Torts—Official Immunity Survives for IIED Police Misconduct: But Should It?

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TORTS—OFFICIAL IMMUNITY SURVIVES FOR IIED POLICE MISCONDUCT: BUT SHOULD IT?

Kelly v. City of Minneapolis, 598 N.W.2d 657 (Minn. 1999)

Susan T. Peterson†

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I. INTRODUCTION

In the last decade or so, “police brutality” has become a household phrase nationwide.¹ Several Minnesota cases demonstrate that police misconduct exists in our own communities and that the various remedies in place are ineffective in solving the problem.² In Kelly v. City of Minneapolis,³ police misconduct inter-

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2. Adewale v. Whalen, 21 F. Supp. 2d 1006, 1008 (D. Minn. 1998) (alleging excessive force and arrest without probable cause for altercation with police and subsequent arrest when plaintiff did not open the apartment building’s security door for the police); Kelly v. City of Minneapolis, 598 N.W.2d 657, 659-62 (Minn.
sects with official immunity and intentional infliction of emotional distress (IIED). *Kelly* offered the Minnesota Supreme Court the occasion to review the scope of official immunity and the elements of IIED, and the opportunity to take a step toward solving the problem of police misconduct.

This case note first examines the history of police misconduct, official immunity, and IIED. Part Three details the facts and procedure of the *Kelly* case. Part Four analyzes both the majority opinion and the dissenting opinion of the *Kelly* decision. Finally, this note concludes that the court legitimizes police misconduct by upholding the status quo in both areas of the law in *Kelly* and argues that it is time for the court to adopt a different standard for IIED police misconduct to remedy this serious issue.

II. HISTORY

A. Police Misconduct

Police misconduct is neither easy to recognize nor easy to define.\(^4\) Nevertheless, police misconduct has been and continues to

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1999) (alleging IIED, among other claims, for brawl with police, racist and sexist name-calling, exposure of plaintiff's breasts, and subsequent arrests); Baker v. Chaplin, 517 N.W.2d 911, 912 (Minn. 1994) (alleging assault, battery, and excessive force for injuries caused by officer who used a police riot baton to hit the plaintiff when the barricade the plaintiff stood by at a demonstration fell over); Carradine v. State of Minnesota, 511 N.W.2d 733, 734 (Minn. 1994) (alleging unreasonable search and seizure, malicious prosecution, and excessive force for stop and arrest by police when plaintiff was on his way to the airport to catch a flight); Kelly v. City of Minneapolis, 581 N.W.2d 372, 378 (Minn. Ct. App. 1998), rev'd, 598 N.W.2d 657, 659 (Minn. 1999) (characterizing the officers' conduct as a "disproportionate response" inflicting "gratuitous cruelty"). See also David Chanen, *Police Brutality Reports Declining in Minneapolis–But Some Say Victims Are Less Likely to Complain*, STAR TRIB. (MPLS.–ST. PAUL), April 24, 2000, at 1B (reporting that there were six excessive force claims in Minneapolis in 1999); Mary Lynn Smith, *St. Paul Ok's $92,500 Settlement in Brutality Case*, STAR TRIB. (MPLS.–ST. PAUL), June 17, 1999, at 2B (alleging police brutality where police handcuffed an intoxicated Native American plaintiff, sprayed him with a chemical irritant, called him racist names, and left him outside in the snow while wearing only a light jacket); see also infra notes 6, 9.

3. 598 N.W.2d 657, 657 (Minn. 1999).

be a complex and pervasive problem.\textsuperscript{5} One dimension of police

target."); Carl B. Klockars, \textit{A Theory of Excessive Force, in Police Violence, supra, at 7
(suggesting that police conduct constitutes brutality only when it is unnecessary or
inappropriate and “abusive of the rights or dignity” of citizens); David S. Cohen,
\textit{Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt
misuse of force, or excessive force, includes subcategories of deadly force, low
level brutality, verbal abuse and harassment, with verbal abuse including racial epi-
thets and discourtesy); David Dante Troutt, \textit{Screws, Koon, and Routine Aberrations:
The Use of Fictional Narratives in Federal Police Brutality Prosecutions, 74 N.Y.U. L.
Rev. 18, 102-03 (1999) (noting that definitions of police brutality vary because its preva-
ience is not measured by standardized statistics but that generally it is “force that
crosses the line of objective reasonableness”). Cf., Alexa P. Freeman, \textit{Unscheduled
Departures: The Circumvention of Just Sentencing for Police Brutality, 47 Hastings
L.J. 677, 684-85 (March 1996) (noting that “[e]ven the ‘obvious’ cases are not obvious
to everyone.”) (citing Thomas Barker & David L. Carter, \textit{A Typology of Police Devi-
ance, in Police Deviance 4, 7 (Thomas Barker & David L. Carter, eds., 1991) (de-
fining ‘police abuse of authority,’ which can be physical, psychological, or legal in
form, as ‘any action’ by a police officer without regard to motive, intent, or malice
that tends to injure, insult, trespass upon human dignity, manifest feelings of infe-
riority, and/or violate an inherent legal right of a member of the police constitu-
cy in the course of performing ‘police work’)). In this scheme, physical abuse,
or police brutality, is synonymous with excessive force. Barker & Carter, supra, at
7. Psychological abuse includes “verbal assault[ing], ridicul[ing], discriminat[ing],
or harass[ing] individuals and/or plac[ing] a person who is under the actual or
constructive dominion of the officer in a situation where the individual’s esteem
or self-image [sic] are threatened or diminished.” Freeman, supra, at 685-86 (citing
Barker & Carter, supra, at 7-8). But see Hubert G. Locke, \textit{The Color of Law and
the Issue of Color: Race and the Abuse of Police Power, in Police Violence, supra, at 130
(assuming that racial slurs and abusive language should not be classified as police
brutality because such a broad category “ultimately describes nothing usefully”).
Legal abuse is the “violation of a person’s constitutional, federally protected, or
state-protected rights by a police officer.” Freeman, supra, at 686 (citing Barker &
Carter, supra, at 8).

