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CORE ANALYSIS

Conceptualising the tortuous harms of sexist and racist hate speech

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Abstract

Online sexist and racist hate speech has been condemned by many and condoned by most. In this paper we explicate in private legal terms the harms caused by sexist and racist hate speech. By centring the experiences of women of colour through coded testimonies we seek to rethink harm in tort in order to make visible private harms, which have remained largely invisible in European private law discourse. We highlight two aspects of harm that private law structurally fails to make visible: health harms and relational harms in the context of persistent and structural gender and racial injustice. In this paper, we argue that these systemic injustices must inform how we think of tortuous harms that arise from sexist and racist hate speech in bilateral relationships. In this article we centre the knowledge of women of colour targeted by SR hate speech within legal knowledge production and to the ways that the legal community thinks about tort law and its purpose. Conceptualising the tortuous harms of sexist and racist hate speech is crucial for access to private law pathways for redress and damages.

Keywords: European private law; private law theory; tort; critical race theory; gender; intersectionality; hate speech

*“The places where the law does not go to redress harm
have tended to be the places where women, children,
people of colour, and poor people live.”
Matsuda, 1989, p. 2322*

1. Introduction: Civil liability and sexist and racist online hate speech

Sexist and racist hate speech (SR hate speech), particularly online, has been condemned by many, but is condoned by most. In a UN statement, the Secretary General Antonio Guterres called hate speech ‘a menace to democratic values, social stability and peace.’ The statement also identified that in the online space, hate is moving mainstream.¹ In a 2016 Eurobarometer, 75 per cent of people that follow or participate in online debates had seen or come across abuse, threats and hate speech aimed at journalists and public figures. Half of those people said seeing this abuse turned them off from participating in online debates.²

¹United Nations, *Strategy and Plan of Action on Hate Speech* (United Nations 2022) available at: <<https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>>.

²Eurobarometer Media Pluralism and Democracy, Fieldwork September–October 2016 <https://ec.europa.eu/information_society/newsroom/image/document/2016-47/sp452summary_en_19666.pdf>.

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Women generally, and particularly women of colour, who participate politically and journalistically in public spheres are targeted most viciously and most often by SR hate speech.³ Access to justice for those targeted by SR hate speech is a persistent challenge. Among others, obstacles to justice include difficulties in the speedy take-down of hateful digital content⁴ and the ability to hold perpetrators liable and demand damages in civil liability.⁵

In various legal contexts, redress for SR hate speech can be sought through tort law which allows people to hold others accountable when they inflict harm.⁶ The legal and philosophical discussion around hate speech hinges on questions of what exactly hate speech is, and how it can be conceptualised.⁷ In its practical legal application, judges in Europe oscillate between the *freedom of speech* and *its limitations* so as to prevent silencing (Article 10 ECHR).⁸ The judicial tendency is to preserve speech, as the European Court of Human Rights identifies: ‘information or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that ‘offend, shock or disturb the State or any sector of the population’.⁹ In both contexts, there is emphasis on the permissibility of speech, that is, on the question of *wrong* of hate speech.

Yet, the question of wrongfulness is not the only obstacle to holding others accountable for the infliction of harm that occurs in horizontal relationships. How we think of harm in tort can also form an obstacle on the pathway of seeking private legal redress.¹⁰ Our Article focuses on *harm in tort*, particularly on the actual harms experienced by those most targeted by SR hate speech: women of colour.¹¹ Our paper aims to enable an improved legal visibility of actual harms experienced by those targeted, which is a precondition for legal redress and the determination of damages. Even when speech is qualified as wrongful, the extent and pervasiveness of these harms remain unintelligible and invisible in the private legal sphere when harm itself is assessed in the absence of considerations of systemic gender and racial injustice. To rethink tortious SR hate speech harm in the context of systemic injustice, we centre the lived experience of those targeted.

Our approach to centre lived experience is rooted in feminist and critical race theory, which we bring into conversation with private law theory. By centring the lived experience of SR hate speech

³J Posetti and Others, *The Chilling: Global Trends in Online Violence against Women Journalists – Unesco Research Discussion Paper* (UNESCO 2021) available at: <<https://en.unesco.org/sites/default/files/the-chilling.pdf>>. Also see M Nadim and A Fladmoe, *Hate Speech, Report 1. Research on the Nature and Extent of Hate Speech* (Institutt for samfunnsforskning 2016).

⁴See for a multidisciplinary exploration of the first dimension here: J van Hoboken et al, ‘Voorziening Voor Verzoeken Tot Snelle Verwijdering van Onrechtmatige Online Content’ (2020) WODC Rapport 3108 <<https://repository.wodc.nl/handle/20.500.12832/2489>>. This dimension confronts the role of large tech corporations and is also addressed by the forthcoming Digital Services Act. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (2020(COM)825).

⁵See for example, Minister voor Rechtsbescherming, *Brief van de Minister voor Rechtsbescherming* (Tweede Kamerstukken, No. 34 602 (2), 6 August 2019) <<https://zoek.officielebekendmakingen.nl/kst-34602-2.html#extrainformatie>>.

⁶While diverse across legal systems in Europe, the principle of a tort is captured by the following idea: ‘A person to whom damage to another is legally attributed is liable to compensate that damage.’ See PETL, NORM: Art 1:101 sub 1.

⁷See for instance: R Langton, ‘Speech Acts and Unspeakable Acts’ 22 (1993) *Philosophy & Public Affairs* 293; J Waldron, *The Harm in Hate Speech* (Harvard University Press 2014); A Brown, *Hate Speech Law: A Philosophical Examination* (Routledge 2015).

⁸In this paper we do not address the issue of the balance between the freedom of speech and the prohibition of discrimination. Art 17 ECHR outlines how fundamental rights regarding one ground for protection cannot be used to take away other legally protected fundamental rights.

⁹Handyside v. the United Kingdom Judgment of 7 December 1976’, § 49; and see ‘EU Code of Conduct on Countering Illegal Hate Speech Online’ available at: <https://edri.org/files/privatisedenf/euhatespeechcodeofconduct_20160531.pdf>.

¹⁰There are, of course, other requirements in tort that must also be considered, but which fall beyond the scope of this Article.

¹¹J Fox, C Cruz and JY Lee, ‘Perpetuating Online Sexism Offline: Anonymity, Interactivity, and the Effects of Sexist Hashtags on Social Media’ 52 (2015) *Computers in Human Behavior* 436; J Menendez, ‘Cyberbullying Victimization and Corresponding Distress in Women of Color’ (2020) Dissertation Georgia State University.

harms, we intend to position the voices of women of colour as central in the processes of European private legal knowledge production around tortuous harms as their knowledge is not often engaged in this sphere. In this paper we conceptualise these harms as private health and relational harms of SR hate speech. By health harms we refer to injuries to the physical and mental wellbeing of persons, while relational harms aim to capture injuries that manifest in the relationships that persons have, or are able to maintain and develop, with private others (these include a wide range of relationships that are intimate, personal, and arms-length).

We do not intend to present a full theory of tortuous SR hate speech harms. Instead, we aim to show that sexist and racist hate speech inflicts interconnected health and relational harms, which have considerable immaterial and material dimensions, including rippling economic consequences. The extent of these harms can only be considered in the light of the gendered racialisation of targets in society. Considering harm in the context of systemic gender and racial injustice is therefore also pivotal to establishing appropriate damages.

We focus on interconnected health and relational harms, because women of colour structurally describe such private SR hate speech harms, yet they remain relatively invisible, and in any case difficult to establish in the legal sphere of tort.¹² Invisibility and unintelligibility around these harms, and particularly how they represent tortuous harms, hinders access to justice because it blocks avenues for damages and redress. In a recent criminal case, a woman of colour was making a live Facebook report of an anti-racism demonstration against 'Black Pete' which is a traditional figure in Dutch St. Nicolas celebrations.¹³ Some of the online commenters to her reporting were deemed criminally liable for the racist and hateful nature of their comments. However, when it came to the matter of civil liability and damages that the claimant incurred, the Court only decided on a hundred euro fine in immaterial damages, rather than delving more deeply into the question of the actual harms that the criminal conduct might have caused. The issue of establishing a civil law tort claim was not difficult in this case, ie, the wrong was evident, given the context in criminal proceedings. Yet, the damages to which the plaintiff had access were limited to 'immaterial' damages based on similar damages that were given in these types of cases.¹⁴

What is more, research shows that while civil law remedies may be available, in practice, people only rarely bring actions under these provisions.¹⁵ The case law of civil courts in hate speech cases (as compared to cases of discrimination more broadly) is extremely limited.¹⁶ Nominal damages and the overall absence of civil liability for SR hate speech seems to misalign with the actual harms

¹²A Duin and others, 'Schadelijk Gedrag Online in Nederland: Resultaten En Nadere Analyse van Surveydata over de Ervaringen van Mensen in Nederland Met Schadelijk Gedrag Online En (Juridische) Stappen Naar Aanleiding Daarvan' (2022) *Onderzoeksrapport Instituut voor informatierecht*; T McGonagle, *The Council of Europe Against Online Hate Speech: Conundrums and Challenges*, MCM (2013) 005.

