychological reactions to racial discrimination often do not fit criteria for disorders in the [DSM.]”¹⁴⁴ Furthermore, the DSM definition of trauma offers no conceptualization of cumulative stress—the sine qua non of a “thick skin” plaintiff—even though racism has been empirically shown to produce trauma reactions through exposure to more subtle, insidious discrimination over prolonged periods.¹⁴⁵ Thus, judicial reliance on such a diagnosis is thoroughly inapposite: plaintiffs have equally deep psychological wounds (i.e. trauma reactions) but because that distress does not manifest in the “right way” (i.e. does not fit within the restrictive confines of a DSM definition), they are denied relief.

In other words, the injury standard was intentionally drafted as difficult to satisfy to prevent frivolous and fraudulent claims, but it now acts to the detriment of genuine, legitimately-injured plaintiffs with bona fide claims because of its artificially high requirements.¹⁴⁶ The standard of severe emotional distress is already incredibly high (arguably unnecessarily

¹³⁶ Carter et al., *supra* note 129, at 139, 147.

¹³⁷ See *supra* text accompanying notes 10–11.

¹³⁸ See *supra* notes 65, 74–85, 103–107 and accompanying text.

¹³⁹ See *supra* text accompanying notes 16–17.

¹⁴⁰ See *supra* text accompanying notes 12, 17.

¹⁴¹ See *supra* text accompanying notes 4–9.

¹⁴² See *supra* text accompanying notes 72–74.

¹⁴³ See *supra* text accompanying notes 118–128.

¹⁴⁴ Carter & Forsyth, *supra* note 90, at 29.

¹⁴⁵ See *supra* notes 66–85 and accompanying text.

¹⁴⁶ Indeed, some studies suggest that as many as eighty percent of plaintiffs in racial discrimination cases do not prevail; and of the mere twenty percent of claims that are successful, the plaintiffs were subject to blatant and egregious racial animus, which was often physical and occurred over prolonged periods. Carter & Forsyth, *supra* note 90, at 30 (internal citations omitted).

so), but the fact that DSM trauma definitions are largely incongruous with the harms of racism and ethnoviolence makes the standard, practically speaking, unattainable for too many plaintiffs. Thus, alternate conceptualizations of racism-related harm are needed to permit legal relief.¹⁴⁷ Further, given that “racism [is] a unique type of life stressor,” this alternate conceptualization of cognizable racism-related injuries should particularly respond to this uniqueness.¹⁴⁸

V. REMEDYING THE INJURY STANDARD IN RACISM- AND ETHNOVIOLENCE-BASED IIEDS

A rich history of scholarship exists drawing upon critical race theories and social sciences research on the harms of racism to advocate for widespread legal reform;¹⁴⁹ and, to a slightly lesser extent, that history is also visible in legal precedent.¹⁵⁰ For racism- and ethnoviolence-based

¹⁴⁷ Carter et al., *supra* note 129, at 147.

¹⁴⁸ Carter & Muchow, *supra* note 99, at 688.

¹⁴⁹ See, e.g., Brown, *supra* note 19 (proposing new injury standards of degradation and humiliation as measures of emotional distress resulting from racially-motivated hate speech); Carter & Scheuermann, *supra* note 63 (using research on RBTS to highlight the importance of legal redress for workplace racial harassment, identify flaws in the current system, and propose a new legal framework to hold employers liable for workplace harassment which produces race-based traumatic stress); Delgado, *supra* note 21 (chronicling the mental and emotional harms of racial stigmatization to propose a new tort of racial insult); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (drawing on cognitive psychology to propose government action motivated by unconscious racism, even if not intentional racial discrimination, should trigger strict scrutiny); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (identifying the empirically-discovered harms of racial stigmatization and proposing a new constitutional test to determine if a new law produces a risk of stigmatic harm, therefore necessitating strict scrutiny); Nelson, *supra* note 19 (identifying adverse mental, emotional, and physical health effects of racism and evaluating the how intentional torts and the eggshell skull rule may adopt a critical race theory lens to better provide redress to victims of racial abuse); Nockleby, *supra* note 129 (proposing a new tort of racial intimidation to remedy the emotional and psychological harm of victims threatened with violence motivated by racial animosity).

