1992

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Publication Information
18 William Mitchell Law Review 983 (1992)

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Abstract
The law of emotional distress is characterized by judicial reluctance to create and expand remedies for emotional injuries. The issue here is whether the Court's decision in R.A.V. v. City of St. Paul will impose further limitations on the right to recover civil damages for the intentional infliction of emotional injury, particular emotional injuries resulting from hate speech. This symposium first examines the applicability of the tort to redress claims based on abusive epithets based on the victim's race, gender, or sexual orientation. The symposium then argues that using this tort in cases involving hate speech should not create constitutional problems, absent a collision with First Amendment interests established by the Supreme Court in the defamation cases; and that R.A.V. v. City of St. Paul should have no impact on emotional distress claims based on hate speech.

Keywords
Emotional distress, IIED, hate speech, racial slurs, First Amendment, R.A.V. v. City of St. Paul, Chaplinsky v. New Hampshire, defamation, Minnesota torts, tort

Disciplines
Civil Rights and Discrimination | Constitutional Law

CIVIL ACTIONS FOR EMOTIONAL DISTRESS AND *R.A.V. v. CITY OF ST. PAUL*

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The law of emotional distress is characterized by judicial reluctance to create and expand remedies for emotional injuries. Furthermore, the adoption of the tort of intentional infliction of emotional distress has proceeded along content-neutral grounds.[1] In general, the law has developed free from First Amendment considerations, except for the Supreme Court's decision in *Hustler Magazine v. Falwell*,[2] where the Court applied the First Amendment limitations developed in defamation cases to limit recovery by public figures or officials for the intentional infliction of emotional distress.

The issue here is whether the Court's decision in *R.A.V. v. City of St. Paul*[3] will impose further limitations on the right to recover civil damages for the intentional infliction of emotional injury. I take the position that it should not.

Before analyzing the constitutional issues involved in determining whether recovery will be allowed for the intentional infliction of emotional distress, I will first examine the applicability of the tort to redress claims based on abusive epithets based on the victim's race, gender, or sexual orientation.

Section 46 of the *Restatement* sets forth a general theory of intentional infliction of emotional distress: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[4] Section 46 has been applied in a wide variety of situations. On occasion, it has

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1. *See generally* W. PAGE KEETON ET AL., THE LAW OF TORTS § 12 (5th ed. 1984); *see also* Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. (forthcoming 1993).

2. 485 U.S. 46, 55-56 (1988).

3. 112 S. Ct. 2538 (1992).

4. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

been applied to permit recovery for racial epithets.[5] Whether section 46 provides a workable civil action to redress the injuries caused by hate speech is a different question, however. The standards the courts have applied to limit recovery in cases involving the intentional infliction of emotional distress are relatively rigid, making recovery under any circumstances difficult. That factor, along with the availability of other alternatives, such as civil rights or human rights act claims,[6] may account for the limited number of cases involving claims for emotional distress based on abusive racial epithets.[7]

Professor Richard Delgado has advocated a separate tort for racial insults to redress the special problems that exist in cases where one person intends to demean another by the use of racial epithets. Delgado's proposed theory would require the plaintiff to prove the following: "Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult."[8] The theory is based in part on a recognition of the peculiar harm

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5. *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216 (Cal. 1970); Gomez v. Hug, 645 P.2d 916 (Kan. Ct. App. 1982); White v. Monsanto Co., 570 So. 2d 221 (La. Ct. App. 1990).

6. In Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990), the Minnesota Supreme Court held that while the Human Rights Act, MINN. STAT. §§ 363.01-.15 (1990), did not expressly abrogate battery claims arising from the same conduct giving rise to claims under the Act, a plaintiff could not achieve a double recovery for the same harm. The plaintiff's recovery under the Human Rights Act for sexual harassment therefore precluded recovery for the same damages for battery. As applied to emotional distress claims, recovery under the Human Rights Act would preclude recovery for racial or sexual epithets causing severe emotional distress.

7. *See, e.g.*, Dawson v. Zayre Dept. Stores, 499 A.2d 648 (Pa. Super. Ct. 1985) (granting motion to dismiss because racial epithet uttered during course of dispute between store customer and employee was insufficient to state a claim for emotional distress absent aggravating circumstances). The court relied on comment (d) to § 46, which states:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

8. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179 (1982).

that racial invective causes to targeted individuals. The lower threshold is justified because of the savage inequalities that make racial invective particularly harmful. The same arguments that justify the theory as applied to racial epithets could also be applied to invective based on a person's gender, sexual orientation, or religion.