¹³Rb. Amsterdam 02-11-2020, ECLI:NL:RBAMS:2020:5294. Also see Committee on the Elimination of Racial Discrimination, 'Opinion of the Committee on the Elimination of Racial Discrimination under Art 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (eightieth session)' 16 June 2009, CERD/C/80/D/46/2009, para 9; where the Comité outlines that in the case of racism so called 'adequate' 'moral' damages are recommended in the case of racist transgressions). We also thank Professor Goran Sluiter for sharing with us his case notes outlining his views on civil damages in the context of criminal proceedings regarding racist insults in the case of the Dutch State against Mr. G Wilders. See <https://www.prakkendoliveira.nl/images/nieuws/2016/s161102_pleinota_met_bijlagen.pdf>.

¹⁴Under Dutch law, a direct link between the interest that is claimed in the case for damages and the criminal violation is not required in case of a civil liability (HR 28 May 2019, ECLI:NL:HR:2019:793). See §10 in case Rb. Amsterdam 2 November 2020, ECLI:NL:RBAMS:2020:5294. The question here is nonetheless if the court was given the opportunity to establish other damage, given the plea by the claimant.

¹⁵LIBE European Parliament, 'Hate Speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches' (2020) available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU%282020%29655135_EN.pdf>.

¹⁶J van Hoboken and others, 'Voorziening Voor Verzoeken Tot Snelle Verwijdering van Onrechtmatige Online Content' (2020) WODC Rapport 3108 WODC <<https://repository.wodc.nl/handle/20.500.12832/2489>>; T. McGonagle (n 12).

experienced by those targeted by SR hate speech. Our article dives deeper into the question of SR hate speech harms from the perspective of those targeted to make possible their acknowledgement in tort and make civil redress more accessible.

We focus on the private legal sphere of tort because private law offers legal remedies for injuries that arise in horizontal relationships between individuals, yet the specific harms that impact gendered and racialised persons often remain beyond its purview. Civil liability gives targets of SR hate speech a legal instrument to respond directly to the conduct of others in their horizontal relationships, which can empower those targeted by SR hate speech. It offers individuals the ability to decide on legal action and to invoke public institutions in the protection of private interests. Moreover, private litigation gives targets of hate speech control over the narrative and explication of harm that lies at the heart of a civil dispute in ways that criminal or administrative legal tools do not. We do not mean to argue against the usefulness for addressing the phenomenon of SR hate speech through public law means.

This article proceeds as follows. We first offer a comment on our methodology and our approach to conceptualising private harms of SR hate speech, which are somewhat non-traditional in the context of the European private legal discourse. In the following section we situate the invisibility of SR hate speech harms within the context of private law theory and identify how these harms could be subject to a tortious recognition, while recognising potential obstacles and limitations within various tort theories. In a next step we identify the nature and manner in which health harms and relational harms occur within the testimonies of targeted women of colour. We end by supporting calls for a specific SR hate speech tort, which we argue assists in making civil liability more appropriately responsive and available to women of colour who are targeted by SR hate speech.

2. Approach and methodology

Before we say more about our approach and methods, it is important to state that we come to this work with scholarly curiosity and feminist legal activist desire for change in the struggle for legal redress for those who are impacted by SR hate speech harms. Both authors are part of a feminist strategic litigation organisation, Bureau Clara Wichmann, which litigates with and on behalf of people who are impacted by various forms of gender oppression. In this context, our colleagues do important work in struggles for legal redress for SR hate speech in collaboration with women of colour who experience these harms. The lived experiences of these women guide this paper, and their testimonies are illustrative of these struggles for legibility of their harm within the legal sphere. The contributions that this paper aims to make are intended to be in service of their struggles for legal redress for harms that are marginalised in private law ‘to the systematic disadvantage of women and minority plaintiffs, who may find that the most serious recurring injuries in their lives are not compensable in tort’.¹⁷

The occurrence of SR hate speech and the issue of the private legal invisibility of its harms can be approached via a variety of prisms. The method we use in this research builds on the epistemological assumption that law is part of the manner humans construct our social world and we must seek to deconstruct its political and social context in order to understand its potential impacts or nature.¹⁸ We approach the issue of private harm of SR hate speech with intersectional complexity in mind, because social problems and people’s social and political lives are shaped by multiple and mutually influencing vectors of social division (eg, gender, race, sexuality, religion,

¹⁷M Chamallas and J Wriggins, *The Measure Of Injury* (New York University Press 2010) 3.

¹⁸See D Della Porta and M Keating, ‘How Many Approaches in the Social Sciences? An Epistemological Introduction’ in *Approaches and Methodologies in Social Sciences, A Pluralist Perspective* (Cambridge University Press 2008) 19; L Snape and L Spencer, ‘The Foundations of Qualitative Research’ in J Ritchie and J Lewis (eds) *Qualitative Research Practice* (SAGE Publications 2003) 2. But also see, b hooks, ‘Postmodern Blackness’ 1 (1990) *Postmodern Culture*.

class, ability).¹⁹ Critical approaches to law, such as feminist and critical race theory, use intersectionality to analyse the harms that impact multiply marginalised people.²⁰ An important methodological tool for both feminist and critical race theory is to treat lived experience of oppression as a valid source of legal knowledge.²¹ By centring marginalised voices, the processes of marginalisation can be made visible in law and legal scholarship.²² Our approach to private harms of SR hate speech is rooted in these insights and we therefore centre testimonies and the knowledge that women of colour have about the harm they have experienced, as valid evidence and legal knowledge.

This Article connects this knowledge to processes of European private legal knowledge production as it regards private harms of SR hate speech. In such a way, we engage testimony alongside feminist and critical race theory, private legal theory, and studies on health and relational harms. Where we offer legal examples, we primarily rely on the Dutch experience, as this is also the legal sphere that is relevant for the experiences of the women of colour that we aim to centre in this research. We draw wider inferences for the European private legal discourse – from these experiences and the law in the Netherlands – by developing a theoretical lens that builds and combines understandings and assumptions from European private law theory and US-based feminist and critical race theory. Starting with the experiences of women of colour, situated within their specific legal sphere, is our methodological choice to help address the invisibility of harms and assists in the development of private legal pathways for redress.²³ Experience of the private harms of SR hate speech ought to be part of the ways in which the legal community thinks of the purpose of tort responses. For, and to whom is tort law, and law more generally, supportive, and responsive? We invoke private law theory and critical race and feminist scholarship to shed light on how knowledge of women of colour who experience hate speech harms can be marginalised or elevated as legal knowledge of harm. For pathways to legal redress, it matters how the legal community understands these harms.

We have chosen to discuss hate speech as *sexist* and *racist* for two reasons. First, the women who participated in the research marked the hate speech as sexist and racist in their testimonies. They made sense of their position *as* targets and the specific expressions of hate through their own gendered racialisation in society. Their experiences show how hate speech functions to marginalize them *as* women of colour in multiple ways across their various intersecting positions. One participant stated:

¹⁹P Collins and S Bilge, *Intersectionality* (1st edn, Polity Press 2016) 1–3; K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1) (1989) University of Chicago Legal Forum 139.

²⁰There is rich scholarship on intersectionality that builds on a history of (and continued work in) Black feminist studies. See for instance: A Hull, P Bell-Scott and B Smith, *All The Women Are White, All The Blacks Are Men, But Some of Us Are Brave* (The Feminist Press 1981); b hooks, *Feminist Theory from Margin to Center* (South End Press 1984); Z Eisenstein, *The Combahee River Collective* (Zilla Eisenstein 1977); PH Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman 1990).

²¹R Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ 87 (1989) Michigan Law Review 2411; M Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ 87 (1989) Michigan Law Review 2320; K Gravett, ‘Story Completion: Storying as a Method of Meaning-Making and Discursive Discovery’ 18 (2019) International Journal of Qualitative Methods 1.

²²Critical race theory often uses counternarrative and storytelling as a tool to do this work, see R Delgado (n 21); M Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (1st edn., Routledge 2014) 41–2.

²³On the importance of centering marginalised voices see: K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ 43 (1991) Stanford Law Review 1241; S Hartman, *Wayward Lives, Beautiful Experiments: Intimate Histories of Social Upheaval* (W.W. Norton & Company 2019) xiii–v; M Chamallas, *Introduction to Feminist Legal Theory* (Wolters Kluwer 2013) 4.

the hate I received, I want to say without exception, targeted my gender and race. So I had to be raped and return to monkeyland, to mention the most common speech.²⁴

Second, we elevate race alongside gender because of the underacknowledged salience of race in the European context where gender is more prominent as a visible frame for hate speech.²⁵ We believe it is significant to name private harms of hate speech as sexist and racist, precisely because of the almost absent role of intersectionality in European private law discourse.²⁶ Thus, an important methodological consideration and normative choice is to highlight the gendered and racialized dimensions of the harm of hate speech in response to a generally European colourblind context.²⁷ In this context dimensions of racial power, privilege, and oppression remain undertheorized and underacknowledged; and race is still largely absent in legal constructions of private harm and downplayed in broader academic discourse.²⁸ European hate speech discourse also tends to elevate gender as a singular lens, which stands in sharp contrast with the centrality of gender and race in the testimonies of the targeted women of colour. In this context, it remains a struggle to name race in analyses against its replacement with religion, ethnicity, citizenship, or migration status.