5. \textit{Antony M. Pate & Lorrie A. Fridell, Police Use of Force: Official Re-
ports, Citizen Complaints, and Legal Consequences} 5 (1993) (noting that
“[l]ong before Lord Acton warned that power corrupts, and absolute power cor-
rupts absolutely, the Romans were asking ‘Sed quis custodiet ipsos custodes?, or
‘[W]ho will guard the guards themselves?’”). From the beginning of American
history, “violence [was]...the primary tool used by the dominant class to preserve
the order, culture and hierarchical structure of the status quo” against minority
groups. Myriam E. Gilles, \textit{Breaking the Code of Silence: Rediscovering “Custom” in Sec-
study “found extensive evidence of police misconduct and violence” in U.S. cities
and concluding that “[p]olice brutality, corruption and abuse of authority have
long presented American cities with some of their most pressing—and legally vex-
ing - social problems.”); see also Jennifer E. Koepke, Note, \textit{The Failure to Breach the
Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury, 39 Washburn
L. J. 211, 219 (2000) (noting violence first against Native Americans and later against
Mexicans, Chinese, and blacks); Cole, supra note 1, at 13A (citing the 1968 Kerner
Commission Report which discussed causes of urban riots in African American
neighborhoods). Cf Mary M. Cheh, \textit{Are Lawsuits an Answer to Police Brutality? in

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misconduct, and inseparable from it, is racial prejudice and tension.\textsuperscript{6}

Proposals to alleviate this problem are numerous and varied.\textsuperscript{7} Remedies aimed at averting future incidents of misconduct often target the selection and training processes of potential officers or suggest department reforms, but these preventive remedies have had little impact on the numbers of incidences of misconduct.\textsuperscript{8}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{6} Troutt, supra note 4, at 104-05 (noting "[b]lack and Latino men...report higher rates of victimization at the hands of police officers[,]" and racist verbal abuse occurs frequently).
\item \textsuperscript{7} Infra note 9 and accompanying text.
\item \textsuperscript{8} Chanen, supra note 2 (explaining that statistics seem to indicate a decline in instances of misconduct because people have quit lodging complaints); Verena Dobnik, \textit{Coalition Against Brutality Proposes 10 Major Police Reforms in N.Y. City}, \textit{Buffalo News}, March 28, 1999, at A9, available at 1999 WL 4546270 (reporting that a New York City multirace coalition proposed reforms, after Amadou Diallo’s killing, which included providing uniforms for undercover cops, recruiting more minorities and women, creating a special prosecutorial position to handle police misconduct, and setting up a complaint board); Senkel, supra note 5, at 418 (advocating the need for reform of criminal and civil law statutes); Love, supra note 5, at 59-60 (arguing that 42 U.S.C. § 14141, which would allow the Attorney General to bring a civil suit seeking injunctive relief from offensive police department practices, is a possible solution to the problem); Cohen, supra note 4, at 183, 186 (proposing the creation of the crime of official oppression to officers’ "cover lower-level abuse"); Michelle A. Travis, Note, \textit{Psychological Health Tests for Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives}, 46 STAN. L. REV. 1717, 1718 (1994) (proposing alternative police candidate screening tests that "focus on behavior modifi-
Retrospective relief such as civil causes of action, criminal prosecution, and disciplinary measures have also failed in deterring police from abusing their power because plaintiffs who suffer from police misconduct are infrequently compensated and sentences are light.9

Refusing to address police misconduct is not a viable option as it further alienates minorities and fuels their mistrust of the police.10 The animosity minorities feel toward police manifests itself in turn, reinforcing the police perspective of “us versus them” and encouraging the cycle of misconduct.11
B. Official Immunity

Official immunity evolved with the doctrine of sovereign immunity in common law England.12 Although the American trend has been toward restricting or abrogating immunities, American courts recognize official immunity to protect public officials from potentially harassing damage suits when their duties require the exercise of judgment or discretion.13

Official immunity can be defeated only by proof that the official committed "a willful or malicious wrong."14 A willful or mali-
cious wrong is a "willful violation of a known right."\textsuperscript{15} If an official intentionally commits an act which he then has reason to believe is prohibited, official immunity is defeated, and the official is liable.\textsuperscript{16} "[This] standard contemplates less of a subjective inquiry into malice, which was traditionally favored at common law, and more of an objective inquiry into the legal reasonableness of an official's actions."\textsuperscript{17}

Since \textit{Cook v. Trovatten},\textsuperscript{18} a 1937 decision, the Minnesota Supreme Court has repeatedly held that a public official is automatically entitled to official immunity when his lawful duties require the exercise of judgment or discretion.\textsuperscript{19} Specifically, police officers'
duties, including preventing crimes and enforcing the law, involve the exercise of discretion. Furthermore, the court has broadly construed “official immunity to apply to any claim against public officials involving personal liability ‘for damages.’” Thus, as applied to police, the court has consistently held that official immunity shields police officers from liability even if officers take intentional action that could support an intentional tort claim.

N.W.2d 32, 39-40 (1953) (affirming demurrer for county employee because “[p]ublic officials and employees are not held personally liable for acts done honestly in the exercise of the discretion which the law gives them.”); Wilbrecht, 179 Minn. at 264, 228 N.W. at 916 (dismissing action against State Commissioner of Highways because “[t]he Legislature did not specify the grade nor...[specify details] but left all such matters to be determined by the commissioner.”). Before 1976, sovereign immunity generally prevented suit against the state of Minnesota. Nusbaum v. Blue Earth County, 422 N.W.2d 713, 717 (Minn. 1988). In 1975, Nieting changed the general rule of immunity to one of liability. Nieting v. Blondell, 306 Minn. 122, 128, 235 N.W.2d 597, 601 (1975); see Nusbaum, 422 N.W.2d at 718. The court did not abolish official immunity, however. Nieting, 306 Minn. at 131, 235 N.W.2d at 603. Official immunity shields a public official even though the discretionary actions are taken “on an operational rather than a policymaking level.” Pletan, 494 N.W.2d at 40; see generally Nusbaum, 422 N.W.2d at 718-22 (distinguishing discretionary immunity from official immunity). Both discretionary immunity, which “rests on the need to protect policymaking activities that involve a balancing of social, political or economic considerations,” and official immunity involve discretion, but discretion “has a broader meaning in the context of official immunity.” Elwood, 423 N.W.2d at 678. Because discretionary immunity and official immunity are separate doctrines, analyses under the two doctrines differ. Holmquist v. State, 425 N.W.2d 230, 233 n.1 (Minn. 1988)(noting it is “analytically unsound to equate” official immunity with discretionary immunity). Whether the officer’s acts are discretionary or ministerial is a question of law. Kelly v. City of Minneapolis, 598 N.W.2d 657, 664 n.5 (Minn. 1999); Carradine v. State, 494 N.W.2d 77, 80 (Minn. Ct. App. 1992), aff’d in part, rev’d in part, 511 N.W.2d 733 (Minn. 1994). Whether the officer’s acts deserve immunity turns on the facts of the case. Elwood, 423 N.W.2d at 678; infra note 54 and accompanying text.

20. Cook, 200 Minn. at 224, 274 N.W. at 167 (explaining police duties are general and executive in character, unlike ministerial duties, which are “absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts....”(quoting People v. May, 251 Ill. 54, 54, 95 N.E. 999, 101 (1911)); accord Pletan, 494 N.W.2d at 40; Elwood, 423 N.W.2d at 678; Kelly v. City of Minneapolis, 581 N.W.2d 372, 376 (Minn. Ct. App. 1998) (noting that “[t]he usual duties of police officers are not purely ‘ministerial’...”).

21. Beaulieu, 518 N.W.2d at 570-71 (holding that official immunity shields an officer from liability for a claim of discrimination brought under the Human Rights Act, a statutory cause of action, as well as common law claims).

