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# DISCRIMINATORY SPEECH AND THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

JEAN C. LOVE\*

## I. SECTION 6-103 OF THE MODEL COMMUNICATIVE TORTS ACT

Section 6-103 of the Model Communicative Torts Act (Model Act) recognizes a tort action whenever a person “intentionally engages in a course of conduct (*i.e.*, “a pattern of communication evincing a continuity of purpose”) that is addressed to an individual, that is specifically intended and reasonably likely to harass or intimidate the individual because of the individual’s race, sex, [ethnic origin], or religion, and that directly causes serious emotional distress.”<sup>1</sup> The Model Act provides two remedies for such tortious conduct: injunctive relief and damages for proven losses, including pecuniary loss and emotional distress.<sup>2</sup> The comment to Section 6-103 states that the Section is “bracketed” to indicate “divisions of opinion” among the drafters as to “whether freedom from harassment based on an individual’s race, sex, ethnic origin, or religion is an interest that the drafters wished to protect in the context of tort liability based on communication.”<sup>3</sup>

To understand the “divisions of opinion” among the drafters, one must understand the evolution of the Section. Originally, the drafters of the Model Act abolished the common-law actions for intentional, reckless, and negligent infliction of emotional distress whenever the defendant had inflicted such harm through “pure speech” (as opposed to “pure conduct” or “speech plus conduct”).<sup>4</sup> Although the drafters never explained exactly

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1. MODEL COMMUNICATIVE TORTS ACT § 6-103 (1989) [hereinafter MODEL ACT]. The original inspiration for § 6-103 came from Professor Delgado’s article, which recommends the recognition of a tort action for racial insult, provided the plaintiff proves:

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.

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) [hereinafter *Words That Wound*].

2. The remedies for a violation of § 6-103 are set forth in §§ 9-101, 9-102, and 9-108 of the Model Act.

3. MODEL ACT § 6-103 comment. Professor Delgado’s proposal was as controversial as § 6-103. See also Heins, *Banning Words: A Comment on “Words That Wound,”* 18 HARV. C.R.-C.L. L. REV. 585 (1983); Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593 (1983).

4. Section 2-101 of the Model Act abolished the emotional distress actions for “pure speech.” Section 2-101 of the Model Act provides:

There shall be no liability in tort for injuries caused by communication except as

why they chose to eradicate emotional distress actions, the drafters did write a "Prefatory Note" to the Model Act, stating that the Act is designed to "consolidate the sources of tort liability."<sup>5</sup> Presumably, the drafters were concerned about the overlap between the dignitary torts of defamation, invasion of privacy, and infliction of emotional distress.<sup>6</sup> In particular, the drafters probably were worried about those plaintiffs who bring claims for infliction of emotional distress in an effort to avoid the constitutionally imposed restrictions on the law of defamation.<sup>7</sup> To preclude such plaintiffs from joining emotional distress and defamation claims, the drafters abolished all emotional distress actions.

After the drafters of the Model Act had "consolidated" the sources of liability for tortious speech by eliminating emotional distress claims, they realized that they had eradicated the only tort action that could provide vindication for the victims of racist and sexist speech. By a divided vote, the drafters then added Section 6-103 to the Act.<sup>8</sup> Generally speaking, the Section restores the action for intentional infliction of emotional distress in cases where a defendant has harassed or intimidated a plaintiff on the basis of race, sex, ethnicity, or religion.<sup>9</sup> The comment to Section 6-103 indicates that the purpose of the Section is to "provide recovery for injury to the emotional well-being of individuals who are the victims of intentional, personalized harassment."<sup>10</sup> The Section protects the interests of "dignity" and "self-respect."<sup>11</sup> It reflects the policy that "members of groups that traditionally have been . . . discriminated against should be protected in

provided in this [Act]; however, this [Act] shall not affect:

a) liability explicitly imposed notwithstanding this [Act] by a statute or regulation of this State; . . .

c) liability for conduct that is related to or part of a communication to the extent that liability would apply to the conduct absent the communication. . . .

In essence, the Section abolishes any action for tortious "speech" unless such action is authorized by the Model Act. By contrast, the Section preserves liability for tortious "speech plus conduct." The comment to § 2-101 offers the following illustration of how a "speech plus conduct" case would be resolved under the Model Act:

Many communications have potentially actionable conduct associated with them. For example, if X paints a statement on Y's house without Y's permission, X has made a communication and has damaged Y's property. X's liability for the communication depends on the availability of relief under the Act. Even if relief is not available under the Act, however, liability for the property damage would remain available if provided by the laws of a State.

Because the Model Act, as originally conceived, contained no authorization of any action for the infliction of emotional distress, all such actions for purely tortious speech were abolished. Only emotional distress actions for "speech plus conduct" were preserved.