Yet, this choice does not preclude the significance of other vectors of social division that should be part of the legal question of private harm that people experience. Notably, our testimonies demonstrate how SR speech is inextricably tied to pervasive forms of European Islamophobia,²⁹ while in other instances hate speech relied, invoked, and adopted anti-Black narratives particular to the American historical context.³⁰ By naming race we do not minimize the importance of religious identity, but instead highlight European Islamophobia through European racialization of religion.³¹ For instance, we understand hateful responses to veiled women as illustrating the gender racialization of European Muslims. Thus, in naming race alongside gender, we do not claim that European Islamophobia is a separate issue from the SR hate speech that targets, for instance, Black and Brown Muslim women. Islamophobia is a racial issue, and racism is a religious issue when it comes to hate speech that targets Muslim women of colour. An illustration from testimony:

I was verbally abused all the time, and in a very sneaky manner, so that nobody else would hear, by walking by me very closely, and especially targeting the fact that I wear a headscarf, that I'm a Muslim and that I'm Black, so I had to go back to Africa. I was a 'headragmonkey', you name it, and a Black woman who wears a headscarf; they don't belong in politics in the Netherlands. This keeps returning in all the responses I receive, online, on the street, through mail.³²

Our focus and naming of gender and race as important factors to understand the private harms of hate speech are thus motivated by the aforementioned reasons and not by a conviction of irrelevance of other factors, including ethnicity, religion, ability, nationality, and age. We do not aim to

²⁴Participant 2, May 2020.

²⁵Race, ethnicity, religion, sexuality, and other vectors of social division are often mentioned as 'additional' factors, see for instance: Council of Europe, Gender Equality Unit, *Background Note on Sexist Hate Speech* (2016) available at <<https://rm.coe.int/168059ad42>>.

²⁶In the context of contract law, see M Hesselink, *Justifying Contract In Europe* (Oxford University Press 2021) 307.

²⁷See M Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (1st edn, Routledge 2014); and LKL Tjon Soei Len, 'On Politics and Feminist Legal Method in Legal Academia' in M Bartl and JC Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022) 31.

²⁸*Ibid.*; F El-Tayeb, *European Others: Queering Ethnicity in Postnational Europe* (University of Minnesota Press 2011) xxviii–ix.

²⁹W Hutten and N Mustafa, 'Contesting Neutrality Dress Codes in Europe' (2022) *Open Society Foundations* 1–46.

³⁰For instance, hate speech invoked images and practices particular to American context, including images of lynching.

³¹El-Tayeb (n 28) xxvii–ix.

³²Participant 5, May 2020.

propagate the idea of a hierarchy in these oppressions.³³ By centring and elevating gender and race, we mean to contribute to an entangled and levelled, intersectional understanding of complex private harms within relevant systems of power. Our resulting analyses should be read in this light, as we name gender and race among the relevant social hierarchies that inform private harms, rather than as a hierarchical claim about the primacy of race and gender. We cannot understand testimonies of harm without understanding how gender and race shape and constitute the relationship between those who suffer and those who inflict injury, because parties are positioned within gendered and racialized hierarchies. As Chamallas states:

The interaction between systemic and individual harm occurs because the effects of systemic injustice are felt at the individual level, sometimes changing the intensity of the injury, or even distorting the nature of the injury. An example of this systemic/individual interaction includes the infliction of gross racist insults in public, still quite commonplace in daily interactions. Such intentional behavior is not only offensive but may inflict a kind of racialized trauma that builds on a history of racially discriminatory treatment, making the distress suffered by the victim especially painful and disabling.³⁴

The testimonies were gathered in an online recorded session with women of colour who participate in public discourse (eg, as journalists, political representatives, activists) in the Netherlands. We spoke to the women in the context of seeking a strategy for litigation for a case on sexist and racist hate speech. All women are known figures in Dutch public discourse. In the fifth session women shared their testimonies of being targeted by SR hate speech and explored in as much detail as possible the precise harms they experienced for themselves and in relation to their surroundings. Across gender, race, ethnicity, and religion these women became targets of hate speech and experienced various forms of hate speech harms. We transcribed, anonymized, and translated these testimonies from Dutch and coded these accounts for descriptions of online SR hate speech, health harms and relational harms, where we created a sub-code with respect to relational harm for descriptions of economic harm. We chose to sub-categorise economic harm from relational harm given that most participants described significant relational harms of online hate speech in their social lives, which can have both health and economic impacts. However, all economic impacts described were relational in that they related to the foreclosure of opportunities for contractual (arms-length) relations that function as sources of income and professional development.³⁵ It is this process that anchored the initial exploration and co-construction of meaning in relation to legal data, and grey literature and further academic discourse.³⁶

3. Private law theory: the intelligibility of SR hate speech in private law

In legal communities and jurisdictions hate speech is generally viewed and treated as speech that can be regulated.³⁷ Generally hate speech refers to abusive and threatening language that expresses prejudice against a particular group. But in the legal context the usage of ‘hate speech’ aims to capture legally restricted speech that targets and intends to incite hatred against people on the basis of their membership in a social group (eg gender, race, ethnicity, religion, nationality, sexual

³³A Lorde, ‘There Is No Hierarchy of Oppressions’ 14 (3, 4) (1983) *Bulletin: Homophobia and Education* (Council on Interracial Books for Children) 9.

³⁴M Chamallas, ‘Social Justice Tort Theory’ 14 (2021) *Journal of Tort Law* 309, 7.

³⁵We recognise that health harms are interconnected with economic harms, as they can severely impact people’s abilities to make use of, or perform in, otherwise available opportunities. We do not further conceptualise those connections in this article.

³⁶J Munday, ‘What Is a Focus Group and Why and How Would Feminist Researchers Want to Use Them?’ in SN Hesse-Biber (ed), *Feminist Research Practice: A Primer* (SAGE Publications 2013) 235.

³⁷Brown (n 7) 5.

orientation, disability etc).³⁸ In the European law context, the term indicates a shared consensus that there are limitations to speech, but there seems to be no universally applicable legal concept or term.³⁹ The Council of Europe sustains focus on the ways in which hate speech can be regulated, particularly online,⁴⁰ and defines hate speech as:

covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.⁴¹

In (grey) literature the three elements of ‘online’ ‘sexist’ and ‘racist’ have not been explicitly brought under one heading. Sexist online hate speech is identified as cyber gender harassment and cybersexism.⁴² Regarding sexism the emphasis in the literature has been placed on the aims of the speech, which is taken to undermine the reputation of women; their dignity, to humiliate and shame, and make them fearful and vulnerable, to altogether ‘perpetuate hierarchy in public places’.⁴³

Yet, as the term hate speech is legally not clearly defined, neither is the regulatory regime to address its realities. In some countries there is emphasis on criminal law, in other countries civil law is used, sometimes both.⁴⁴ In a comparative legal study of the NGO, *Article 19*, from 2018 it was shown that the civil causes for action in cases of hate speech generally are widely varied in Europe.⁴⁵ While those targeted by hate speech can seek (diverging) civil law remedies in Europe, research shows that in practice, people only rarely bring actions under these provisions.⁴⁶ The case-law of civil courts in hate speech cases (as compared to cases of discrimination more broadly) is extremely limited. The limited information available, however, does not allow specific conclusions to be drawn on the effectiveness of these provisions. Targets of online hate speech who want

³⁸Brown (n 7) 448.

³⁹By ‘European legal context’ we refer to the law that is adopted either by the European Union institutions, developed by the Council of Europe or developed in the context of the case law. See for instance, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (http://data.europa.eu/eli/dec_framw/2008/913/oj).

⁴⁰T McGonagle (n 12).

⁴¹See ‘Council of Europe, Committee of Ministers Recommendation No. R (97) 20 of the Committee of Ministers to Member States on Hate Speech’ (Adopted by the Committee of Ministers on 30 October 1997 at the 607th Meeting of the Ministers’ Deputies) (1997). Also see Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (http://data.europa.eu/eli/dec_framw/2008/913/oj).

⁴²G Richard and S Couchot-Schiex, *Cybersexism: How Gender and Sexuality Are at Play in Cyberspace* (HAL 2021) 17–30 <<https://hal.archives-ouvertes.fr/hal-03140145/document>>. Also see the European Institute for Gender Equality at: *Cyber Violence against Women* (EIGE 2022) <<https://eige.europa.eu/gender-based-violence/cyber-violence-against-women>>.

⁴³Council of Europe, Gender Equality Unit, ‘Background Note on Sexist Hate Speech’ (2016) <<https://rm.coe.int/168059ad42>> Also see, D Zuckerberg, *Not All Dead White Men: Classics and Misogyny in the Digital Age* (Harvard University Press); L Richardson-Self, *Hate Speech against Women Online* (Rowman & Littlefield 2021).