22. Greiner v. City of Champlin, 27 F.3d 1346, 1355 (8th Cir. 1994)(finding immunity for state tort claims, including intentional infliction of emotional distress); Rico v. State, 472 N.W.2d 100, 102-106 (finding immunity for official who fired former employee, even if official intentionally committed an act later determined to be wrong); Morris, 453 N.W.2d at 42 (finding immunity for shooting out tires and handcuffing man who evaded arrest even though same actions would...
C. Intentional Infliction Of Emotional Distress (IIED)

As recently as 1934, the law did not allow recovery for emotional distress independent from physical harm, even if it was intentionally inflicted.\(^\text{23}\) In 1936, however, Harvard Law Professor Calvert Magruder proposed an emerging principle: that recovery for severe “mental distress purposely caused is actionable unless justified…”\(^\text{24}\) Thus, in the 1948 revision of the Restatement of Torts, the Restatement first recognized an independent tort based on IIED.\(^\text{25}\) Since then, most jurisdictions have followed the Restatement’s guidelines in widely recognizing the tort.\(^\text{26}\)

otherwise be battery); Elwood, 423 N.W.2d at 674 (finding immunity on claims of battery and trespass). \(^\text{But see 423 N.W.2d at 679 (concluding that official immunity “protects honest law enforcement efforts, and is not intended to shield police brutality.”).}\(^\text{23}\)

23. David Crump, Evaluating Independent Torts Based Upon “Intentional” or “Negligent” Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?, 34 ARiz. L. REV. 439, 447 (1992) (noting that the law from 1861 to 1934 or so, depending on the jurisdiction was that “[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone…” (quoting Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861))); William L. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. R. 874, 874 (1939) (noting that “the law has been reluctant, and very slow indeed” to recognize emotional distress but that more than a hundred decisions from 1919 to 1939 allowed recovery).

24. Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936); Crump, supra note 23, at 447 (noting that Professor Magruder and others recognized that society needed a way to deter severe emotional distress “incident to participation in a community life” (citing Magruder, supra, at 1035)).

25. RESTATEMENT OF TORTS § 46 (1934 & Supp. 1948) (stating that “[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable...for such emotional distress.”); see also DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 488 n.1 (1997). The drafters of the Restatement (Second) (1965) replaced the “without a privilege” approach with the “outrageous” limitation and added that a claim could be based on recklessness. RESTATEMENT (SECOND) OF TORTS § 46 (1977); Crump, supra note 23, at 449.

26. Crump, supra note 23, at 446; RESTATEMENT (SECOND) OF TORTS § 46 cml. b (1977); infra note 30 and accompanying text; see generally Alcorn v. Anbro Eng’g., Inc., 468 P.2d 216, 218 (Cal. 1970) (noting California has “long recognized” IIED); Johnson v. Sampson, 208 N.W. 814, 816 (Minn. 1926) (holding that the complaint stated a cause of action, independent of assault or slander); LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790, 794 (Miss. Ct. App. 1981) (holding that a prima facie case of IIED was met); Samms v. Eccles, 358 P.2d 344, 346 (Utah 1961) (holding complaint stated cause of action for IIED even though no other tort was alleged). See also Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42, n.9 (1982) (listing jurisdictions that have adopted the Re-
Pre-1983, Minnesota allowed recovery for emotional distress claims in egregious situations where the plaintiff was not threatened physically but suffered emotional distress as a result of the defendant’s intentional action. Then, in the *Hubbard* decision in 1983, the Minnesota Supreme Court adopted IIED as a separate and independent tort. The *Hubbard* court established four elements that the plaintiff must prove to recover: extreme and outrageous conduct, intentionally or recklessly inflicted, which causes emotional distress, which is severe. Neither physical injury nor statement (Second) formulation and those that recognize the tort but have not adopted the Restatement).

27. Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 28 (1993); see generally Johnson v. Sampson, 167 Minn. 203, 204, 208 N.W. 814, 815-16 (1926) (allowing recovery where school officials accused schoolgirl of unchastity and threatened to imprison her); Lesch v. Great N. Ry. Co., 97 Minn. 503, 505, 106 N.W. 955, 956 (1906) (allowing recovery when defendant’s employees, without asking for permission, entered and inventoried the plaintiff’s yard and home in her presence). *But see* Shuch v. Prudential Ins. Co. of America, 96 F. Supp. 400, 400, 403 (D. Minn. 1950) (concluding no recovery where defendant allegedly terminated plaintiff’s employment in a way to deprive him of his benefits); Haagenson v. National Farmers Union Property and Cas. Co., 277 N.W.2d 648, 652 (Minn. 1979) (holding no recovery for insurer’s refusal to pay plaintiffs’ claim because insurer’s “motive in breaching [the] contract does not convert...the action into a tort action”). The policy rationale for not recognizing emotional distress as an independent tort or for limiting the recovery for emotional distress claims is the “potential for abuse of the judicial process” because “mental anguish is speculative” and is therefore “likely to lead to fictitious allegations.” Hubbard v. United Press Int’l, Inc., 330 N.W.2d 428, 438 (Minn. 1983); Sampson, 167 Minn. at 207, 208 N.W. at 816 (noting possibility of “trumped-up claims”).


29. *Id.* at 438. The adoption of IIED did not expand the right to recover for emotional distress independent of physical injury. *Id.* at 439. In fact, because of the extreme nature of the conduct and the degree of distress necessary to recover under IIED, the scope of this cause of action is quite narrow. Steenson, supra note 27, at 36-37.

30. Extreme and outrageous means “so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.” *Hubbard*, 330 N.W.2d at 439 (quoting Haagenson, 277 N.W.2d at 652 n.3); accord RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977) (noting that extreme and outrageous conduct “would arouse...resentment against the actor, and lead [an average member of the community] to exclaim, ‘Outrageous!’”).

31. *Hubbard*, 330 N.W.2d at 438-39; accord RESTATEMENT (SECOND) OF TORTS § 46(1) (1977) (defining IIED as “[o]ne 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.”). One acts intentionally when one “desires to cause consequences of his act, or [when] he believes that the consequences are substantially certain to result from it.” RESTATEMENT (SECOND) OF TORTS § 8A (1977). See also
malice is required, and even verbal abuse, "under circumstances peculiarly calculated to cause mental distress," is actionable.\textsuperscript{32}

III. THE KELLY DECISION

A. The Facts\textsuperscript{33}

Antoinette Deyo was hosting a party at her Minneapolis home in the early morning hours of September 29, 1991 when Officer Wells was dispatched to investigate a loud party at a neighboring address.\textsuperscript{34} Outside at the scene, Wells met Deyo.\textsuperscript{35} Believing the