5. MODEL ACT, Prefatory Note.

6. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

7. *Id.*

8. See *supra* text accompanying note 3.

9. See *supra* text accompanying note 1.

10. MODEL ACT § 6-103 comment.

11. *Id.*

tort from harassment" based on their membership in such groups.<sup>12</sup>

The earliest version of Section 6-103 would have allowed recovery for isolated "slurs" (*i.e.*, single incidents of discriminatory speech).<sup>13</sup> But, due to opposition from a majority of the students involved in the drafting process, the original version was amended to require a "pattern of communication evincing a continuity of purpose."<sup>14</sup> The amendment was added "as a compromise so that the Section would not be eliminated entirely."<sup>15</sup> Presumably, the proponents of the "pattern of communication" language believed that such a restriction on liability was necessary to accommodate first amendment concerns.<sup>16</sup> So justified, the restriction reflects one of the overall purposes of the Model Act: "to strike a balance within the torts themselves that reflects the needed attention to first amendment concerns."<sup>17</sup>

## II. IMPACT OF THE MODEL ACT ON TORT ACTIONS BY VICTIMS OF DISCRIMINATORY SPEECH

If a legislature were contemplating the adoption of the Model Communicative Torts Act, it would want to know what impact Section 6-103 would have on existing tort law. Therefore, in this Part, I describe the reported cases in which plaintiffs have sought to impose tort liability for discriminatory speech. I focus on two questions: 1) Have the courts authorized intentional infliction of emotional distress actions against defendants who, by "pure speech,"<sup>18</sup> have harassed or intimidated a plaintiff on the basis of race, sex, ethnicity, religion, or some other group characteristic? 2) If such recovery has been allowed, did the plaintiff have to prove that the defendant engaged in a "pattern of communication evincing a continuity of purpose"?

My methodology in this Part will be to tell the stories of the plaintiffs in the reported cases in considerable detail.<sup>19</sup> One of my objectives is to

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12. *Id.*

13. Letter of January 15, 1990, from Jill S. Talbot, the student primarily responsible for drafting § 6-103 of the Model Act, to Jean C. Love (on file with author).

14. See *supra* text accompanying note 1. A "pattern of communication" was understood by the drafters to mean "multiple incidents" of verbal harassment and not just the repetition of abusive epithets during a "single incident." Telephone conversation on October 30, 1989, with Jill S. Talbot, the student primarily responsible for drafting § 6-103 of the Model Act.

15. Letter of January 15, 1990, from Jill S. Talbot to Jean C. Love (on file with author).

16. MODEL ACT, Prefatory Note.

17. *Id.*

18. I will consider only those cases in which the defendant discriminated by means of "pure speech." I will not discuss the cases in which the defendant discriminated by means of "speech plus conduct," as when the defendant simultaneously uttered racial or ethnic epithets and fired the plaintiff. See, *e.g.*, *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 88, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); *Robinson v. Hewlett-Packard Corp.*, 183 Cal. App. 3d 1108, 228 Cal. Rptr. 591 (1986); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977). For a discussion of the Model Act's distinction between "pure speech" cases and "speech plus conduct" cases, see *supra* note 4.

19. See generally *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (symposium that contains several articles on storytelling from minority perspectives).

answer the two questions posed in the preceding paragraph. My other objective is to provide an opportunity for all of us to hear the hurt in the voices of the victims of discriminatory speech. Only by listening to their stories can we begin to develop empathy for the nature of their harms.<sup>20</sup>

If you are a reader who is not familiar with the historical development of the tort of intentional infliction of emotional distress, let me take this opportunity to give you a thumbnail sketch of the evolution of the cause of action. The tort of intentional infliction of emotional distress was proposed first in the 1930s<sup>21</sup> and was incorporated into the Restatement of Torts in 1948.<sup>22</sup> Prior to the 1930s and 1940s, a person could sue only for an insult to personal dignity by bringing an action for assault, battery, trespass, or defamation.<sup>23</sup> The courts adhered to the old proverb: "Sticks and stones may break my bones, but names will never hurt me."<sup>24</sup> In 1948 the American Law Institute adopted the following proposition as Section 46: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress and (b) for bodily harm resulting from it."<sup>25</sup>

Ten years later, Professor Prosser, as the Reporter for the Restatement (Second) of Torts, announced that there were over one hundred cases dealing with the question of liability for intentional infliction of emotional distress.<sup>26</sup> Professor Prosser redrafted Section 46 "to keep the courts from running wild on this thing" and added numerous comments designed to "spell out some boundaries, qualifications and limitations" to the new tort.<sup>27</sup> As a result, Section 46 of the Restatement (Second) of Torts imposes

20. See generally Getman, *Colloquy: Human Voice in Legal Discourse*, 66 TEX. L. REV. 577 (1988); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989).