⁴⁴See for an overview of legal tools including in criminal, civil, administrative law: A Brown (n 7). Legislative attempts to better regulate online speech include a French legal proposal in 2020, but this law was criticised heavily and ultimately quashed by the French Constitutional court. See: ‘Proposition de loi visant à lutter contre les contenus haineux sur internet 2020’ (Assemblée Nationale 2020) available at: <https://www.assemblee-nationale.fr/dyn/15/textes/115t0419_texte-adopté-provisoire.pdf>; See the decision of the Constitutional Court; Loi visant à lutter contre les contenus haineux sur internet (2020) Conseil Constitutionnel, Décision n° 2020-801 DC (Conseil Constitutionnel) <<https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>>.

⁴⁵Austria, Hungary, Poland, and Germany have pathways for civil liability, see: Art 19, ‘Article 19, Responding to “Hate Speech”: Comparative Overview of Six EU Countries’ (2018) available at: <https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf>.

⁴⁶LIBE European Parliament, ‘Hate Speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches’ (2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU%282020%29655135_EN.pdf>.

to pursue these remedies might be deterred by problems such as the cost of legal representation and the excessive length of the civil proceedings in the context of a very uncertain and uncharted pathway towards redress.⁴⁷ Obstacles in the legibility of SR hate speech harms in tort, however, may also play a role. Tort can offer parties that are injured by speech pathways to redress when utterances lead to harm, but in order to make fully visible and intelligible what the health and relational harms of SR hate speech are, it matters how lawyers and courts think of the aims of private law and what it can and should do for people.

Private law is generally understood as comprising the legal institutions that govern horizontal relationships between private actors (eg, contract, tort).⁴⁸ Legal scholars tend to think of private law questions as separate from questions of systemic social injustices (including gender and racial injustice). While they might enter private law considerations tangentially, mainstream accounts of justification tend to set aside systemic injustice from the normative significance of private law. Such is true for mainstream approaches to tort law,⁴⁹ which include economic, corrective justice, and civil recourse approaches.⁵⁰ Each of these approaches generally excludes, for various reasons, systemic injustices from the sort of information that is generally viewed as salient for justificatory accounts of tort law. Yet, the racial and gendered dimensions of hate speech inform the health and relational harms experienced by women of colour and thus are salient to the question of, for instance, correction. The conceptualisation of SR hate speech harms is pivotal for what corrective justice requires between private actors, even when corrective justice goals reject private law's pursuit of a more socially just order across racial and gendered dimensions. Social justice tort theory, including distributive justice approaches, take a notably different stance on private law's pursuit of social justice. Understanding how and why social injustice (including gender and racial injustice) concerns may play a role across different accounts of tort is relevant to our understanding of the obstacles to making gendered and racialized tortious harms fully visible.⁵¹

A. Exclusions of social injustice: Decentering gender and racial justice in private law

Economic analyses of private law offer consequentialist accounts that focus on the maximization of social utility (often captured through aggregate wealth and efficiency aims). In this frame, the role of tort law is to minimize the social costs of engaging in daily activities. Specifically, this translates into tort law as a regime for allocating the costs of accidents, determining the demarcation between efficient and inefficient accidents, and aiming towards optimal deterrence.⁵² Under the economic approach, all private actors are presumed equally positioned in their encounters, ie, as economic agents in pursuit of preference satisfaction under similar conditions. Tort law alternatives are evaluated according to the production of the greatest social utility in a forward-looking

⁴⁷J van Hoboken and others (n 16).

⁴⁸On various understanding of the role of private law, see J Gordley, *Foundations of Private Law* (Oxford University Press 2006).

⁴⁹We focus on tort as online SR hate speech usually does not occur between a target and perpetrator who are bound in a contractual relationship. Another question, not addressed in this paper, concerns the relation between the (social media) platform where hate speech takes place, which may have a contractual relationship with the respective target and/or perpetrator. Beyond the scope of this paper is also the question of the importance of public legal instruments for deterrence and norm setting of unacceptable sexist and racist conduct.

⁵⁰M Chamallas, 'Beneath the Surface of Civil Recourse Theory' 88 (2013) *Indiana Law Journal* 527, 17; J Oberdieck, *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014).

⁵¹In European tort, while divergent across national Member States, the contrast between corrective justice and distributive justice accounts is most salient. See eg, M Loth, 'Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' 22 (2015) *Maastricht Journal of European and Comparative Law* 788.

⁵²See MA Geistfeld, 'Compensation as a Tort Norm' in J Oberdieck (ed), *The Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 65.

manner as deterrence refers to the prevention of future action. How systemic social injustices influence and shape private interactions and their consequences are irrelevant for such considerations.

Corrective justice approaches, by contrast, argue that private law's normative foundation must centrally revolve around the significance of the bilateral, horizontal relationships in which a wrongdoer is held accountable for the reparation of injury for which they are responsible.⁵³ Yet, similar to economic approaches, corrective justice imagines private actors to be formal equals, symmetrically positioned vis-a-vis each other taking the status quo as between them as a given. Under this approach, the correction of a private wrong is established by a return to the status quo and independent of the question of its quality in terms of social (in)justice. Any (pre-existing) asymmetries of social privilege and power between parties differently positioned across social hierarchies are irrelevant. This is similarly true for civil recourse, which focuses on offering private parties who suffer legally recognized harm the opportunity to seek redress against those responsible for harm.⁵⁴

In each of these main frames of tort, systemic social injustices find little expression in tort law values. When the exclusive justificatory structure of tort is solely internal to the bilateral relationship between parties, taking status quo positions for granted, social justice aims remain beyond the remit of private law. But for the question of harm that occurs between bilateral parties, the gendered and racial dimensions of harm are salient as they give insight into, for example, relevant costs and thus inform demands for correction that private law justice requires. While questions of when, how, and why tort law ought to respond are settled separate from questions of systemic injustice (eg, gender and racial injustice) in these accounts, gendered and racial dimensions of harms are relevant as a matter of the actual harms that parties experience. How women of colour are harmed by hate speech matters in terms of what other private parties owe them as a result of the injuries they cause. Thus, as relevant accounts of the harm caused by hate speech, the gendered and racial dimensions of hate speech harms are crucial to determining what is owed within bilateral relationships and for the question of tort's demarcation around the selective availability of state power for redress. This is relevant even as tort law remains a gender and racial justice-neutral endeavour under mainstream approaches.⁵⁵

B. Social justice tort theory: Making gender and racial injustice visible

Distributive justice accounts of tort mark a notable exception in that they allow, or even place as central, a distributive justice role of tort.⁵⁶ Diverse distributive accounts of tort exist, with important differences for how, if at all, gender and racial injustice may play a role in the justification of tort. Gardner, for instance, argues that the point of tort law is the distribution of correction.⁵⁷ Tort law institutionalizes some wrongs as legal wrongs, which establishes both a corrective claim

⁵³See for example, E Weinrib, *The Idea of Private Law* (Harvard University Press 1995) and A Ripstein, *Private Wrongs* (Harvard University Press 2016).

⁵⁴JCP Goldberg and BC Zipursky, 'Tort Law and Responsibility' in J Oberdieck (ed), *The Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 16.

⁵⁵Chamallas and Wriggins (n 17). Herein Chamallas and Wriggins describe law and economics and corrective justice as the two major pillars of tort, the former focuses on efficiency whereas the latter focuses on correcting harm between parties. Neither framework views as significant gender nor racial social hierarchy.

⁵⁶There are also distributive accounts, in which corrective justice is viewed as distributive justice such that it excludes considerations that are informed by non-corrective considerations of systemic injustice. See; H Sheinman, 'Tort Law and Distributive Justice' in J Oberdieck (ed), *The Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 354.

⁵⁷J Gardner, 'What Is Tort Law For? The Place of Distributive Justice' in J Oberdieck (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 2011) 8–9. 'How do we distribute, across the vast range of candidate wrongdoers and candidate persons wronged, the numerous possible sets of legal arrangements to support the doing of corrective justice as between them?'

against the wrongdoer, and a claim towards the state for access to its power of enforcement. In pursuit of tort's primary goal of corrective justice, the law necessarily distributes corrective justice entitlements between groups and loss between wrongdoer and injured party. This account raises the question of how corrective justice entitlements are distributed between social groups. What sorts of harms are recognized as legal wrongs that ground a corrective claim? And how are such claims generally distributed across people who are differently positioned across social hierarchies? Who has claims towards the state for access to its power of enforcement of corrective claims? Gardner's distributive framing can create pathways through which information about parties' social positions can become relevant and accompany corrective justice claims.