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BLACK'S LAW DICTIONARY 810 (6th ed. 1990) (defining intent as having the "desire to bring about [a] result that will invade interests of another."). Reckless behavior is "heedless" or "indifferent" conduct where the actor "pays no regard to...probably or possibly injurious consequences" or where the actor "[foresees] such consequences, [but] persists in spite of such knowledge." BLACK'S, supra, at 1270-71. \textit{See also} RESTATMENT (SECOND) OF TORTS § 500 cmt. g (1977) (noting that "reckless misconduct requires a conscious choice of a course of action, either with knowledge of...danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man."). Recklessness is characterized by an unreasonable, substantial, and probable risk of harm consciously (and perhaps deliberately) disregarded. \textit{Id}. Severe emotional distress is "so severe that no reasonable... [person] could be expected to endure it." \textit{Hubbard}, 330 N.W.2d at 439 (citing RESTATMENT (SECOND) OF TORTS § 46 cmt. j (1965)); \textit{Restatement (Second) of Torts} § 46 cmt. j (1977)(noting emotional distress includes "mental suffering, mental anguish, mental or nervous shock" and "mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," but liability exists only where distress is extreme). \textit{Post-Hubbard} rulings indicate no relaxation of these strenuous requirements. \textit{E.g.}, Jensen v. Walsh, 609 N.W.2d 251, 254 (Minn. Ct. App. 2000) (affirming that depression, anxiety, sleeping problems, inability to concentrate, chest and intestinal stress, vomiting and headaches do not meet the legal standard of severity); Langehaug v. Mary T., Inc., No. C4-98-1445, 1999 WL 31182, at *4 (Minn. Ct. App. Jan. 26, 1999)(unpublished) (holding that extreme and outrageous conduct must be more than merely offensive or inappropriate behavior); Hanson v. Hackley, No. C7-98-1410, 1999 WL 43522, at *4 (Minn. Ct. App. Feb. 2, 1999)(unpublished) (affirming trial court's determination that the jailers' refusal to lend medical assistance to epileptic plaintiff "did not 'meet the high standard necessary to sustain a claim....'" under IIED); Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853 (Minn. Ct. App. 1985) (concluding that employment discharge does not meet the level of distress required, even if the distress is exaggerated because of the plaintiff's peculiar susceptibility).

\textsuperscript{32} Prosser, \textit{supra} note 23, at 881. \textit{Cf.} MICHAEL AVERY & DAVID RUDOVSKY, \textit{Police Misconduct: Law and Litigation} § 2.3(k), at 2-74 (2d ed. 1995) (noting even if actionable as IIED, verbal abuse or harassment may "not constitute a violation of constitutional rights" under Section 1983).

\textsuperscript{33} The parties disputed virtually every fact beyond these basics. Kelly v. City of Minneapolis, 598 N.W.2d 657, 660 (Minn. 1999); Kelly v. City of Minneapolis, 581 N.W.2d 372, 374 (Minn. Ct. App. 1998).

\textsuperscript{34} \textit{Kelly}, 598 N.W.2d at 660. Plaintiffs Deyo and Kelly are African American;
noise came from Deyo’s house, Wells attempted to write the uncooperative Deyo a citation. Wells struggled with Deyo to restrain her, and Deyo fought back. When Deyo screamed that she was being raped, Wells let go of her, and she ran into her house.

Wells, also believing that he was assaulted in the scuffle, called for backups. Backup Officer Roiger and others went with Wells into the house to arrest Deyo. When Roiger tried to arrest Deyo, Deyo’s sister, Virginia Kelly, fought with him.

the officers are Caucasian males. Resp’t Br. at 4. Officer Wells was dispatched to investigate at 2932 Humboldt Ave. N. Kelly, 598 N.W.2d at 660. Deyo’s address is 2934 Humboldt Ave. N. Id. Wells parked in the driveway that separates 2932 and 2934 Humboldt Ave. N. Resp’t Br. at 4.

Kelly, 598 N.W.2d at 660. Deyo testified that she was sitting outside talking to a friend when Wells arrived. Resp’t Br. at 4. Deyo, observing that Wells looked confused, approached him. Kelly, 598 N.W.2d at 660. Deyo indicated to Wells that someone at 2932 was screaming, so obviously police were needed there, but instead of investigating the screams, Wells asked Deyo if she was aware of the city noise ordinance. Resp’t Br. at 4. Wells testified that when he told Deyo he was investigating a noisy party, she told him she was hosting a party at her house. Kelly, 598 N.W.2d at 660. He seemed to think that she indicated that it was her party he was looking for. Appellant Br. at 3.

Kelly, 598 N.W.2d at 660. Specifically, Wells asked Deyo to come to his squad car so he could give her a copy of the ordinance. Id. Because he could not find a copy of the ordinance, he asked for her name in case he needed it for further police action or prosecution. Appellant Br. at 3. When Deyo refused to give him her name, he asked her to sit in the back seat of his car while he wrote her a citation for violating the ordinance. Kelly, 598 N.W.2d at 660. Deyo sat in the car but kept one foot on the pavement. Id. Wells tapped her calf with his hand and told her to move her leg into the car. Id. Not understanding how she could be arrested for violating a noise ordinance, Deyo attempted to get out of the car. Id.; Resp’t Br. at 5.

Kelly, 598 N.W.2d at 660. Deyo claimed that she asked if she could get out to get her shoes and give keys to the friend with whom she was talking and that Wells had said no. Resp’t. Br. at 5. She testified that Wells then grabbed her throat, twisted her arm, said, “I will put you out” (Kelly, 598 N.W.2d at 660), and “called her a ‘black bitch’ and ‘nigger bitch.’” Kelly, 581 N.W.2d at 375. Wells claimed that when Deyo tried to get out of the car he grabbed her arm to restrain her and put his hands on her shoulders to push her back into the car. Appellant Br. at 4.

Kelly, 598 N.W.2d at 660. Deyo testified that Wells’ choke hold tore her top, exposing her breasts, and almost caused her to pass out. Resp’t Br. at 5. She claimed her breasts were fully exposed when she ran into the house. Id. See also Kelly, 598 N.W.2d at 660 (noting “there was disputed testimony as to whether or not Deyo’s breasts were exposed...”); cf. Appellant Br. at 4, 17 (admitting that Wells may have torn Deyo’s top but that Deyo’s breasts were not exposed during her arrest and booking).

Kelly, 598 N.W.2d at 660. Wells was bleeding from scratches to his neck and ear. Id.

Id.

Id. at 661. Deyo testified that Roiger, mistaking Virginia Kelly for Deyo,
Kelly and Deyo sued officers Wells and Roiger "alleging a wide variety of police misconduct including intentional infliction of emotional distress." The jury used a special verdict form and found that Wells and Roiger were liable for the IIED claim but concluded that neither officer had acted with malice. The trial court held that because the officers had not acted with malice, official immunity shielded them from liability. On appeal, the court of appeals held that malice is inherent in a finding of IIED and reversed the trial court's ruling.

B. The Court's Analysis

The Minnesota Supreme Court reversed the court of appeals started to beat Kelly. Resp't. Br. at 7. Deyo testified that Roiger punched Kelly, kneed her face, grabbed her hair, and struck her with force, tearing an earring from her ear. Id. Wells testified that he described Deyo to the other officers. Appellant Br. at 5. Roiger testified that the two women did not look alike although they were both wearing black, that he did not mistake Kelly for Deyo, and that Kelly was hostile as the officers looked for Deyo. Kelly, 598 N.W.2d at 660-61.