There are obvious practical problems with the theory. It deviates to a significant degree from the requirements of section 46 of the *Restatement* and would permit recovery with a lesser showing than that required by section 46. Courts that have attempted to hold the line against a barrage of claims under section 46 are unlikely to adopt a theory that seems to lower the guidelines developed to resolve emotional distress claims.

If Delgado's theory is rejected because of concerns about its distance from the requirements of section 46 and the consequent inability of judges to keep the theory in check, section 46 itself may be adapted to impose civil liability in hate speech cases in a way that permits redress of injuries caused by hate speech. This remedy will recognize the peculiar nature of the harm that racial invective causes, but with limitations that do not exist under the Delgado theory.

Section 46 requires extreme and outrageous conduct. The guideline is general. In Minnesota, to be extreme and outrageous, a defendant's conduct must be "utterly intolerable to the civilized community."[9] There are various ways of satisfying that standard, including a showing that the defendant took advantage of a peculiar susceptibility on the part of the plaintiff, abused a power relationship, or engaged in a pattern of harassment. Whether conduct is extreme and outrageous is a question for the court in the first instance.[10]

Whether "hate speech" meets the standard depends on the circumstances. It could be argued that the circumstances are sufficiently aggravated in any case where a defendant inten-

9. Hubbard v. United Press Int'l, 330 N.W.2d 428, 439 (Minn. 1983).

10. RESTATEMENT (SECOND) OF TORTS § 46, cmt. h (1965), states:

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

tionally uses language directed toward the plaintiff because of the plaintiff's race, gender, sexual orientation, religion, or disability, similar to the hate crimes statutes that enhance criminal penalties when the defendant's motivation for an assault, trespass, or other crime is based on "the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability . . . or national origin."[11]

The hate crimes statutes take a strong position against bias-motivated criminal conduct. The state policy embedded in those statutes is transferable to civil claims for emotional distress, even if it does not result in a per se finding of civil liability where the defendant's conduct or verbal assault directed to the plaintiff is based on the identified characteristics. At the very least, it should make summary judgment on the outrageous conduct issue correspondingly more difficult to grant,[12] and, with a better understanding of the impact of bias-moti-

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11. *See, e.g.*, MINN. STAT. § 609.595, subd. 2(b) (1990), which states:

> Whoever intentionally causes damage to another person's physical property without the other person's consent because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363.01, age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both, if the damage reduces the value of the property by not more than $250.

MINN. STAT. § 609.2231, subd. 4(a) (1990), states:

> Whoever assaults another because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363.01, age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

12. One problem with a legally automatic conclusion that any epithet based on certain characteristics of the plaintiff is actionable is that the focused verbal assault may or may not be extreme and outrageous conduct, absent that conclusion. For example, would a single statement by a co-employee be actionable under circumstances where the person making the statement makes it out of frustration with the job performance of the targeted person? Would the same statement be actionable if it arises out of a driving dispute? If it is made by an adult to a child? The variance may raise doubts about the wisdom of any expansion of section 46 based on the compelled legal conclusion that any bias-motivated epithet is extreme and outrageous.

There may also be constitutional problems with that conclusion. In State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), *cert. granted*, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992), the Wisconsin Supreme Court, the day after *R.A.V.* was decided, held the Wisconsin "hate crimes" statute unconstitutional because it punished subjective motivation, something prohibited by the First Amendment. Justice Abrahamson, in dissent, would have concluded that the statute was constitutional because the "statute is a prohibition on conduct, not on belief or expression. The statute does nothing more than assign consequences to invidiously discriminatory acts." *Id.* at 819 (Abrahamson, J., dissenting).

vated emotional assaults, that the distress suffered by the victim of the verbal assault is not severe enough. As the California Supreme Court suggested over twenty years ago in *Alcorn v. Anbro Eng'g, Inc.*,[13] it is time to recognize the abusive nature of racial epithets and their impact on persons of color. The same may be said of verbal assaults based on other immutable characteristics of hate speech victims.