Another distributive approach to tort brings in a social justice-oriented account that expands the justification of tort beyond the bilateral, corrective justice structure.⁵⁸ Keren-Paz argues for a 'progressive' distributive justice account of tort, which offers solutions that redistribute 'benefits from the more to the less advantaged, or burdens from the less to the more advantaged.'⁵⁹ Distributions of tort allocated benefits and burdens may go beyond the distribution of the corrective claims. In this account, disadvantage is informed by the burdens of systemic injustices and Keren-Paz adopts an intersectional approach that allows highlighting of gender and race-based burdens that pre-exist and originate outside of the bilateral tort relationship between private parties. In this conception, a private wrong need not be abstracted away from the disproportionate distributions of social privilege and power but can be conceptualized in relation to the systemic social inequities that shape people's lives. What is more, socially relevant 'disadvantage' centrally captures and acknowledges systemic, group based and historically informed injustices that shape experiences of harm, the disparate impacts of legal rules, and the disparate distribution of access to legal redress.⁶⁰ On this account, the justification for the law's response to tortious harm can be informed by the wrongs that arise because of interactions between individuals socially positioned across unjust social hierarchies. Tort, in this respect, can capture and make visible the structural gender and racial asymmetries that shape social injustice not merely as background context, but as crucial to our understanding of the patterns in which private law acknowledges tortious harm. On this account, the way that SR hate speech reproduces unjust social hierarchies is relevant to how we think of SR hate speech harm in tort. In the words of one participant:

You make a claim to power by using your voice, when you're a woman – but when you are also a woman of colour you definitely have to be silenced, that is massive and *en masse*. And in the meantime, people say: what a shame we don't see any women in talk shows. Well, any woman should think twice, because everyone can see what can happen when you open your mouth.⁶¹

Justifications and normative accounts of tort are important for our conceptualization of the tortious harms of SR hate speech. Social justice tort theory can provide a basis for a more distributively just mode of addressing SR hate speech harms in tort.⁶² We take on board systemic gender and racial injustice for our understanding of unfair distributions of tort claims which informs our support for calls for a specific recognition of the harm, and therewith we support a specific tort, in response to the gendered and racialized devaluation of injury and harm.⁶³ In this regard, it matters how legal rights to redress are distributed across gendered and racialized groups in the context of historical and systemic denials of injury experienced by women of colour. A gender and race

⁵⁸M Chamallas, 'Social Justice Tort Theory' 14 (2021) *Journal of Tort Law* 309.

⁵⁹T Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Routledge 2007) 12.

⁶⁰*Ibid.*, 50.

⁶¹Participant 2, May 2020.

⁶²Chamallas (n 23); ZK Said, *Tort Law: A 21st-Century Approach* (CALI Langdell Press 2021).

⁶³Chamallas and Wriggins (n 17) 45,49.

sensitive account of the justification of tort, can make visible the social reality of the distribution of correction. If tort creates legal rights to corrective justice for only a particular type of harm, who are the people who receive the privilege of this legal recognition of wrongdoing? Who are among those who the law identifies as wronged? And which harms tend to qualify as legal wrongs from which the corrective right arises?

Furthermore, this understanding is particularly crucial where the injury directly relates to the normative significance of the politics of systemic injustice, which is what is at stake in the ability for women of colour to speak on issues of public policy in their political functions or in journalistic roles. Private SR hate speech harms directly call upon the historical politics of social hierarchies. Hence, we adopt a social justice tort frame that leads us to consider – in order to establish tortious harms of SR hate speech – the lived realities of marginalized groups, including the broader set of social inequalities that particularly women of colour journalists and politicians experience in online spaces. This alignment with social justice tort theory, however, does not preclude the relevance of our conceptualization of SR hate speech for private law responses that are grounded in, for instance, corrective justice. To the contrary, systemic gender and racial injustice must inform how we think of the harms that arise within bilateral horizontal relationships and the types of reparations tort should require of wrongdoers in response to the injuries for which they are responsible. While corrective justice accounts of tort may decentre racial and gender justice as a tort objective, racial and gendered dimensions of harm ought to inform the question of correction between bilateral private parties.

4. Conceptualizing SR private hate speech harms

As previously outlined, a hurdle towards the legal conceptualization of SR hate speech harms inflicted upon women of colour, concerns the ability to conceptualize the specific harm in the legal sphere. Not often does the law capture and reflect the experiences of women of colour or the harms inflicted upon them, which have deep ramifications for the lives they are able to live.⁶⁴ Instead, legal storytelling tends to make their experiences invisible under the guise of neutral, objective, colour blind concepts and forms of legal reasoning.⁶⁵ It is imperative then, that we approach the question of harm not as a matter of *legal* storytelling, but through the testimonies of women of colour who experience harm as a result of having become targets of SR hate speech.

A. The lived reality of SR hate speech: online anonymity

To conceptualize the harms of hate speech, we draw attention to the way hate speech often occurs in the lived reality of people. In this context it is significant to draw attention to the online sphere.⁶⁶ This is an important preliminary step to thinking about the harms of SR hate speech. Social media providers have made the tools through which hate speech can be directed at targets increasingly accessible. Online tools make the expression of hate speech more anonymous and collective (mass – pile on). Hence when we conceptualize the harms of hate speech in the online context, we need to consider features important to online SR hate speech: its anonymity, its lasting impact, and the captive audience. This is important to considerations of the impact of hate speech and rethinking the harm in tort through the lived experience of targets. From testimony:

⁶⁴K Crenshaw (n 9).

⁶⁵P Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991); R Delgado (n 21); Matsuda (n 21); K Gravett, 'Story Completion: Storying as a Method of Meaning-Making and Discursive Discovery' 18 (2019) *International Journal of Qualitative Methods* 1.

⁶⁶While notoriously difficult to hold online speakers accountable for harmful speech due to presumed anonymity, IP address disclosures can help with identification.

It was an organized and orchestrated national hate campaign towards my person.⁶⁷

Where did the campaign come from? It's just organized, with bots, trolls, everything that has to do with Muslims, and then it's just that it keeps repeating on social media.⁶⁸

It's just easy online, with anonymized accounts and such.⁶⁹

At some point I realized that it was organized, every time I was in the media, there was an army of trolls ready, with one or two front men to lead them.⁷⁰

The anonymous nature of online hate speech increases anxiety and fear for one's safety in other spaces. Since the target does not know who the speaker is, the sense of loss of safety extends into other spaces (eg, public, employment) extending the impact of relational harms and mental health harms (discussed in Section 4.B) through time and space. Anonymous online hate speech makes targets justifiably suspicious and anxious around other people injuring their ability to feel safe and the ability to form new relationships with unknown others. From testimony:

One time, there was a group of thousands of people in a Facebook group that was targeting me. One night I came home and I was thinking, if all of these people would show up at my door, I would have a big ff-ing problem. And everyone would tell me, it's only online, but I thought: behind every account there is a person. In that sense I have always taken this very seriously.⁷¹

(...) you don't know who they are. Everyone becomes dangerous because of that. It makes one paranoid. You don't dare to call a plumber anymore; the policeman can be that guy on Twitter. The sense of being unsafe is immense, it's not just the physical sense of not being safe, you just lose all spontaneity.⁷²

Online hate speech also creates a lasting impact given the online profile that is created of one's person and the captive audience that takes note of this profile. The negative online profile of the targeted person, impacting social and professional networks, damaging a person's ability to form new relationships and eventually also the availability of employment opportunities.

My name and reputation were ruined, because of the intensity that was created around me as a person.⁷³

There is an online profile that is made of you, and that does not look good, so a potential employer will think twice of hiring you; you're trouble.⁷⁴

Important in this regard is that the injury this speech causes is part of a social transgression that is targeting people as part of a group. As noted by Lawrence: '(...) the victim is a captive audience and the injury is experienced by all members of a racial group who are forced to hear or see these words; the insulting words, in effect, are aimed at the entire group.'⁷⁵

⁶⁷Participant 2, May 2020.

⁶⁸Participant 4, May 2020.

⁶⁹Participant 3, May 2020.

⁷⁰*Ibid.*

⁷¹Participant 2, May 2020.

⁷²Participant 1, May 2020.

⁷³*Ibid.*

⁷⁴Participant 3, May 2020.

⁷⁵CR Lawrence, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' (1990) *Duke Law Journal* 431, 437.

B. Conceptualizing health and relational harms

In the conceptualization of tortious hate speech harms, we focus on health and relational harms. These are certainly not the only dimensions of harm that occur. Notably, a foundational harm of SR hate speech is the dignitary harm entailed in disrespectful treatment based on one's race and gender. Dignitary harms arise from SR hate speech because such speech communicates not only social division, but social hierarchy based on gendered and racialized notions of status and personhood. As race and gender form central aspects of identity, racist and sexist forms of disrespectful treatment go to the heart of one's self-image.⁷⁶ Dignitary harm always arises—alongside other types of harms – when SR hate speech occurs, as such speech degrades and humiliates persons injuring their personal dignity. It places women of colour outside of the community of people deserving of equal respect, relegating them to a class of persons whose equal worth can seemingly be disregarded.

It is important to place these harms in their structural contexts. Such contextualization is imperative for our understanding of the meaning and nature of these harms. While private law tends to capture harm as an occurrence between formal equals, such posited equality masks the depth and breadth of injuries arising in a context of structural inequalities of power and privilege. We draw attention to the 'before' and 'after' of hate speech occurrences.