When Roiger told Deyo that she was under arrest and tried to free her from her brother's grip, Kelly attacked Roiger. Id. at 661. Roiger claimed that Kelly grabbed his sweater near his throat, gouged at his eyes, cheeks, neck, and throat. Appellant Br. at 6. At one point, when Kelly's head was near his crotch, Roiger was allegedly afraid that Kelly was going to bite his penis. Id. To pull her face away from his crotch, he grabbed Kelly by her hair. Id. at 7.

42. Kelly, 598 N.W.2d at 659-60. Plaintiffs also sued the Minneapolis Chief of Police John Laux and the City of Minneapolis. Id. at 661. Besides IIED, plaintiffs alleged false arrest and imprisonment, assault, battery, negligent infliction of emotional distress, excessive force, wrongful entry, conspiracy to violate constitutional rights, racial discrimination, and unreasonable delay of medical treatment. Id.

43. Id. at 662. The court gave the six-member jury "an 81-question special verdict form, requiring findings as to whether each defendant had committed each claimed offense and, if so, whether the offense had been committed with malice." Id. at 661. It is not clear from the special verdict form what the jury's finding of IIED was premised on. Id. at 663 (concluding that brawl and subsequent arrests likely formed basis for IIED). See also Kelly, 598 N.W.2d at 666 (Gilbert, J., dissenting) (speculating that racial slurs and exposure of Deyo's breasts formed basis for IIED); Resp't Br. at 20 (concluding that failure to take Kelly promptly to a hospital could have formed the basis for IIED); Appellant Br. at 22 (suggesting that IIED could have been found because "two initially innocent parties" were severely harmed "as the result of a very minor complaint."). The jury also found that the officers were not liable as to any other claim and that Deyo suffered $82,546 in damages attributable to Wells (for medical expenses, emotional distress, pain and suffering, and loss of earnings) and that Kelly suffered $85,220 in damages attributable to Roiger (for medical expenses, emotional distress, and pain and suffering). Kelly, 598 N.W.2d at 661-62; accord Kelly, 581 N.W.2d at 375-76.

44. Kelly, 598 N.W.2d at 662; Kelly, 581 N.W.2d at 376.

45. Kelly, 598 N.W.2d at 662; Kelly, 581 N.W.2d at 377, 379.
and reinstated the trial court’s decision. The supreme court held that the court of appeals erred in vacating the jury's finding that the appellants acted without malice when they caused emotional distress, and that, in the absence of malice, official immunity shields officials from liability when they perform discretionary duties. The court concluded that the jury could have believed the officers committed the intentional infliction of emotional distress, but acted without malice, under at least two theories.

IV. ANALYSIS

A. The Majority Opinion

In pointing out the flaws in the court of appeals' opinion, the supreme court offers several logical reasons to support its conclusion that this case presents no reason to limit either the applicability of official immunity or the elements of IIED.

First, the court of appeals bases its conclusion on the desire not to protect police activity that exceeds the scope of authority from liability. The court does not dispute that police misconduct, when malicious, should not be immune from suit. The real bone of contention here is that the court of appeals cannot fathom a

46. Kelly, 598 N.W.2d at 665.
47. Id.
48. Id. at 663. The court concluded either that the jury could have found that Wells and Roiger acted recklessly instead of intentionally, which would prevent a finding of malice, or that the officers’ behavior, although outrageous, was justified under the circumstances and thus not malicious. Id. The dissent grants that the court’s conclusions may be “appropriate” if the jury findings were based on the scuffles. Id. at 666. However, the dissent, characterizing the jury answers as a compromised verdict, argues that the court’s conclusion that the jury finding of IIED was based on physical contact is inconsistent with jury findings that the officers did not commit assault or battery or use excessive force. Id. at 666-67. The dissent speculates that the finding of IIED hinged on racial or sexist slurs or “the exposure of...[Deyo’s] breasts.” Id.; infra note 44.
49. Kelly, 581 N.W.2d at 378 (concluding that the officers’ conduct “far exceed[ed] any ‘discretionary conduct’”); Kelly, 598 N.W.2d at 665 (Gilbert, J., dissenting) (arguing that official immunity should not protect the officers’ actions because they “clearly exceeded the bounds of their discretionary authority”); Baker v. Chaplin, 497 N.W.2d 314, 318 (Minn. Ct. App. 1993) (explaining that “official immunity is intended to protect bona fide law enforcement practices...not...police brutality.”), aff'd and remanded by, Baker v. Chaplin, 517 N.W.2d 911, 916 (Minn. 1994); Elwood v. County of Rice, 423 N.W.2d 671, 679 (Minn. 1988) (noting that official immunity protects “honest law enforcement efforts,” not “police brutality,” which is synonymous with a willful or malicious wrong).
50. Kelly, 598 N.W.2d at 664.
situation where police engage in IIED without malice. The majority, however, presents two credible possibilities.

Second, the issue of whether an officer's actions were malicious or willful is generally a question of fact to be decided by the jury. In this case, Kelly and Deyo produced sufficient evidence from which a reasonable jury could conclude that the officers acted maliciously. Nonetheless, the jury concluded that neither Wells nor Roiger acted with malice. Because a finding of malice requires a finding of intentional conduct, it is probable that the jury premised the IIED finding on reckless, rather than intentional, behavior.

Third, the actions of Wells and Roiger, though "repugnant" and "unfortunate," are exactly the kinds of behavior from which official immunity protects officials from liability. Official immunity

51. *Kelly*, 581 N.W.2d at 378 (holding that a finding of intentional infliction of emotional distress "[a]most invariably...meets the definition of malice...." and is thus the equivalent to police brutality). See also Appellant Br. at 11-12 (arguing that the court of appeals' holding contradicts precedent); cf. *Elwood*, 423 N.W.2d at 679 (explaining that malice is not to be presumed but is a question for the jury).

52. *Kelly*, 598 N.W.2d at 663. *Infra* notes 44, 49 and accompanying text. The majority's theories are crucial because the jury verdict must be sustained if the jury's answers can be reconciled. Swanson v. Minneapolis St. Ry. Co., 252 Minn. 484, 487, 90 N.W.2d 514, 517 (1958). Furthermore, a special verdict form "is to be liberally construed" to reconcile jury answers. Reese v. Henke, 277 Minn. 151, 155, 152 N.W.2d 63, 66 (1967).

53. *Kelly*, 598 N.W.2d at 664 n.5; *Elwood*, 423 N.W.2d at 678 (recognizing that applying official immunity "turns on the facts of each case."); *Kelly*, 581 N.W.2d at 376 (citing *Elwood*, 423 N.W.2d at 678); Carradine v. State, 494 N.W.2d 77, 80 (Minn. Ct. App. 1992), aff'd in part, rev'd in part (on other grounds), Carradine v. State, 511 N.W.2d 733 (Minn. 1994).