¹⁵⁰ For example, Kenneth Clark’s research on the impact of racial segregation on Black children was foundational in the NAACP’s brief in *Brown v. Board of Educ.* and was even cited to in the ultimate Supreme Court opinion to overturn the doctrine of “separate but equal.” Ludy T. Benjamin, Jr. & Ellen M. Crouse, *The American Psychological Association’s Response to Brown v. Board of Education*, 57 AM. PSYCHOLOGIST 38, 39–41 (2002); see also *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing seven psychology studies on the effect of racial prejudice and segregation on children, including Kenneth Clark’s research). Consider also not-yet-Supreme-Court-Justice Louis D. Brandeis’s landmark brief in *Muller v. Oregon* which drew on statistical studies, public health reports, and social science research to argue against invalidating a law instituting maximum work hours for women working in factories and laundries; it was one of the first briefs to draw more upon science and social science research than legal citations and was so influential an advocacy tool that “Brandeis Brief” is now the shorthand for legal briefs

IIEDs, two scholars have used this methodology to advocate for prominent tort reforms. The most well-known is Richard Delgado's 1982 proposal for a tort of racial insult.¹⁵¹ Delgado began by chronicling the harms of racial stigmatization: internalized degradation and humiliation, shame, and self-loathing and the subsequent exacerbated rates of substance abuse, hypertension, and negative psychosomatic outcomes among people of color.¹⁵² He then argued racial insults are even more damaging than other forms of verbal abuse because they rely on "the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country."¹⁵³ He noted racial insults are inherently "dignitary affront[s]" because they "express[] a judgment that the victim of the racial slur is entitled to less than that to which all other citizens are entitled,"¹⁵⁴ so the dignitary tort of IIED may be suitable to redress racial insults; but, he worried the tort's injury standard makes it a flawed response.¹⁵⁵ Consequently, Delgado proposed a tort of racial insult, actionable when a plaintiff proves "[l]anguage was addressed to him or her by the defendant [1] that was intended to demean through reference to race; [2] that the plaintiff understood as intended to demean through reference to race; and [3] that a reasonable person would recognize as a racial insult."¹⁵⁶ Delgado admitted the new tort may have minimal impact on the incidence of racism; but he posited that making racial insults financially costly can shift social norms to decrease bigotry by threatening to make it too expensive for most; and, to the extent that legality confers a benediction of morality, making racial insults tortious suggests the conduct is immoral and contrary to the public conscience.¹⁵⁷ Although in the decades since Delgado first proposed the tort it has not been accepted as a cause of action, the article in which he proposed it has been cited in a handful of court opinions, the most notable of which is a 1998 New Jersey Supreme Court opinion which relied on it to sustain an IIED claim based on a single racial slur against summary judgment.¹⁵⁸

emphasizing social science or economic statistics in their arguments. Clyde Spillenger, *Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon*, 22 CONST. COMMENT. 5, 5–6 (2005); see also *Brandeis Brief*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/legal/Brandeis%20brief> (last visited Oct. 18, 2018).

¹⁵¹ Delgado, *supra* note 21.

¹⁵² Delgado, *supra* note 21, at 136–39.

¹⁵³ Delgado, *supra* note 21, at 143–44.

¹⁵⁴ *Id.*

¹⁵⁵ Delgado, *supra* note 21, at 152, 154–55.

¹⁵⁶ Delgado, *supra* note 21, at 179.

¹⁵⁷ Delgado, *supra* note 21, at 148–49.

¹⁵⁸ Taylor v. Metzger, 706 A.2d 685, 694–700 (N.J. 1998).

More recently, Alexander Brown has proposed new injury standards—degradation and humiliation—to measure IIED injuries.¹⁵⁹ Like Delgado, Brown centered how racial insults violate and deny victims’ dignity.¹⁶⁰ He, too, considered IIED torts inadequate due to their sometimes insurmountable outrageousness and injury requirements.¹⁶¹ Brown therefore proposed a test for degradation to conceptualize racism’s dignitary affront¹⁶² and a test for the higher injury of humiliation to use when a plaintiff’s degradation is publicized.¹⁶³ Brown has received mixed reactions in academia¹⁶⁴ but no attention to date from a court.

Thus, while these proposals may remedy deficiencies in IIED law if adopted, another theory is needed to meanwhile bridge the gap between the IIED “severe emotional distress” standard and the injury *actually* suffered

¹⁵⁹ Brown, *supra* note 19, at 42.

¹⁶⁰ Brown, *supra* note 19, at 12–13. Brown defines dignity to include one’s internal sense of worth and value as a human being, others’ recognition of that worth, and one’s status as a full and equal member of society. Brown, *supra* note 19, at 15–16, 24.

¹⁶¹ Brown, *supra* note 19, at 7–8.

¹⁶² The degradation test is: (1) “[t]he defendant intentionally judged as inferior or else denied the plaintiff’s basic worth (as a human being) or their civic status, or both,” including use of a racial slur; (2) “[t]he degrading performed in (1) was allied to the fact that the defendant had the authority or standing to judge as inferior or deny the plaintiff’s basic worth (as a human being), their civic status, or both,” including through a formal grant of power like the status of a judge or employer or an implicit grant through the silence of others; (3) “[t]he plaintiff had a feeling or sense that they were being degraded, and this was as a direct result of the degrading performed in (1) and (2)”; and (4) “[t]he plaintiff experienced, even momentarily, a lapse in, or failure of, dignified bearing, and this was as a direct result of the degrading performed in (1) and (2),” such as by “severe[ly] blushing, physically shaking or trembling, [tearing up], flying into a rage, running away, cowering, clamming up, turning pale, profuse[ly] sweating,” or otherwise losing their “psychological or physiological self-control and self-possession.” *Id.* at 29–36.