With the 'before', we mean the structural sexism and racism that shapes European and Western societies, its social, economic, and political relations, and everyday interactions between private actors.⁷⁷ Before SR hate speech occurs, racism and sexism already wounds people in structural ways. The blows of SR hate speech thus occur in the lives of people already made vulnerable by forces that injure in similar fashion.⁷⁸ It is important to contextualize the harms of SR hate speech within the overall racialised and gendered structures of economic, social, and political daily life. Beyond explicit and intentional racist and sexist behaviours, racist and sexist structures – those that come to life in everyday interactions between well-intentioned individuals – disadvantage and harm women of colour in systemic ways. Being treated as structurally 'out of place' impacts one's ability for flourishing. It is this context which gives rise to the 'death by a thousand cuts' metaphor that captures the severe and long-term injuries inflicted upon women of colour through hate speech.⁷⁹ Structural racism and sexism are thus important contextual elements to understand the long term, formative injuries which concern the core senses of self-worth, self-respect, and desirability of women of colour.

As it regards structural racism, critical race theorists highlight its importance for an understanding and conceptualization of harms of racist hate speech.⁸⁰ Members of racial minorities and gender subordinated groups exist in contexts where the value of their identity and existence is structurally challenged by images, narratives, and messages that express their undesirability and

⁷⁶R Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling' in MJ Matsuda and others (eds), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press 1993) 89–91.

⁷⁷G Wekker, *Duke University Press – White Innocence* (Duke University Press 2016); P Essed and S Trienekens, 'Who Wants to Feel White? Race, Dutch Culture and Contested Identities' 31 (2008) *Ethnic and Racial Studies* 52; P Essed and K Nimako, 'Designs and (Co)Incidents: Cultures of Scholarship and Public Policy on Immigrants/Minorities in the Netherlands' 47 (2006) *International Journal of Comparative Sociology* 281.

⁷⁸This is relevant for European tort law because tortious harms can be and are constructed in relation to pre-existing vulnerabilities. The eggshell rule, for instance, suggests that pre-existing racial trauma cannot function as a defence to liability. The rule expresses a legal extension of liability for instances where the scope of harm is unforeseeable and related to a special susceptibility to injury. Therefore, even in instances where a racist and sexist slur is legally evaluated as minor, the consequences – which can be grave – ought to be leading to the question of tort liability. If the standard rule is that a tortfeasor must take their victims as they find them, such rule supports liability for racist and sexist hate speech harms. See CA Nelson, 'Considering Tortious Racism' 9 (2) (2015) *DePaul Journal of Health Care Law* 905–69.

⁷⁹DW Sue, 'Microaggressions: Death by a Thousand Cuts' (2021) *Scientific American* <<https://www.scientificamerican.com/article/microaggressions-death-by-a-thousand-cuts/>> accessed 9 June 2022.

⁸⁰R Delgado and J Stefancic, *Critical Race Theory* (3rd edn, New York University Press 2001); M Matsuda and others (n 76).

deficiency vis-à-vis societal norms. European societies in this respect reflect deep social hierarchies in which norms based in whiteness, maleness, heteronormativity, Christianity, and ableism, render members of subordinated groups structurally ‘othered’ and ‘lacking’ as much as this has been outlined in American critical race and gender studies. Critical race theorists have argued that ‘the psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred.’⁸¹ In such contexts, disproportionate energy and labour is required of subordinated individuals to achieve and maintain a healthy self-image and sense of self. This additional labour towards self-care is required to navigate the harmful effects of structural racism: ‘The accumulation of negative images . . . present[s] them with one massive and destructive choice: either to hate one self, as culture so systematically demand[s], or to have no self at all, to be nothing.’⁸² Or in the words of Matsuda: ‘From the victim’s perspective, all of these implements [ie overt and covert forms of racism] inflict wounds, wounds that are neither random nor isolated. Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination.’⁸³

Health harms

In the European context there is very little research on the health impacts of discrimination generally, and less so on the specific health impact of SR hate speech.⁸⁴ In a 2015 study on ethnic discrimination in five ethnic groups in Amsterdam it was shown that particularly among people from Turkish and South-Asian Surinamese people depression and major depressive disorder were significantly higher than among ethnic Dutch people.⁸⁵ In American literature the concept of ‘race based trauma’ is increasingly recognized.⁸⁶ And there are a number of studies that are able to link discrimination, including online discrimination and hate speech to depression.⁸⁷ The health impacts of SR hate speech include short term and immediate forms of emotional distress – fear, anxiety, rapid heart rates, difficulty breathing, nightmares, etc, – experienced by addressees of SR hate speech.⁸⁸

When I eventually stopped my work, I was physically and mentally done. I haven’t done anything public after all that.⁸⁹

I have recently finally been able to do groceries by myself again. This has costs me so much energy and heart palpitations. I can take a train again; I can tell you I haven’t taken a train in 20 years.⁹⁰

⁸¹Delgado and Stefancic (n 80); Delgado (n 76) 91. See also T Motala, ‘Words Still Wound: IIED & Evolving Attitudes toward Racist Speech’ 56 (2021) *Harvard Civil Rights Law Review* 115.

⁸²Delgado and Stefancic (n 60); Delgado (n 76) 91.

⁸³Matsuda (n 21).

⁸⁴We invoke other literatures to show the relationship between harm and marginalisation and violence based on social identities in the absence and invisibility of intersectional and critical race approaches in the European context.

⁸⁵UZ Ikram and Others, ‘The Contribution of Perceived Ethnic Discrimination to the Prevalence of Depression’ 25 (2015) *European Journal of Public Health* 243. This article uses ‘ethnic discrimination’ to capture, amongst others, racial harassment and hate speech.

⁸⁶Motala (n 81) 115; And see R Meadows-Fernandez, ‘The Little Understood Mental-Health Effects of Racial Trauma’ (*The Cut*, 23 June 2017) <<https://www.thecut.com/2017/06/the-little-understood-mental-health-effects-of-racial-trauma.html>> accessed 9 March 2022.

⁸⁷D English and Others, ‘Daily Multidimensional Racial Discrimination among Black U.S. American Adolescents’ 66 (2020) *Journal of Applied Developmental Psychology* 101068; K Relia and Others, ‘Race, Ethnicity and National Origin-Based Discrimination in Social Media and Hate Crimes across 100 U.S. Cities’ 13 (2019) *Proceedings of the International AAAI Conference on Web and Social Media* <<https://www.aaai.org/ojs/index.php/ICWSM/article/view/3354>> accessed 1 October 2020; Ikram and others (n 85).

⁸⁸Hate-Motivated Behavior: Impacts, Risk Factors, And Interventions | Health Affairs Brief available at: <<https://www.healthaffairs.org/doi/10.1377/hpb20200929.601434/full/>> accessed 9 March 2022.

⁸⁹Participant 1, May 2020.

⁹⁰*Ibid.*

I also have a child, and I really decided for her and for my own physical health and my mental health, I am just not going to participate in public debate the way I used to.⁹¹

The exact individual impact of speech varies depending on context. One may ask where and how the speech occurs on a variety of spectrums, for instance: private or public nature of the space; the physical closeness of speech (for example, face-to-face, or virtual encounters); the power relation between speaker and addressee; the witnessing by personal loved ones and professional network; and so on. Next to these immediate, short-term afflictions, SR hate speech also contributes to the long-term formative psychological injuries done to the core of person's senses of self-worth, self-respect, and desirability that are already part of the everyday lives of women of colour.⁹² SR hate speech taps into and amplifies the negative social feedback that is part of the routine messages structurally sent to and received by women of colour about their deficient, 'less than' status.

Sometimes I can cancel it out, but then suddenly there is one message that hits you so hard that you are completely blown away by it, this has a huge impact on your mental health.⁹³

I started doubting everything, my skills, my looks, it took me two years to get back on track and regain a little bit of confidence in myself.⁹⁴

For some targets, the harmful impact of hate speech lasts much longer than short-term severe emotional distress. There are also medium- to long-term psychological and physiological health complications to be factored into the evaluation.⁹⁵ These potential consequences of hate speech have been underscored for some time and lead to unhealthy coping strategies, such as increased drinking or smoking.⁹⁶ Other health effects include high blood pressure and 'psychological symptoms including headaches, dizziness, social withdrawal, chronic depression, and anxiety neurosis in survivors of extreme persecution'.⁹⁷ In a 2020 study a direct link was found between online racism and the psychological health of African American and Latinx adolescents.⁹⁸

In sum, the health harms of online SR hate speech are arguably in the short term related to the psychological damage and in the longer term the added health harm to the existing accumulation of discriminatory episodes in the lives of its targets; and the concomitant coping strategies that may result from that. In assessing the health impact in a SR tort for hate speech the short term and longer-term health harms that come about as part of the social realities of the targeted groups need to be considered. Evidence of harm within the law might be developed in this respect in standardized form to include the existing social realities in which harm was inflicted, such as through quantifying the healthy and disability life years lost, using existing measurements for quantifying health outcomes in the field of public health.

⁹¹Participant 5, May 2020.

⁹²DR Williams, N Priest and N Anderson, 'Understanding Associations between Race, Socioeconomic Status and Health: Patterns and Prospects' 35 (2016) *Health Psychology* 407.

⁹³Participant 4, May 2020.

⁹⁴Participant 3, May 2020.

⁹⁵DR Williams and SA Mohammed, 'Discrimination and Racial Disparities in Health: Evidence and Needed Research' 32 (2009) *Journal of Behavioral Medicine* 20; Ikram and Others (n 85).