54. *Kelly*, 598 N.W.2d at 663. Testimony of a tense situation, officers' concern for their own safety, and "the jury finding that the [officers] did not use excessive force in making the arrests and that they reasonably believed that they had lawful authority to do so...." support either the theory that Wells and Roiger acted recklessly or the theory that the officers were justified by acting outrageously under the circumstances. *Id.*

55. *Kelly*, 598 N.W.2d at 662.

56. *Kelly*, 581 N.W.2d at 377 (instructing the jury on IIED included intentional or reckless conduct) (emphasis added). Additionally, to support the alternative theory, the jury would have to justify the alleged sexist or racist name-calling under the circumstances, if it was the basis for the jury's finding of IIED (and it may be difficult for a jury to justify sexist or racist name-calling under any circumstance). *Kelly*, 598 N.W.2d at 666; see also *infra* notes 49, 67, 74.

57. *Kelly*, 581 N.W.2d at 376 (citing the trial court's memorandum of law). See also *Kelly*, 598 N.W.2d at 665 (arresting suspect does "not involve the 'fixed and designated facts' and 'absolute, certain and imperative' duties of a ministerial act."); Pletan v. Gaines, 494 N.W.2d 38, 41 (Minn. 1992) (noting "[i]t is difficult to think of a situation where the exercise of significant, independent judgment and
is practical and rational: "it allows police officers to perform an effective and efficient job with necessary force without being subject to second guessing of their split-second decisions." \(^58\) Other states have reached identical conclusions. \(^59\)

Fourth, the logical extension of the court of appeals' holding would prevent official immunity from shielding officers from liability on all intentional torts because they are premised on intent. \(^60\) Affirming the court of appeals' holding would drastically limit the scope of official immunity afforded to police officers in particular, because officers must make physical contact with citizens who could then recover for any harmful or offensive bodily contact. \(^61\) Thus, limiting immunity to torts not based on intent, such as negligence and some statutory causes of action, would wipe out significant protection from liability for the police.

Fifth, and perhaps most importantly, restricting immunity in
discretion would be more required...than the decision to chase a car."); Johnson v. Morris, 453 N.W.2d 31, 42 (Minn. 1990) (tire-shooting, handcuffing, and point- ing revolver with the threat to shoot is a "classic case" of the kind of discretion official immunity protects); Elwood, 423 N.W.2d at 679 (deciding to enter the home and detain suspects is "the kind of judgment meant to be protected...") and citing as an example Green v. Denison, 738 S.W.2d 861, 865-66 (Mo. 1987) (harming bystanders while exchanging gunfire with man threatening others with rifle qualifies for official immunity)).

58. _Kelly_, 598 N.W.2d at 667 (Gilbert, J., dissenting). See also _Kelly_, 598 N.W.2d at 665 (concluding that "the conduct of police officers in responding to a dispatch or making an arrest involves precisely the type of discretionary decisions, often split-second and on meager information, that we intended to protect from judicial second-guessing through the doctrine of official immunity."). Official immunity is also practical and sensible because it allows latitude for mistakes to be made. _Elwood_, 423 N.W.2d at 678. In emergency situations especially, police need broad discretion "because a more stringent standard could inhibit action." _Id._

59. _Elwood_, 423 N.W.2d at 679; C.L. v. Olson, 422 N.W.2d 614, 616 (Wis. 1998)(explaining policy considerations behind official immunity); Currie v. Lao, 592 N.E.2d 977, 984 (Ill. 1992) (explaining that "a public decisionmaker should not be subject to personal liability where he makes a decision based on his perception of the public needs."); _Green_, 738 S.W.2d at 865 (explaining that "fear of personal liability should not hang over public officials as they make judgments affecting the public safety and welfare."); Ross v. Consumers Power Co., 363 N.W.2d 641, 678-80 (Mich. 1984)(noting that police "must be given a wide degree of discretion in determining what type of action" should be taken).

60. BLACK'S, supra note 31, at 811 (defining intentional tort as "[a] tort in which the actor is expressly or impliedly judged to have possessed intent or purpose to injure."); e.g., _Morris_, 453 N.W.2d at 40 (emphasizing that intent is one of "two operative elements" of battery). Furthermore, previous decisions would have been improperly decided. Appellant Br. at 10-11.

61. _Morris_, 453 N.W.2d at 40 (quoting Paradise v. City of Minneapolis, 297 N.W.2d 152, 155 (Minn. 1990).
this way would undermine the purpose of official immunity—to protect officials from harassing suits and potential liability which would "unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." Because police are called to use their best judgment to make snap decisions under tense circumstances and are allowed to protect themselves from harm, police officers need the protection that official immunity affords.

Therefore, because the jury did not find willful or malicious conduct under the facts of the Kelly case, the majority concluded that the officers are lawfully entitled to immunity. However, by allowing the jury to determine that the officer’s conduct was reckless, and not intentional, the court condones police misconduct because juries more often than not favor the officer over the plaintiff.

B. The Dissenting Opinion

The dissent argues that official immunity should not be applicable in this situation. The problem is that the law has created a cause of action to compensate for unlawful emotional distress but, because of a loophole, the plaintiffs do not recover. Specifically, the IIED’s intentional or reckless element allows juries to exempt officers from liability for causing bona fide severe emotional distress. Furthermore, the kind of police conduct that causes severe emotional distress can only be characterized as “wholly inappropriate” and “irrelevant to the performance of the official duties of a police officer” and deepens the distrust and animosity felt between police and citizens. Therefore, even though official immunity “is

63. MINN. STAT. § 609.06, subd. 1(1,3) (1998) (authorizing public officers’ use of force); MINN. STAT. § 609.066, subd. 2(1) (1998) (authorizing peace officers’ use of deadly force).
64. Patton, supra note 5, at 764-65.
65. The dissent points out that “the court grants immunity for conduct that is ‘utterly intolerable’ and ‘so atrocious that it passes the boundaries of decency.’” Kelly v. City of Minneapolis, 598 N.W.2d 657, 666 (Minn. 1999) (citing Haagenson v. Farmers Union Prop. & Cas. Co., 277 N.W.2d 648, 652 n.3 (Minn. 1979)).
66. Recovery under IIED is already severely limited by stringent standards. Infra notes 28, 30. Furthermore, in the context of police misconduct, some recovery under IIED may be desirable because it would promote social welfare. Supra notes 11, 12, and 76 and accompanying text. But see Crump, supra note 23, at 446.
67. Kelly, 598 N.W.2d at 666, 668 (concluding that “[n]o officer could believe
not intended to shield police brutality," official immunity does
shield police from liability for such conduct.\textsuperscript{68}

The dissent presents three interpretations of the law that jus-
tify their conclusion. First, the dissent argues that in the context of
IIED, recklessness means a knowing disregard. Thus, "calling an
individual derogatory racist and sexist names is intentional rather
than reckless [conduct]."\textsuperscript{69} Second, the kind of discretionary con-
duct that the officers engaged in here—the name-calling and expo-
sure—is not the kind of discretionary conduct official immunity is
meant to protect.\textsuperscript{70} This theory amounts to a threshold question:

\begin{quote}

himself to be legally justified in calling a suspect such derogatory racist and sexist
names[,]" and "name-calling and demeaning actions in an already tense situation
can only serve to escalate the existing conflict."); City of Minneapolis v. Richard-
son, 307 Minn. 80, 89, 239 N.W.2d 197, 203 (1976) (concluding that the word
"nigger" has no place in the civil treatment of a citizen by a public official.").