¹⁶³ To satisfy the test for humiliation, the plaintiff must satisfy the requirements for degradation plus two additional elements: (5) “[t]he defendant not merely degraded the plaintiff in the manner described in (1) and (2) but also did so in public or as a public event, and with the intention to humiliate the plaintiff,” where public means simply “within sight or hearing of . . . at least one other person in addition to the defendant and plaintiff”; and (6) “[t]he plaintiff had a feeling or sense of being humiliated, over and above any sense of being degraded involved in (3), and this was a direct result of the public degrading performed in (5).” *Id.* at 37–39. Brown notes “[f]eeling humiliated is a complex dysphoria that typically manifests itself in intense discomfort arising from the consciousness that one is being made low in front of others . . . [and] the feeling of being humiliated is akin to but not the same as feelings of embarrassment. A person can be made to feel embarrassed without necessarily feeling humiliated. Embarrassment is a feeling of self-consciousness or unease, often in socially awkward situations, arising from one’s awareness that one has done or said something inappropriate. Humiliation involves a sense of public debasement, that one’s basic worth or civic status has been ranked as inferior, challenged, or denied in front of others.” *Id.* at 38–39.

¹⁶⁴ See Richard Delgado & Jean Stefancic, *Retheorizing Actions for Targeted Hate Speech: A Comment on Professor Brown*, 9 ALA. C.R. & C.L. L. REV. 169, 172–74 (2018); Steven J. Heyman, *When is Hate Speech Wrongful? A Comment on Alexander Brown’s Hate Speech As Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 185, 186 (2018).

by targets of racism and ethnoviolence, particularly thick skin plaintiffs. Enter race-based traumatic stress. Robert T. Carter expressly stated his intent in developing RBTS was to “offer[] [the model] as a way to break the stalled and blocked avenues of redress and relief for contemporary forms of racism (i.e., subtle, indirect) and racial justice.”¹⁶⁵ He added that “in the forensic context, when the issues of complaints and legal claims enter the adversarial realm of the law, mental health and legal professionals need to be able to show the impact of the event on the person(s), given the person’s history and background,” and his evidence “shows that racism and discrimination can be physically, psychologically, and emotionally harmful to their targets both as stress and as trauma.”¹⁶⁶ Some professionals have expressed cautious optimism RBTS has potential as an alternative to PTSD when evaluating psychological and emotional injuries resulting from racism in the forensic and counseling contexts.¹⁶⁷ Unfortunately, to date, RBTS has never been cited in any case in any jurisdiction,¹⁶⁸ and the only legal scholarship to discuss RBTS was in fact authored by Carter.¹⁶⁹

RBTS sits in a unique position of blending clinical and empirical scholarship to provide the legal community a means of assessing a very particularized injury so that—rather than trying to fit a square peg in a round hole with standard DSM diagnoses that mental health professionals agree are patently inapposite to racism and ethnoviolence—the law can use a metric pointedly designed for that square peg. Historically, the law has favored DSM diagnoses almost exclusively as injuries due to fear of

¹⁶⁵ Carter, *supra* note 92, at 148.

¹⁶⁶ Carter, *supra* note 92, at 149–50.

¹⁶⁷ See, e.g., Thema Bryant-Davis, *Healing Requires Recognition: The Case for Race-Based Traumatic Stress*, 35 COUNSELING PSYCHOLOGIST 135, 137 (2007) (making the case that racist incidents—even non-physical ones—can produce trauma which should be formally recognized as an independent traumatic or stress-related disorder); Carter & Forsyth, *supra* note 90, at 36–37 (“Since the law does not require a DSM diagnosis to show evidence of injury and because the DSM does not currently consider the racial or social context of stressors that cause psychological injury, we recommend that psychiatrists expand their perspectives beyond the DSM,” such as through RBTS theory); Lillian Comas-Díaz, *Racial Trauma Recovery: A Race-Informed Therapeutic Approach to Racial Wounds*, in THE COST OF RACISM FOR PEOPLE OF COLOR *supra* note 69, at 249 (outlining a proposed means of using RBTS to understand and treat the “insidious trauma” of racism and racial microaggressions); Ezra E. H. Griffith, *A Forensic and Ethics-Based View of Carter’s “Racism and Psychological and Emotional Injury,”* 35 COUNSELING PSYCHOLOGIST 116 (2007) (noting the forensic application potential of RBTS); David R. Williams, *Improving the Measurement of Self-Reported Racial Discrimination: Challenges and Opportunities*, in THE COST OF RACISM FOR PEOPLE OF COLOR, *supra* note 69, at 55, 57–59 (suggesting RBTS can be used to classify the trauma of perceived discrimination).