If there is judicial recognition of the intense psychological harm that may occur when abusive epithets are used, there should be a correspondingly greater judicial willingness to permit a jury determination of the damages in light of the severity of the emotional injury that may result, as reinforced not by medical opinions, but rather, by the circumstances surrounding the verbal attack.

Lack of proof that the defendant intended to inflict severe emotional distress on the plaintiff may also act as a check on expanded recovery. Intent exists where the defendant's purpose is to cause the result, but it also includes cases where the defendant knows to a substantial certainty that the result will occur. That may be a fact question in many cases involving the use of the epithets. Intent may be harder to establish where the statement is tossed out as a reflexive action in certain settings.

The application of section 46 to cases involving hate speech should not create constitutional problems, absent a collision with First Amendment interests established by the Supreme Court in the defamation cases. *R.A.V. v. City of St. Paul*[14] should have no impact on emotional distress claims based on hate speech.

The typical approach to hate speech is to begin with the United States Supreme Court precedent carving out certain areas of unprotected speech, including defamation and obscenity, and, under *Chaplinsky v. New Hampshire*,[15] "fighting words," and, *Brandenburg v. Ohio*,[16] incitement to imminent lawless action. *Chaplinsky* has been the constitutional baseline against which hate speech limitations have been measured, including the ordinance in issue in *R.A.V.*

13. 468 P.2d 216, 219 n.4 (Cal. 1970).
14. 112 S. Ct. 2538 (1992).
15. 315 U.S. 568, 572 (1942).
16. 395 U.S. 444, 447 (1969).

From the perspective of a torts professor, at least two things have occurred to me in examining the potential impact of the Court's decision in *R.A.V.* on civil actions for speech that causes injury. One is whether the proper comparisons are being made. The answer to that question raises another: whether *Chaplinsky* is the appropriate constitutional baseline against which to measure hate speech limitations.

While the right to recover for emotional harm that is an offshoot of the invasion of other interests protected by tort law is permitted, the *Restatement* establishes that only recently has the rule in section 46 "been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like."[17] Written in 1965, the comments to section 46 note that the law is still developing and the "ultimate limits of this tort are not yet determined."[18] In a caveat, the American Law Institute "expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress."[19]

The development of the tort of intentional infliction of emotional distress has generally progressed free from First Amendment interference. As the tort has developed, the courts' concerns have not been First Amendment concerns. Early concerns over permitting recovery for emotional harm unaccompanied by any underlying tort focused on the difficulty in proving the harm, the intangible nature of the harm, and the possibility that once the right to recover for emotional distress is recognized, there will be no ready means of limiting those claims and the law will be forced to deal with trivial and perhaps fraudulent claims. Those are the same concerns that have prevented the undue expansion of the tort to date. That does not mean that the First Amendment is inapplicable to intentional infliction of emotional distress claims, however.

The development of constitutional restrictions on claims for defamation is a good example. The reputational interests protected by the tort of defamation are subject to limitation in cases involving claims by public officials and figures, and by

17. RESTATEMENT (SECOND) OF TORTS § 46, cmt. b (1965).
18. *Id.* cmt. c.
19. *Id.* caveat.

private figures, at least where public issues are involved. The degree of constitutional protection depends on the importance of the state's interest in protecting reputation as balanced against the First Amendment interest in promoting speech. Public officials and figures who bring defamation claims must meet the standards of *New York Times Co. v. Sullivan*,[20] while private persons must meet the standards established in *Gertz v. Robert Welch, Inc.*[21]

In situations where there is no public official or figure involved, and no matter of public concern, the usual common law standards apply, permitting recovery without proof of fault and without proof of actual damages, or the publisher's knowledge of the falsity of the defamatory statement or substantial doubts about the truth of the statement. The important point is that there is a balancing of interests that makes the state's interest in protecting reputation paramount at a certain point. Absent *Chaplinsky* as the qualifying standard, the issue is why the same balancing should not take place in cases involving claims of intentionally inflicted emotional injury.

Tort law recognizes the importance of the interest in emotional tranquility, not as an absolute matter, but as an interest to be protected from interference by particularly outrageous conduct that causes severe emotional distress. In cases where the defendant causes severe emotional distress by picking on a peculiar susceptibility of the plaintiff, engages in a repeated pattern of harassment, or abuses a power relationship, the necessary degree of outrage may be established, justifying recovery if the distress is severe enough.