⁹⁶Williams and Mohammed (n 95) 20. GG Bennett and Others, 'Perceived Racial/Ethnic Harassment and Tobacco Use Among African American Young Adults' 95 (2005) *American Journal of Public Health* 238.

⁹⁷Matsuda (n 21).

⁹⁸BM Tynes and Others, 'Trajectories of Online Racial Discrimination and Psychological Functioning Among African American and Latino Adolescents' 91 (2020) *Child Development* 1577.

Relational harms

Relational harms refer to injuries that manifest in the relationships that the target of SR hate speech has (or is able to develop) with others. These relational harms impact a wide range of often interconnected intimate, personal relationships and arms-length relations. SR hate speech often targets women of colour who actively participate in public discourse, but its impacts resonate in waves around the personal and professional networks of the targeted individuals. SR hate speech impacts relationships between the target and intimate others, injuring not only personal freedom, but their abilities to maintain supportive and flourishing relationships with others. Reflected in the words of participants, the impacts of SR hate speech ripple across various relational spaces, from the most intimate to those that represent economic opportunities:

My whole family wants me to stop. And even my mother is getting all kinds of comments when she walks through our city.⁹⁹

When you google me, you immediately see all that sh*t. Any future employer or future client that has googled me probably thought, well... I really think that has had an impact on whether they considered hiring me, one wonders, always.¹⁰⁰

This sentiment is shared among many targets of SR hate speech. As they explain the pressures placed on them to stop engaging in public discourse, serious impediments come to the fore regarding their abilities to relate with others and pursue productive and fulfilling personal and professional relationships. Targets share experiences of family members, friends, and community members directing anger and frustration regarding their sense of endangerment and aggravated experience of marginalization. Family members, including children, witness and become targets of SR hate speech themselves because of close affiliation. From testimony:

There was a point where I was going to be the first Muslim woman in this important public function, but there was such incredible hate, and the authorities did not know what to do with it. I eventually gave up on the assignment, I didn't even fight for it anymore, I just would not have been able to do my job, also because the institution was not able to back me up.¹⁰¹

First it was online, but then people started to know me, and then it started happening in the street. It totally freaked out my mother as well.¹⁰²

They encounter verbal insults, epithets, and threats in their own lives. The women of colour who continue to participate in public discourse and thus remain targets of continuous SR hate speech are asked to defend their choices given the SR hate speech harms which represent high costs to their relationships. Simultaneously, family members are also placed in positions to defend the target of SR hate speech within their own communities. Communities experience a heightened sense of vulnerability as 'one of them' speaks out and draws negative attention towards the community. In testimony, one participant describes the signals she receives from people within her community:

I know that some people just want me to stop, they are thinking I create this constant image of discrimination and sexism, they don't want to hear or see. But I know that there are also some people that feel represented by me, because they are going through similar things.¹⁰³

⁹⁹Participant 5, May 2020.

¹⁰⁰Participant 3, May 2020.

¹⁰¹Participant 1, May 2020.

¹⁰²Participant 3, May 2020.

¹⁰³Participant 5, May 2020.

These relational rippling effects are severe and result in increased social isolation of targets as well as decreased opportunities for valuable professional pursuits. If the message of SR hate speech represents a violent attack to ‘shut up’, this message is amplified through its relational rippling effects and conversion in a ‘please be quiet’ request from loved ones.

For women of colour at the sustained centre of SR hate speech, these messages come across and they find themselves isolated in bulletproof homes with secured front doors and cameras. Testimonies of targets of SR hate speech consistently describe how their choice processes are impacted as it regards their everyday movements: going into public spaces, when and how to leave their homes, where and how to live, if and how to participate in public social and political discourse. They are forced to retreat, not only from public discourse, but public life. We find women of colour withdrawing from activities that can re-engage or increase exposure – such as doing groceries and going to public and commercial spaces. Testimony illustrates isolating measures:

My house is completely secured with cameras, movement sensors and video registration, I even have bullet-proof glass in my windows.¹⁰⁴

These impacts are not ‘merely’ restrictive on options about free movement and participation in social, economic, and political life, but of every aspect of being, including a sense of self-worth, ability, and how one carries themselves.¹⁰⁵ In efforts to navigate (that is, avoid or minimize) SR hate speech while still maintaining public engagement, targets describe numerous forms of labour that tend to be invisible to outsiders but must be considered in any attempt to understand the disproportional burdens and harms inflicted by SR hate speech. Things that many people take for granted (for example, what clothes to wear; how to style (and not style) one’s hair; how to speak; which manners to regulate; how to position one’s body in relation to others and in public space) are salient and scrutinized as potential strategies for adaptation. SR hate speech induces hyper vigilance and remarks about the body impact self-worth and professional abilities and relationships:

And so many people saying I was ugly, fat, and then they get you on your skills, like she writes so childish and bad. I really started to believe it.¹⁰⁶

These relational rippling effects work through mechanisms that resemble victim blaming. Where online perpetrators are often seemingly invisible and anonymous, their behaviours and actions remain outside a sense of control for loved ones and communities who direct their attention to targets of SR hate speech who are made hyper-visible by contrast. Family members, friends, and communities experience strong interests in protecting targets and their surroundings from SR hate speech harms which drives them towards feasible strategies for the control and reduction of risk and exposure. Powerlessness towards the conduct of perpetrators of hate speech centres efforts on the behaviour of the target. In such moves, the harms of SR hate speech appear to fall under the individual responsibility of the target. Namely, if one could avoid becoming a target by choosing to behave differently, ideas around responsibility may shift towards the target. In testimony, targets recall responses that focus on their behaviours, rather than on the expressions of hate:

Why do you make yourself so visible in public discourse?

Just don’t say anything.

Just don’t respond.¹⁰⁷

¹⁰⁴Participant 2, May 2020.

¹⁰⁵Matsuda (n 72) 2337.

¹⁰⁶Participant 3, May 2020.

¹⁰⁷Participant 4, May 2020.

This mechanism of victim blaming is familiar from the context of sexual harassment and rape where survivors (often, but not only, women and LGBTQIA+ persons) are asked why they dressed or behaved in ways that made them targets of sexual violence.¹⁰⁸ For instance, in narratives of victim-blaming, gender non-conforming behaviour is viewed as risky behaviour that targets choose to engage in. When victim blaming occurs in intimate personal relationships, injuries manifest in and to the relationship itself. And experiences of isolation following a sense of being misunderstood, unsupported, unseen taps into structural invisibilities of the gendered and racialized harms.

The relational rippling effects of SR hate speech reflect a process by which senses of self and security are violated. Matsuda describes how fears of being hated and alone do not only arise as the result of hate speech but are exacerbated in context where such speech is tolerated. Relevant for this context is the extent to which people are precluded from state support for redress of harm, as is the case when courts dismiss redress for racial insults.¹⁰⁹ Similar to the mechanism of victim blaming, such dismissals reflect moves of toleration towards SR hate speech itself. Rather than directing energy and disapproval towards the speaker, energy and disapproval is directed towards the choices and behaviours of the target such as: why are you continuing to draw attention to yourself? Why are you provoking SR hate speech? When intimate others engage in these forms of toleration, the psychological harms of hate speech are interconnected, and compounded and exacerbated by the accompanying relational harms.

Relational harms also extend to arms-length relationships. Opportunities for contractual relations that generate income decrease as targets of SR hate speech become marked by ‘controversy’. Women of colour who are targeted by SR hate speech become ‘risky’ contractual partners, employees, agents, and collaborators. Such economic dimensions of the harms of SR hate speech often manifest as foreclosures of valuable opportunities for income and professional development. Targets share these experiences of foreclosed opportunities in the shape of dismissals and the discontinuation of freelance relationships. Causal connections are often hard to prove for individual women, but shared experiences reveal that they are viewed as bringing ‘unrest’ and as drawing ‘negative attention’. Testimonies reveal shared struggles to maintain and secure new opportunities for income and professional development essential to sustain families and financial independence.

It’s called ‘doxing’. They find the address of your employer and put it online. Then they start flooding the work inboxes with hateful messages. I was asked by co-workers and in the end also my employer to stop speaking out. In the end they asked me to leave, I was creating too much ‘unrest’ for the organization. I did not really want to stop; I was just let go.¹¹⁰

I really wanted to keep working, but they wanted to get rid of me, they did not back me up.¹¹¹

Opportunities to form and maintain such relations are lost for a variety of reasons. ‘Undesirability’ manifests as increased risk for harms to reputation, but also by associated increase in costs of engagement. Participants describe how employers may be hesitant to hire them or to extend contracts with them as they become known targets of SR hate speech. A target’s public profile and presence becomes tainted with controversy because of SR hate speech. Such speech thus creates reputational concerns, particularly when the speech undermines or chips away at perceptions around the performance, competencies, and abilities of a person. Reputational harms centre on a target’s public persona, making them undesirable as an agent in the public and economic sphere. Reputational harms have been addressed in literature around hate speech, showing how such harms affect social capital and the networks on which people rely for future opportunities. Close affiliation may also extend the speech to others in the organization, or to the organization itself, making others more likely targets

¹⁰⁸See E Martellozzo and E Jane (eds), *Cybercrime and Its Victims* (Routledge 2017) 11–3.