¹⁶⁸ A search in Lexis Nexis of “race-based traumatic stress” or “race-based stress” or “race-based trauma” or “RBTS” produced no results.

¹⁶⁹ See Carter & Scheuermann, *supra* note 63 (discussing the utility of RBTS in workplace racial harassment claims).

frivolous or fraudulent lawsuits in which plaintiffs waste judicial resources and clog overfull dockets with spurious claims predicated on inconsequential, trivial inconveniences or entirely fabricated injuries.¹⁷⁰ Our understanding of mental health as a society has greatly evolved over the last several decades, however. Substantial scholarship now exists to provide forensic psychologists and clinicians an empirically-driven framework to assess the veracity, or lack thereof, of a plaintiff's nonpathological, non-DSM psychological and emotional harms without falling prey to either being duped by unscrupulous plaintiffs *or* denying bona fide plaintiffs relief due to overly-restrictive definitions. To continue to rely on outmoded theories of mental injuries, originally founded on now-obsolete concerns that we will otherwise be unable to validate the injury, is to deny genuinely injured plaintiffs legal redress. Data shows injuries from racism run as deep as DSM trauma, but because of their non-lethal triggers, cumulative nature, and origin in everyday stressors, that injury does not manifest in a currently legally-recognized way. That is a travesty of the very premise of tort law—making plaintiffs whole.

This is not to argue for a lower injury standard but rather for a new conceptualization of equally genuine severe emotional distress from racism and ethnoviolence—one sensitive to the particular harms stemming from such phenomena, while not lessening the injury's provability. RBTS satisfies those requirements. It has been well-received in the mental health community. It has a clinically- and empirically-tested symptom scale by which experts can evaluate and attest to a plaintiff's injuries. And it does not invalidate the traumatic wounds of thick skin plaintiffs who experience so frequent racism that even outrageous incidents do not "disable" them.

Finally, recall the primary impediment to many plaintiffs' PTSD diagnoses is that the ethnoviolence they faced was not the right type of traumatic event (i.e., it was nonlethal). But, IIED already accounts for the nature of a traumatic trigger in the "outrageousness" element, meaning PTSD inherently requires a *higher* outrageousness standard than the law does. Comparatively, RBTS is not necessarily a "lesser" injury in the gravity of symptomology it requires, but it *is* more inclusive of injuries stemming from otherwise-legally-outrageous trauma. Thus, RBTS provides plaintiffs an opportunity to, at the very least, have the merits of their claims heard rather than being summarily dismissed—as Ms. Turner was.

¹⁷⁰ See *supra* text accompanying note 23.

VI. CONCLUSIONS AND IMPLICATIONS

The immediate pushback to tort reform proposals is often a floodgates concern, but incorporating RBTS into the IIED injury standard does not necessarily run those risks. First, the outrageousness requirement—and, to a slightly more limited extent, the causation and intent requirements—will continue to operate as gatekeepers. There will be no deluge of microaggression-based IIEDs, for instance, because they would almost universally fail the outrageousness requirement¹⁷¹ (and likely would not qualify as intentional or reckless). Furthermore, the very premise of a deluge of litigation is unsubstantiated at best and farcical at worst: studies show that less than ten percent of all targets of racist incidents seek *any* help, be it from a “counselor, professor/teacher, psychologist, lawyer, religious leader, psychiatrist, medical doctor, social worker, or healer.”¹⁷² Additionally, this proposed injury standard affects such a narrow subset of cases that a deluge is hardly even *possible*. So the idea that not systematically disadvantaging plaintiffs of color in IIED suits will result in waves of new plaintiffs is, frankly, chimerical. Consider also the practical concerns of litigation which would continue to act as barriers: attorneys are not cheap, the judicial system is not quick, and litigation is not simple or easy, not to mention potentially retraumatizing. And institutionalized racism¹⁷³ means these impediments operate as an even greater barrier for people of color.

Essentially, this means if more new cases *are* brought because of this proposal, they will not be fraudulent or frivolous; they will be bona fide claims. Expanding IIED’s injury standard to include RBTS as a form of severe emotional distress resulting from modern racism and ethnoviolence—to include a still empirically-validated but far more congruous measure—will not threaten a deluge of litigation. But it will make justice more attainable for thick skin plaintiffs of color to recompense and vindicate affronts to their dignity.

¹⁷¹ See *supra* notes 19–20 and accompanying text.

¹⁷² Robert T. Carter & Jessica Forsyth, *Reactions to Racial Discrimination: Emotional Stress and Help-Seeking Behaviors*, 2 PSYCHOL. TRAUMA 183, 188 (2010).

¹⁷³ See *supra* note 43 and accompanying text.