The tort of intentional infliction of emotional distress does not apply in every case involving emotional harm caused by words or actions. Concerned about an undue expansion of the right to recover for emotional harm, the courts have rigidly limited the availability of the tort. To check the use of the tort to circumvent other limitations, such as the right to recover for breach of contract or the constitutional limitations on defamation actions, the courts have liberally utilized limitations on the right to recover for emotional distress to dispose of trivial claims as a matter of law, based either on the conclusion that the defendant's conduct did not exhibit the necessary degree

20. 376 U.S. 254 (1964).
21. 418 U.S. 323 (1974).

of outrageousness, or because the plaintiff's distress was not severe enough, as measured either by physical manifestations or medical testimony corroborating the claim of severe emotional distress.

It should be obvious that even absent constitutional limitations on the right to recover for the intentional infliction of emotional distress, the courts have limited the use of the tort by imposing significant restrictions on the right to recover. The state interest in preserving the right to recover for emotional distress is, therefore, a limited one, borne out by hundreds of litigated cases, but as is also evidenced by the cases where recovery has been allowed, the interest is significant.

Given the legitimacy of the state's interest in protecting its citizens from intentionally inflicted severe emotional distress, the issue then becomes whether there is a countervailing constitutional interest that justifies further limitation on the right to recover. That was the issue in *Hustler Magazine v. Falwell*.[22] The plaintiff, Jerry Falwell, a well known minister who commented frequently on public affairs and politics, was the subject of a parody of an advertisement for Campari Liqueur in one of the issues of Hustler Magazine, published by Larry Flynt. The advertisement was modeled on actual ads for Campari in which celebrities were interviewed about their "first times." In the parody, Falwell was chosen as the celebrity. An "interview" of Falwell established that his "first time" was "during a drunken incestuous rendezvous with his mother in an outhouse." The parody also portrayed Falwell and his mother as drunk and immoral.

Falwell brought suit for libel, invasion of privacy, and intentional infliction of emotional distress. At the close of the evidence, the trial court granted a directed verdict for the defendants on the invasion of privacy claim. The jury found against the plaintiff on the libel claim, with a specific finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which Falwell participated. However, the jury did find for Falwell on the emotional distress claim and awarded him $100,000 in compensatory damages, as well as punitive damages of $50,000 against each defendant.

22. 485 U.S. 46 (1988).

The Seventh Circuit affirmed the judgment against the defendants, concluding that the actual malice standard in *New York Times Co. v. Sullivan*,[23] did not have to be met before Falwell could recover.[24] The Supreme Court reversed.[25]

The *Hustler* Court noted that the case presented a "novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress."[26] The issue was whether a public figure was entitled to recover damages for the emotional harm caused by an ad parody which is likely repugnant to most. Falwell argued that the state interest in protecting public figures from emotional distress justifies denial of First Amendment protection to patently offensive speech that is intended to inflict emotional distress, even if the speech could not be construed as stating actual facts about the public figure. The Court held that it could not.

Falwell argued that if the defendant's utterance is intended to inflict emotional distress, is outrageous, and in fact inflicted severe emotional distress, it should be actionable, whether the statements are true or false or fact or opinion. The argument is that the intent to cause injury is the gravamen of the tort, and that the state's interest in preventing emotional harm outweighs any First Amendment interest the speaker may have in such speech.

The Court noted: "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' "[27] However, the Court concluded that "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures."[28]

The history of political commentary includes numerous examples of the use of caustic caricatures by political cartoons

23. 376 U.S. 254 (1964).
24. 797 F.2d 1270 (4th Cir. 1986).
25. 485 U.S. 46 (1988).
26. *Id.* at 49.
27. *Id.* at 53.
28. *Id.*

and satirists,[29] making it clear that from the historical point of view, "our political discourse would have been considerably poorer without them."[30] The Court was reluctant to interfere with that freedom of political commentary by drawing a line that would permit recovery for the intentional infliction of emotional distress by a public figure such as Falwell, because of the impact that a standard permitting recovery would have on freedom of commentary about public figures and officials:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application of the *New York Times* standard, . . . it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.[31]

Given the fact that the ad parody could not reasonably be construed as making a false statement of fact, Falwell was not entitled to recover for libel. The same deficiency precluded recovery for intentional infliction of emotional distress.[32]

The Court's opinion was limited to claims by public officials and figures. Unanswered is the question of what will happen if the claim for intentional infliction of emotional distress is

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29. *See id.* at 53-55.