68. Elwood v. County of Rice, 423 N.W.2d 671, 679 (Minn. 1988).

69. \textit{Kelly}, 598 N.W.2d at 666; cf. \textit{Kelly v. City of Minneapolis}, 581 N.W.2d 372,
377 (Minn. Ct. App. 1998) (citing jury instruction No. 40: "Intentionally means
that the actor either has a purpose to do the thing, or cause the result specified or
believes that this act, if successful, will cause that result."); 4A \textsc{Michael K. Steen-
son} \& \textsc{Peter B. Knapp}, \textit{MINNESOTA JURY INSTRUCTION GUIDES: CIVIL} 4 (1999) (in-
structing that "'[i]ntent' or 'intentionally' means that a person: 1. Wants to cause
the consequences of his or her acts, or 2. Knows that his or her acts are substan-
tially certain to cause those consequences."); Crump, \textit{supra} note 23, at 494 (argu-
ing that states "should define recklessness in a manner that embodies an inten-
tional disregard of the victim's interests" and that cases construing the reckless
disregard standard for libel are precedent for this proposition). Redefining "reck-
less" would make it more difficult for officers to escape liability in situations like
this. However, defining recklessness in this way would expand recovery under
IIED instead of limit it, and courts have been concerned with limiting recovery
under IIED since its inception. \textit{Id.} at 446, 449.

70. \textit{Kelly}, 598 N.W.2d at 667-68 (concluding that "such conduct...should
never be condoned as 'discretionary conduct' shielded by official immunity.").
Thus, under this theory, discretion for the purposes of official immunity is divided
into two arenas: for conduct taken within the scope of one's official duties, which
would be immune, and conduct that lies outside the scope of one's official duties,
which would not be immune. Currie v. Lao, 592 N.E.2d 977, 984 (Ill. 1992) (hold-
ing that deciding when to turn vehicle was not a discretionary act because it "was
an activity of a non-official nature."); Larson v. Indep. Sch. Dis. No. 314, 289
N.W.2d 112, 120 (Minn. 1979) (noting that "using judgment does not establish
that [the actor] is performing a discretionary duty."); C.L. v. Olson, 422 N.W.2d
614, 620 (Wis. 1988) (noting that immunity does not attach "where a public offi-
cier's challenged decision involves the exercise of discretion but the discretion ex-
ercised is not governmental, i.e. does not require the application of statutes to
facts nor a subjective evaluation of the law."). \textit{Cf.} Jennifer D. Brandt, \textit{Note, The
Plague of Medical Malpractice in Public Hospitals—Texas Adopts a New Standard for De-
termining Whether a Doctor Has Official Immunity}, 26 \textsc{Tech. L. Rev.} 959, 960-61,
974-75, 979-80 (1995) (describing "governmental" discretion, for which there
would be immunity, and "medical" discretion, for which there would not); Nelson
\end{quote}
Does the conduct at issue fall within the scope of official immunity? The dissent suggests that because the officer’s conduct is not integral to his duties, official immunity would not apply. Third, the malice standard of official immunity approximates the objective reasonableness standard of qualified immunity where the particulars of the case come into the analysis. Under this standard, the court could conclude that, by definition, “[a]n officer’s conduct involving racial and gender bias, is by its very nature, malicious conduct” because “[t]here can be no doubt that a police officer knows that the use of racist and sexist names and the exposure of a suspect’s breasts throughout transport and booking are prohibited.” Thus, the dissent would interpret existing law to find li-

v. Babcock, 188 Minn. 584, 585, 248 N.W. 49, 51 (1933) (concluding that if the officer’s act exceeds his authority, he can be held liable). Such an analysis would be difficult in the context of police conduct (“governmental” v. “personal” discretion?) and would drastically limit the scope of official immunity’s coverage, undermining the policy rationale for the doctrine.

71. Kelly, 598 N.W.2d at 667 (noting that “our traditional official immunity analysis” starts with the “identification of ‘the precise governmental conduct at issue’.”) (citing Gleason v. Metropolitan Council Transit Operations, 582 N.W.2d 216, 219 (Minn. 1998)).

72. Kelly, 598 N.W.2d at 668 (concluding that the officers’ conduct was “wholly inappropriate” and “irrelevant”).

73. Graham v. Connor, 490 U.S. 386, 396 (1989) (explaining that whether force is reasonable depends on all “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”) But see Patton, supra note 5, at 759 (arguing that the standard in excessive force cases should be whether the force used was justified and necessary not whether it was objectively reasonable under the circumstances).

74. Kelly, 598 N.W.2d at 667-68. 5 MINNEAPOLIS POLICE DEPARTMENT, CODE OF CONDUCT AND USE OF FORCE §§ 5-104, Nos. 9, 13, 14, and 5-106, No. 3(1988). The Code states explicitly that:

9. [Officers] shall not use indecent, profane or unnecessarily harsh language in the performance of official duties or in the presence of the public.

13. [Officers] shall not use derogatory language or actions which are intended to embarrass, humiliate, or shame a person, or do anything intended to incite another to violence.

14. [Officers] shall be decorous in their language and conduct. They shall refrain from actions or words that bring discredit to the Department. They shall also not use words or terms which hold any person, group or organization up to contempt. The use of such unacceptable terms is strictly forbidden....

3. No [officer] shall willfully mistreat or give inhumane treatment to any person held in custody.

Id.
ability.

Even though the dissent's outcome is desirable, relying on the law as it stands is not the answer to the problem of police misconduct. If official immunity should not shield officers from liability for police misconduct and racial or sexist slurs directed toward a citizen by an officer, or the exposure of a citizen's breasts, qualifies as outrageous conduct causing severe emotional distress that no person should have to endure, then whether the acts at issue were intentionally or recklessly caused is not the right question. Therefore, in the context of police misconduct, where the law allows officials to be immune from liability when they cause citizens severe emotional distress, the court should not uphold the law.

75. The court of appeals and the dissent both conclude that official immunity should not apply, albeit for different reasons. Kelly, 598 N.W.2d at 667-68 (concluding that "official immunity is not applicable" when IIED results from "name-calling and exposure"); Kelly, 581 N.W.2d at 377-78 (concluding that "a finding of intentional infliction of emotional distress necessarily must lead to a finding of malice"). The dissent also concludes that this case should be remanded for a new trial because "[t]he starting point for analysis of an immunity question is identification of the precise governmental conduct at issue...," and there was no clear identification of the conduct which resulted in the IIED claim. Kelly, 598 N.W.2d at 667-68 (quoting Gleason, 582 N.W.2d at 219 (citing Watson ex rel Hanson v. Metropolitan Transit Comm'n, 553 N.W.2d 406, 411 (Minn. 1996))). See also Cohen, supra note 4, at 180 (noting that the law is an ineffective source for police authority because of oppression under the law); supra note 69 and accompanying text. It is not the right question because this question allows an inherently biased jury to ignore the pertinent question—whether or not the officer's conduct was justified. Patton, supra note 5 at 773 (noting that the public's main concern is to be protected from criminals); Stephanie B. Goldberg, Force of Law: Federal Lawsuits for Rodney King Raise New Issues, 78 A.B.A. J., July 1992 at 76, 77 (noting that "[a] need for law and order can weigh heavily on juries' minds, tipping the balance in favor of defendants..." by stretching the law); see also infra note 79. Cf. Patton, supra note 5, at 759 (arguing that the correct standard would ask whether the conduct was "justified and necessary").

