Torts That Heal Words That Wound

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Tasnim Motala, Words Still Wound: IIED & Evolving Attitudes toward Racist Speech, 56 **Harv. Civ. Rts.-Civ. Lib. L. Rev.** 115 (2021).

Among legal academics, the intentional infliction of emotional distress tort is having a moment. Long derided as the "redheaded stepchild"[1] of personal injury law, IIED is being rediscovered by scholars seeking new interventions against social ills like workplace oppression and ethnoviolence.[2] Tasnim Motala is the latest writer to explore the promise of the IIED tort, this time as a response to racist speech. In *Words Still Wound: IIED & Evolving Attitudes toward Racist Speech*, Motala makes three crucial moves: she concretizes the injury of racial insult; she documents the limits of legislative efforts to stigmatize and deter this speech; and she revisits the intellectual history of the tort to suggest its capacity to redress speech-inflicted wounds. Some of these moves work better than others, but in the end, Motala has advanced an important conversation about private law's power to change social norms.

From its inception in the early twentieth century, lawyers and judges have been suspicious about IIED, often because they have resisted the idea that emotional injuries are sufficiently "real" to merit the law's protection. This suspicion has been especially intense where the claimed injury arises from a defendant's use of the legal right and cultural privilege to express personal opinions. Motala meets this objection head-on, showing how racial epithets rupture both the individual and society. She draws on extensive interdisciplinary literature showing that racial insults in person-to-person encounters inflict harms so widely recognized that psychologists have medicalized them as "race-based trauma." (P. 123.) This trauma has been empirically demonstrated to cause "anxiety, hypervigilance to threat, [and] lack of hopefulness for [the] future," often leading to depression and substance abuse. (P. 123-24.) Leveraging tort's simultaneous concern with private rights and social concerns, Motala argues that when these injuries are unredressed, they corrode both individual well-being and the social trust on which economic and democratic structures rely. (P. 120, 123.) Notably, Motala does not try to placate critics who insist that only physiological injury counts for tort liability. She subtly rejects the terms on which these critics want to joust, instead urging readers that tort's concerns go beyond the tangible alone.

Motala may aspire to a broader application of tort because, in her telling, twentieth century public law efforts to address racism have stalled out. While existing civil rights laws have had some impact on conduct in shared public spaces (public accommodations, government programs, employment, and education), they are powerless to address private racial hostility. (P. 131, 139-49.) State legislatures are equally hamstrung; when they have used their political capital to criminalize and punish hate speech, the Supreme Court has thwarted those efforts as unconstitutional abridgments of expression. (P. 134.)

Against this backdrop, IIED is offered as the "best vehicle" (P. 117) for stigmatizing and deterring racial insults; in fact, Motala makes the historical claim that the tort was "designed" for this purpose. (P. 118.) This claim is as bold as the two that precede it, but not quite as persuasive. Motala provides a capsule history of the academic drive to put a label on the cluster of turn-of-the-century tort cases recognizing emotional injury. (P. 135-39.) But she deemphasizes the history of institutional ambivalence about this effort – both within the American Law Institute and among the judiciary at the time. And she plays down the extent to which IIED advocates declined to specify the goals they thought the tort would serve over

time.[3] Yes, the creators of IIED have said behavior is more likely to be "outrageous" where it takes place between those who do not share power equally, (P. 138) and in theory, this does suggest that it is an apt response to racialized insults. But the creators of IIED stopped short of framing the tort as a means to empower victims of those insults. And while Motala points to a few cases where courts *have* used IIED this way, (P. 155) she points to just as many where they have *refused* to compensate victims, undercutting her claim that IIED was designed for this space. (P. 156-58.) Of course, law evolves over time. So even if IIED was not expressly created to do racial justice decades ago, it can do justice today and Motala persuasively argues that it should. But as a member of the pro-IIED choir, I am easy to persuade. Whether the speech absolutists and tort consequentialists in the congregation will agree is another question.

Motala's enthusiasm for IIED arises in part from a presumption that Americans have definitively pronounced racism immoral and racial insults socially taboo. (P. 117.) She backs these assertions by pointing to celebrities, student activists, and others who have leveled racist insults in recent years and been "cancelled" as a result. (P. 126-28, discussing, among others, comedian Roseanne Barr.) Unhappily, it is not clear what inference to draw from these scandals. Popular outrage against Barr, for example, suggests that many Americans consider such insults intolerable. But the very fact that Barr chose to tweet her insults for all to see suggests that many people freely traffic in words that wound.

Of course, the persistence of American racism does not doom Motala's bid for racial justice through IIED. If anything, it raises the stakes of her project. Here, her proposal might benefit from a deeper theorization of tort's operation and purposes. Like other instrumentalists who deploy tort in the service of the values they think society demonstrably prefers, she wants judges to impose anti-racist norms in these cases. (P. 159.) But if tort is a body of evolving common law that facilitates the construction of community norms, maybe IIED should be framed less as a tool of top-down judicial morality, and more as a vehicle for bottom-up norm modernization through jury conversations about race, equity, and interpersonal dignity. These conversations might organically produce the racial reckoning that Motala presumes to be largely behind us.

Whatever the future of IIED in the context of racist speech, Motala's article should spur an essential conversation about the comparative competencies of public and private law as tools of social justice.

1. Constance A. Anastopoulo & Daniel J. Crooks III, *Where's the Outrage: "Outrageous" Conduct in Analyzing the Tort of Intentional Infliction of Emotional Distress in the Wake of* Snyder v. Phelps, 19 **Tex. Wes. L. Rev.** 667 (2013).
2. *See*, *e.g.*, Christopher J. Robinette, *Filling the Gaps in IIED*, JOTWELL Torts (2021); Alex B. Long, *Using the IIED Tort to Address Discrimination and Retaliation in the Workplace*, **Ill. L. Rev.** (2021); Hafsa S. Mansoor, *Modern Racism but Old-Fashioned IIED: How Incongruous Injury Standards Deny "Thick Skin" Plaintiffs Redress for Racism and Ethnoviolence*, 50 **Seton H. L. Rev.** 881 (2020); and, well, Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity about Subjectivity*, 12 **J. Tort Law** 283 (2019).
3. *See* Tilley, *supra* note 2, at nn 89-93.

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