30. *Id.* at 55.

31. *Id.* at 56. In Price v. Viking Press, Inc., 625 F. Supp. 641, 643 (D. Minn. 1985), the United States District Court for the District of Minnesota held that alleged defamatory statements in defendant's publication of a book, *In the Spirit of Crazy Horse*, that allegedly defamed the plaintiff because of the plaintiff's involvement as an FBI agent in the Wounded Knee incident, were not "so outrageous as to go beyond all possible bounds of decency." *Id.* at 650. The court's perception of Minnesota law was that only in extreme situations will a person's conduct be sufficient to justify a finding of intentional infliction of emotional distress, including mutilation of a corpse, embalming a body without the permission of the relatives, or threatening a school girl with serious consequences unless she confessed to immoral conduct. *Id.* In conclusion, the court stated that it "found no Minnesota case which discusses whether allegedly false statements made against a public official may state a cause of action for intentional infliction of emotional distress." *Id.* at 651. The court held as a matter of law that the statements in the case were not "utterly intolerable in a civilized society." *Id.*

32. *Id.* at 56.

brought by a private person against either a media or non-media defendant, whether or not a public issue is involved.

Absent a claim by a public figure or public official for the intentional infliction of emotional distress arising out of political commentary directed toward the official or figure, there is arguably no justification for holding that the First Amendment prohibits use of the tort. However, the First Amendment baseline, or a baseline established by state policy, may push the tort back further. In cases where the emotional distress claimed by an individual is the product of commentary on a matter of public concern, it is arguable that even a private person should be unable to recover for the intentional infliction of emotional distress as a means of circumventing the First Amendment limitations of *Gertz v. Robert Welch, Inc.*[33] *Gertz* held that a private figure bringing suit against a media defendant for defamation must prove fault on the part of the defendant and must prove actual damage. Neither term was clearly defined, although fault means at least negligence in failing to determine the truth or falsity of the matter published, and actual damage means, not special damages in the sense of a slander per se claim, but that damages awards must be justified by record evidence. The damages requirement ensures that damages will not be presumed and the fault requirement ensures that states will not impose strict liability on publishers of defamatory matter.

Subsequently, in *Philadelphia Newspapers v. Hepps*,[34] the Court held that in cases where the publication concerning a private person is about a matter of public concern, the plaintiff must prove the falsity of the statement.[35] In addition, the Court has indicated that the justification for *Gertz* is the public nature of the defamatory statement, rather than the status of the defendant.

If *Gertz* applies and a claimant asserts claims for both defamation and intentional infliction of emotional distress, the Court would likely reach the same result as in *Hustler*. The plaintiff would have to prove the falsity of the statement, and an inability to do so would preclude recovery for defamation. The plaintiff would not be able to circumvent the constitu-

33. 418 U.S. 323 (1974).
34. 475 U.S. 767 (1986).
35. *Id.* at 777.

tional limitations in such a case by pleading the intentional infliction of emotional distress.

The *Hustler* limitations on the right to recover for emotional distress should not be applicable in cases where there is no public official or figure or where there is no matter of public concern. The *Hustler* limitations, necessary in cases where there is satire or other commentary concerning public officials or figures, or where there is commentary concerning an issue of public concern, are unnecessary where there is focused, abusive conduct in the private context. As in the defamation cases, where there is no public official or figure, and no public issue, the state's right to vindicate reputational interests is correspondingly greater, and any First Amendment concerns more remote or nonexistent. The same should be true in cases involving the intentional infliction of emotional distress.