Furthermore, given that juries favor officers, the implicit message that a jury could find malice in police conduct will not deter police misconduct. Rob Yale, Note, Searching for the Consequences of Police Brutality, 70 S. CAL. L. REV. 1841, 1842 (1997) (noting a direct correlation between lack of punishment and the attitude of police "that they can commit acts of brutality unchecked"); Crump, supra note 23, at 446 (explaining that requiring officers to pay damages incurred by their behavior will deter their undesirable conduct); see generally Richard A. Posner, AN ECONOMIC ANALYSIS OF LAW, ch. 6 (3d ed. 1986). Because IIED intends to redress "outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance," the recovery should not hinge on whether the conduct was recklessly or intentionally caused. Prosser, supra note 23, at 879.

77. In balancing the competing interests of legitimate police practices and freedom from severe emotional distress caused by the police, courts need to take into account "that the burden of aggressive and intrusive police action falls disproportionately on African-American[s]...." Washington v. Lambert, 98 F.3d 1181,
incidents of police misconduct will be affected by liability, a different
standard for police misconduct cases would enable juries to dis-
tinguish between conduct that should be immune and conduct that
should not. An appropriate standard would analyze whether the
officer’s conduct was privileged. The dissent hints at this possibil-

1187 (9th Cir. 1996); Freeman, supra note 4, at 680, 684 (arguing that “it is
equally important to ensure that justice is done when prevention fails....” and
concluding that “how we deal with [police brutality]...speak[s] volumes about our
commitment to overcoming...deep societal chasms”). While this Note addresses
only one kind of official, the police officer, there is no reason that the standard
proposed should be limited just to the police. This standard could extend to all
public officials who are authorized to use force. MINN. STAT. § 609.06 (1), (6), (7),
(8), (9) and (10) (2000) (authorizing public officers, teachers, lawful custodians of
children or pupils, school employees or school bus drivers, common carriers,
those who have the authority over the mentally ill or mentally defective, and
public or private institutions that provide custody or treatment to use reasonable
force).

78. Crump, supra note 23, at 446 (noting that “requiring actors in a market
system to pay the costs they externalize,...[discourages] their dysfunctional con-
duct”); see also supra note 77. But see Givelber, supra note 26, at 62 (noting that the
original “privilege formulation” focused “on the policy question of whether the
defendant’s ends justified his or her means....,” a difficult task, and the outra-
geousness test allows courts and juries to avoid this question).

79. Privilege is an appropriate standard because it recognizes that “there are
many socially desirable human activities of which the intentional causing of emo-
tional distress is an essential part.” Crump, supra note 23, at 448. This standard
appreciates that the police may legitimately need to cause emotional distress.
Privilege would be based on the importance of and need for officers’ discretionary
acts. RESTATEMENT (SECOND) OF TORTS § 10(2) (b) (1965) (explaining that privilege
can be based on “the fact that its exercise is necessary for the protection of some
interest of the actor or of the public which is of such importance as to justify the
harm caused or threatened by its exercise....”). The privilege would be condi-
tional, protecting the officer from liability, only if the acts are “done for the pur-
pose of protecting or advancing the interest in question.” RESTATEMENT (SECOND)
OF TORTS § 10 cmt. d (1965). If the officer acted “for any purpose other than the
protection or advancement of the interest in question....,” the privilege would be
destroyed. Id. To disprove privilege, a plaintiff would have to show that the offi-
cer’s conduct was not justified and necessary or was forbidden. Id. at cmt. c (not-
ing that privilege would be an affirmative defense for the defendant). Thus, un-
der this proposal, the “intentionally or recklessly inflicted” element of IIED would
change to “intentionally inflicted or recklessly inflicted without privilege.” Supra
text accompanying note 32. Cf. AVERY & RUDOVSKY, supra note 32, § 13.3(d), at 13-
7 (setting out jury instructions for unreasonable force: “An officer is entitled to use
such force as a reasonable person would think is required to take one arrested into
custody....However, an officer is not allowed to use any force beyond that rea-
sonably necessary to accomplish his lawful purpose.”). Because privileged conduct
is legally reasonable, conduct that is not privileged would come under the malice
exception to official immunity. Supra note 16 and accompanying text. Thus, offi-
cers engaging in either intentional or reckless, but unprivileged behavior, would
not escape liability.
ity when it says “[a] finding of intentional infliction of emotional distress is implicitly void of any legal justification, as legally justified behavior is always tolerable under the circumstances that justify it.”  

V. CONCLUSION

There is nothing wrong with the *Kelly* decision on its face. The court does not change the scope of protection official immunity affords police whose duties require discretion or the elements to make out a prima facie case of IIED. Specifically, the *Kelly* decision upholds *Hubbard* by affirming the elements of IIED, including reckless, in lieu of intentional, conduct. Furthermore, *Kelly*, in upholding *Cook* and its progeny, affirms the malice exception to official immunity. Thus, plaintiffs suing an official may recover if the official exercises a ministerial duty or acts with malice while performing a discretionary duty. In the absence of malice, the *Kelly* decision also makes clear that official immunity will act as a bar to recovery for intentional torts, including IIED, because officers need latitude in exercising discretionary activities.

There is something very wrong about the *Kelly* decision, however. Given the opportunity to address police misconduct, the court neither interprets “recklessness,” “discretionary activities,” or “malice” in a way that would allow for recovery nor adopts a different standard for liability for IIED police misconduct. Rather, in excusing a legitimate case of police misconduct, the court does society a distinct disservice. One can only hope that police will not understand the *Kelly* decision as a license to abuse citizens because official immunity automatically extends to all their discretionary acts but, instead, will be deterred from misconduct because a jury could find malice in their conduct.

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80. *Kelly*, 598 N.W.2d at 664 (noting two exceptions to official immunity: ministerial duty and malice); *supra* notes 14 and 15 and accompanying text.

81. Of course, plaintiffs would also have to make out a prima facie case under the tort’s elements to recover. *Supra* notes 14, 15.

82. The *Kelly* decision may be included in the police training manual but likely only as a footnote because *Kelly* did not change the law and because excessive force claims make up the main body of litigation so the manual focuses on use of force, not emotional distress. Telephone Interview with Timothy Skarda, Assistant Minneapolis City Attorney (Aug. 8, 2000).