¹⁰⁹Matsuda (n 21) 2338.

¹¹⁰Participant 4, May 2020.

¹¹¹Participant 3, May 2020.

themselves. Concerns about organization reputation may arise – as organizations may be seen as politically controversial in ways that they wish to avoid.

But these types of economic harms associated with the loss of valuable professional opportunities also extend beyond the reputational sphere. Even when a target's reputation is not corroded – that is, others do not have negative perceptions of a person's conduct, competencies, or performance – SR speech may still foreclose opportunities with otherwise willing partners. For instance, participants describe how SR hate speech increases the need for security measures when participating in public events and public life:

Oh, this definitely has cost me lots of money. I was making a good income through gigs. But as soon as I started to be more political, any client that would book me had to make sure there was security, so that made it a lot of fuss to hire me. They just backed off. It ruined my reputation.¹¹²

Such security measures reflect economic costs that makes contracting with targets more costly and thus potentially out of bounds. The relational rippling effects of SR hate speech are thus felt throughout the entire spectrum of relations from intimate personal to arm's length contractual relations. Harms arise in the form of stunted abilities to form flourishing relations with others and the foreclosure of valuable economic and professional opportunities to sustain oneself and one's family.

5. Towards a SR hate speech tort

It is important to note that the *interconnected relation* between health and relational harms have immaterial and material dimensions that are undervalued and made invisible in legal practice. SR hate speech harms are compounded by the fact that it also impacts people's abilities to do reproductive, care and domestic labour. Because this labour is often done informally, and unpaid within the home and 'private' sphere, damage in these areas is often undervalued through exclusions from the scope of economic value.¹¹³

Mainstream economic paradigms exclude these forms of life sustaining labour (disproportionally gendered and racialized) from the scope of human 'economic' activity even though the functioning of the entire economic, social, and political order depends on it. Overlapping legal frames, including tort,¹¹⁴ further make invisible and severely devalue damages in the relational sphere where women of colour labour to generate and distribute resources that sustain people's needs.¹¹⁵ In this regard, health and relational harms have additional material dimensions often overlooked. Where legal redress frames material dimensions merely as doctor's bills, or loss of income from labour in the market, informal labour remains disproportionately undervalued through relegation to the sphere of the 'immaterial'.¹¹⁶

The health and relational harms that we highlighted are at the foreground of the experiences of women of colour who have been targeted by SR hate speech and these harms become better visible in tort by understanding them, intersectionally and not exclusively, as gendered and racialized. The actual health and relational harms impact the lives of women of colour through their abilities to develop themselves and to participate fully in all life sustaining activities, including intimate, social, political, and economic life. As we have argued, social justice tort theory aligns with our proposed conceptualization of tortuous SR hate speech harms, but the gendered and racialized

¹¹²Participant 2, May 2020.

¹¹³A Agenjo-Calderón and L Gálvez-Muñoz, 'Feminist Economics: Theoretical and Political Dimensions' 78 (2019) *American Journal of Economics and Sociology* 137.

¹¹⁴P Kotiswaran, 'An Ode to Altruism: How Indian Courts Value Unpaid Domestic Work' 56 (2021) *Economic and Political Weekly* 45–46; Chamallas and Wriggins (n 17).

¹¹⁵ Agenjo Calderón and Gálvez-Muñoz (n 113). Agenjo-Calderón and Gálvez-Muñoz (n 100) 147, 148.

¹¹⁶Chamallas and Wriggins (n 17) 228.

dimensions we discussed are salient also to mainstream approaches which claim to be ‘neutral’ towards gender and racial justice.

In the American context, critical calls persist which favour a specific tort and re-evaluation of the standard of injury and harm of hate speech under conditions of systemic gender and racial injustice.¹¹⁷ These proposals developed in critical race theory span almost half a century and have aimed to capture the unique harms resulting from racial insults. Most famous is Delgado’s ‘Words that Wound’ in which he argues in favour of an independent tort action for racial insults that are deliberately expressed in face-to-face interactions.¹¹⁸ Other proposals include the adoption of a rebuttable presumption regarding the extreme and outrageous nature of categories of discriminatory speech.¹¹⁹ Mansoor and Motala each argue to incorporate developments and evidence from psychological and psychiatric research on race-based traumatic stress under the conceptualization of tortious harms of racist hate speech a part of the tort of intentional infliction of emotional distress.¹²⁰ This literature shows how racialized trauma invokes the history of racist treatment and the present context of systemic racism, which characterizes the injuries inflicted by SR hate speech.¹²¹

We support these calls for re-evaluation of private SR hate speech harms in the service of making the pervasive health and relational harms that are described above more legible and visible in the European context. Based on the exploration in this research, we would argue for this form of redress while recognizing that tort redress for these harms is structurally incomplete – that is, the health harms and relational harms that we highlight are often irreparable and incongruous with the redress tort can offer. Nevertheless, rethinking harm in tort may be facilitated through a specific tort in the European context, as it can shift the lens through which the legal community understands private SR hate speech harms, and may also impact how others view litigative action and by impacting social norms around the (un)acceptability of SR hate speech.

In the European context of online SR hate speech, it would be important to (1) explore a shift in the burden of proof in light of the wealth of evidence of the harm experienced by women of colour as a result of SR hate speech, (2) reassess the legal distinctions between immaterial and material damages that devalue gendered and racialized labour as non-economic, and (3) capture the broader harmful impacts of SR hate speech in new standardised schemes of damage calculations and redress on both the health and economic impacts. We believe courts would be aided by a framework that considers interconnected health and relational harms of SR hate speech in tort. Such a framework may need to be generalized, as it is not always precisely clear how far the ripple effect of harm reaches and can be subject for damages, but its estimation should centre on making the lived injuries visible and intelligible across gender, race, religion, nationality – amongst others. Similarly, in gauging the precise harm that is caused in human health impacts, some generalized categories of (im)material damage may need to be developed to ensure that the harms as described here can be properly adjudicated in a civil suit.

¹¹⁷Others have long argued for a specific tort, and our work aims to elevate those calls for gender and racial justice. See for instance: Delgado and Stefancic (n 80); R Delgado (n 76); (n 81).

¹¹⁸Delgado (n 65).

¹¹⁹J Love, ‘Discriminatory Speech and The Tort of Intentional Infliction Of Emotional Distress’ 47 (1990) *Washington and Lee Law Review* 123.

¹²⁰Mansoor relies on evidence of trauma of chronic racism which proves the psychological and emotional costs of systemic racism. If survival under systemic racism requires a mechanism of survival for people of colour, for instance the cultivation of a ‘thick skin’, functions in tort to make racist hate speech harm invisible through mainstream injury standards. H Mansoor, ‘Modern Racism but Old-Fashioned IIED: How Incongruous Injury Standards Deny “Thick Skin” Plaintiffs Redress for Racism and Ethnoviolence’ 50 (2020) *Seton Hall Law Review* 881, 892–898; Motala (n 81) 115; Carter, ‘Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-based Traumatic Stress’ 35 (1) (2007) *The Counseling Psychologist* 13–105.

¹²¹Motala argues that the status quo of American tort law marks racist hate speech as a form of ‘racism as neither intolerable nor outrageous, entrenches and emboldens racism as acceptable and inevitable conduct that minorities must exclusively endure.’ Motala (n 81) 167.

6. Conclusion

In this article we find that part of what makes online SR hate speech injurious cannot be understood from a gender and race neutral perspective. We argue that tortious SR hate speech harms must be understood considering systemic gender and racial injustice, in order to make visible the full extent of the health and relational harms that impact women of colour. Individual harm is not insulated against systemic harms and cannot be conceptualized in tort without taking systemic harms into consideration. The health and relational harms that we have highlighted in this Article are magnified in a context where SR hate speech is tolerated, by communities and bystanders, including the legal community and its courts.¹²² The significance of rethinking SR hate speech harms lies thus not only in the way in which tort damages can offer relief to the losses that women of colour incur, but also in the importance of legal recognition and visibility of those harms in horizontal relationships.

Sustained and structural experiences of having the costs and burdens of sexism and racism minimized by others, constitute compelling reasons that may dissuade women of colour from taking the substantial financial risk to pursue tort remedies. Financial barriers to litigation form an independent obstacle to access to justice generally, but the burden of having to confront unintelligibility is disproportionately distributed across members in societies. Marginalized groups face additional burdens. What is more, in the specific instance of SR hate speech, private law remedies require public engagement of the sort that targets of SR hate speech have good reason to avoid, managing new instances of, or the intensification of SR hate speech.

Litigation means stepping into the public light, which attracts negative responses exacerbating the precise harms women of colour are seeking to address. In the absence of a private remedy for redress for SR hate speech, the harms and its associated costs are borne by women of colour who systemically already bear disproportionately the burdens of structural racism and sexism. A specific tort for SR hate speech and a more encompassing understanding of its harm could contribute to a more proportionate distribution by placing costs on harm-doers.

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¹²²Matsuda (n 21) 2320.