There are additional potential limitations on the right to recover for emotional distress. The tort of intentional infliction of emotional distress may not override state fact/opinion distinctions, even if not constitutionally compelled,[36] and it may not override any common law qualified privileges that would apply to defamation claims.[37] But those limitations should be applicable only in cases where the claim for intentional infliction would in fact circumvent the constitutional or common law privileges applicable to speech that is otherwise protected. If the severe emotional distress is caused by a communication that is otherwise privileged, then the privilege should preclude a finding that the speaker's conduct is extreme and outrageous. In cases where the commentary exceeds the privilege, as it might in cases where the *New York Times Co.* actual malice standard is met, or common law qualified privileges are exceeded, recovery should be allowed, if the elements of a section 46 claim are met.

Permitting recovery in cases involving focused verbal assaults should not run afoul of the First Amendment. In another setting, the Supreme Court in *Frisby v. Schultz*,[38]

36. *Compare* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990) (holding that fact/opinion distinction not compelled by the First Amendment) *with* Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990) (holding that fact/opinion distinction compelled under Minnesota law).

37. The existence of a common law qualified privilege is a question of law for the court. *See* Lewis v. Equitable Life Assurance Co., 389 N.W.2d 876 (Minn. 1986).

38. 487 U.S. 474 (1988).

recognized that focused picketing is not protected by the First Amendment. Given the parallel harm that is involved in focused picketing and focused verbal assaults, it is arguable that focused verbal assaults are no less worthy of protection than the harm caused by focused picketing.

The Court began its analysis with the proposition that public streets and sidewalks are the archetype of the traditional public forum, and do not lose that status because they run through a residential neighborhood. The ordinance was adopted in response to focused picketing by anti-abortion protestors on a public street outside the house of a doctor who performed abortions.[39] The Court accepted the lower court's construction of the ordinance as content-neutral. The issue was whether it was " 'narrowly tailored to serve a significant government interest' and whether it [left] 'open ample alternative channels of communication.' "[40]

Before analyzing the ordinance, the Court concluded that it was subject to a narrowing construction that avoided any constitutional difficulties.[41] The Court found that the ordinance was "intended to prohibit only picketing focused on, and taking place in front of, a particular residence."[42] The picketing ban was held to apply only to "focused picketing taking place solely in front of a particular residence."[43]

As construed, the Court found that the ordinance left open ample alternatives for communication and that the ordinance served a compelling government interest:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." . . . Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick" . . . .
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> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, . . . the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to ob-

39. *Id.* at 480.

40. *Id.* at 482 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

41. *Id.* at 482.

42. *Id.*

43. *Id.* at 483.

> jectionable speech . . . does not mean we must be captives everywhere." . . .
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> Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.[44]

The court also concluded that the ordinance was narrowly tailored to protect only "unwilling recipients of the communications."[45] The Court stated:

> The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. . . . Here, in contract, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt . . . .[46]

Thus, the Court carefully distinguished situations where the message is disseminated to the general public.

The Court concluded that the number of picketers is irrelevant because a solitary picketer could create the same invasion of residential privacy. The medium of the expression itself creates the evil to be avoided—the trapping of the person inside the home with no means of avoiding the unwanted communication—making the size of the group engaging in the picketing irrelevant. That construction enabled the Court to conclude that the complete ban of focused picketing was narrowly tailored to achieve the desired objective.

Justice Stevens, in dissent, noted the disruptive nature of picketing. He found that the picketing that prompted passage of the ordinance in question was intended not only to convey

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44. *Id.* at 484-85 (citations omitted).

45. *Id.* at 485.

46. *Id.* at 486.

the picketers' opposition to the doctor's practice, but it was also "intended to cause him and his family substantial psychological distress."[47] He also stated his view that "picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home" is not constitutionally protected.[48] The ordinance would have been valid as applied to the kind of conduct that prompted the city to enact the ordinance.[49] He also concluded that the ordinance was overbroad because it would overburden other speech protected by the First Amendment.[50]

The significance of the decision, for purposes of determining the constitutional validity of either criminal ordinances or statutes intended to punish focused conduct or civil actions intended to compensate persons who have been subjected to focused conduct is, at its most basic, that the First Amendment does not provide constitutional protection for all focused conduct, even if there is an expressive element to that conduct. That means that where there is no First Amendment protection, the State may vindicate its interest in protecting its citizens from the harm that results from focused conduct, either through the adoption of narrowly drawn legislation that limits certain types of focused conduct, or through the application of state tort claims to provide compensation for injured victims of such conduct.

The tort approach has the utility of redirecting the constitutional inquiry, permitting an appropriate balancing of interests, but without using *Chaplinsky* as an immovable constitutional baseline. Even if *Chaplinsky* is used, however, the first prong of the fighting words formulation, which focuses on words that are likely to cause injury, is receptive to the balancing approach. The injury prong of *Chaplinsky* could readily be used to establish a less grudging approach to the protection of emotional security in the face of hate speech.

Permitting recovery for the intentional infliction of emotional distress should not run afoul of the limitations in *R.A.V.* Nothing in the case should preclude recovery for the intentional infliction of emotional distress based on abusive lan-

47. *Id.* at 498 (Stevens, J., dissenting).
48. *Id.* (Stevens, J., dissenting).
49. *Id.* at 498-99 (Stevens, J., dissenting).
50. *Id.* at 499 (Stevens, J., dissenting).

guage or behavior, where the language or behavior emphasizes the race, gender, religion or sexual orientation or disability of the targeted victim. Recognizing that such language or behavior creates particularly egregious harm where it is focused on an individual[51] should not run afoul of the Court's rationale in *R.A.V.* Unlike Professor Delgado's proposed tort,[52] which is not content-neutral, section 46 actions are content-neutral. Allowing the action in cases where the claim is based on abusive epithets is simply a case-specific application of the general civil cause of action for the intentional infliction of emotional distress. No special rules are utilized to permit recovery where the elements of section 46 are met. Recognition of the harm caused by abusive behavior focused on a person because of the person's race, gender, sexual orientation, religion, or disability is no different than recognizing the peculiar harm that results in situations where positions of power are abused, causing persons in subordinate positions severe emotional distress, or where one person exploits a susceptibility of another, causing that person severe emotional distress. Given the content-neutral basis for emotional distress actions, it should be unnecessary to fit the claim within one of the exceptions established by Justice Scalia.

In the concurring opinions in *R.A.V.*, Justices White and Stevens appear to add some life to the first prong of *Chaplinsky*. While Justice White notes that generalized reactions such as "anger, alarm or resentment" are insufficient to divest expression of its constitutional protection,[53] and that hostile activity such as the burning of a cross at a political rally would probably be protected expression, he also notes that in that context, "the cross burning could not be characterized as a 'direct personal insult or an invitation to exchange fisticuffs,' to which the fighting words doctrine . . . applies."[54] Conversely, Justice White also notes that offensive speech may be subject to regulation when it intrudes upon a "captive audience,"[55] or when it

51. *See* Richard Delgado, *supra* note 8; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

52. *See supra* note 8.

53. 112 S. Ct. at 2559 (Blackmun, O'Connor, Stevens, JJ., concurring).

54. *Id.* at 2553 n.4 (Blackmun, O'Connor, Stevens, JJ., concurring) (citing Texas v. Johnson, 491 U.S. 397, 409 (1989)).

55. *Id.* at 2560, n.13 (Blackmun, O'Connor, Stevens, JJ., concurring) (citing Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978)).

merges into conduct.[56]

In addition, Justice Stevens states:

> Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to 'by its very [execution] inflict injury.' Such a limited proscription scarcely offends the First Amendment.[57]

Conversely, where there is focused expression, there should be no constitutional protection for that expression, when the person engaging in the conduct or communication intends to inflict severe emotional distress on the victim.

A final note: by suggesting a tort approach to the problem of hate speech causing severe emotional injury, I do not mean to suggest that the civil remedy should be the only remedy for hate speech. It should not. It most certainly is not likely to be the most effective remedy. But at the very least, it should open up for consideration the possibility of a less grudging approach to claims for hate speech which meets the elements of section 46 emotional distress.

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56. *Id.* (Blackmun, O'Connor, Stevens, JJ., concurring) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

57. *Id.* at 2571 (White, Blackmun, JJ., concurring). In footnote 8, Justice Stevens in effect makes the analogy of an expressive or verbal fist, relying on the argument made by the City of St. Paul:

> Finally, we ask the Court to reflect on the 'content' of the 'expressive conduct' represented by a 'burning cross.' It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim['s] head. It is perhaps the ultimate expression of 'fighting words.'

Id. at 2569-70 (citing Appendix to Brief for Petitioner at C-6, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)).