21. For a discussion of the development of the tort, see Chamallas & Kerber, *Women, Mothers and the Law of Fright: A History* (forthcoming); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPPERDINE L. REV. 1 (1985); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1951).

22. RESTATEMENT OF TORTS § 46 (Supp. 1948).

23. See, e.g., *Bouillon v. Laclede Gaslight Co.*, 148 Mo. App. 462, 129 S.W. 401 (1910) (action for trespass; pregnant plaintiff who experienced fright that caused miscarriage allowed to recover special compensatory damages for emotional distress). See generally Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

24. Wade, *supra* note 23, at 63.

25. RESTATEMENT OF TORTS § 46 (Supp. 1948). For a description of the American Law Institute's cursory discussion of § 46, see Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPPERDINE L. REV. 1, 3-4 & n.7 (1985).

26. *Id.* at 4 n.10.

27. RESTATEMENT OF TORTS § 46 (Supp. 1948). The 1948 version required only that the conduct causing the distress be intentional. *Id.* It was not until a 1957 revision that extreme and outrageous conduct became an element of the tort. RESTATEMENT (SECOND) OF TORTS § 46 (Tent. Draft No. 1, 1957). See generally W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 12, at 64 & n.94 (5th ed. 1984).

liability for damages on a defendant who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . ." <sup>28</sup> The comment that defines "extreme and outrageous conduct" narrowly circumscribes a defendant's liability for the use of abusive language:

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. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 47 *Harvard Law Review* 1033, 1053 (1936). It is only where there is a special relation between the parties, as stated in § 48, that there may be recovery for insults not amounting to extreme outrage. <sup>29</sup>

The feared flood of litigation under Section 46 never materialized. <sup>30</sup> In the last ten years, there have been approximately 600 reported cases citing the Section. <sup>31</sup> That figure averages out to sixty reported cases per year or slightly more than one case per state each year. <sup>32</sup>

"Pure speech" cases constitute a very small percentage of the total cases decided under Section 46 of the Restatement (Second) of Torts. Most of the litigation has involved allegations of "speech plus conduct" or "pure conduct." <sup>33</sup> Not surprisingly, then, most of the cases in which the courts have imposed tort liability for racial or sexual harassment have been "speech plus conduct" cases. <sup>34</sup> For example, a "colored" wife of a dental surgeon

28. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The drafters of the Restatement included a separate provision governing the infliction of emotional distress by common carriers: "A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment." RESTATEMENT (SECOND) OF TORTS § 48 (1965). Section 48 governs actions for racial, ethnic, sexual, or religious epithets uttered by common carriers, owners of hotels and motels, and possibly by owners of businesses open to the public. *Id.*

29. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

30. Pedrick, *supra* note 25, at 6-7 (reporting that, as of 1985, § 46 had been cited in 556 reported cases since 1948).

31. Acosta, *The Tort of "Outrageous Conduct" in New Mexico: Intentional Infliction of Emotional Harm without Physical Injury*, 19 *N. MEX. L. REV.* 425, 434 (1989).

32. *Id.* at 434-35.

33. *Id.* at 439-45 (describing wide array of intentional infliction of emotional distress cases).

34. For a discussion of the tort of intentional infliction of emotional distress in the

was denied service by the Slenderella Salon and told: "We have never served anybody but Caucasians and I just know you won't be happy here."<sup>35</sup> A "Negro" truck driver was called a "nigger" by his foreman and fired from his job.<sup>36</sup> A black man was called a "nigger" and told to get his "black ass" out of the defendant's auto parts store, and denied service.<sup>37</sup> A Mexican-American employee was subjected to "repeated racial jokes, slurs and comments" before he was wrongfully discharged.<sup>38</sup> A female employee was told by her supervisor that he wanted to have sex with her, and then he brushed up against her, rubbing his penis against her buttocks.<sup>39</sup> Another female employee, a legal clerk in the litigation department of the Equal Employment Opportunity Commission, was verbally pressured by her boss for sexual relations and touched in a sexual manner while on the job.<sup>40</sup> When she refused to comply with his demands, he retaliated by giving her extra work and unfavorable work evaluations.<sup>41</sup>

### A. Racial Harassment

The first case in which a plaintiff sued a defendant for purely racist speech on a theory of intentional infliction of emotional distress was *Wiggs v. Courshon*.<sup>42</sup> A black family went to a restaurant for dinner while on vacation. The family consisted of Joe Wiggs (a lawyer), Barbara Wiggs (a lawyer), Kevin Wiggs (their seven year old son), plus Arthur and Miriam Bracey (Barbara's parents). The family members were celebrating Joe Wiggs' graduation from law school and sitting for the bar exam. The family was in a motel restaurant in Miami Beach, Florida, on their way back to their home in Virginia. Joe Wiggs ordered the fisherman's platter for the entire family. Before ordering he asked the waitress to check the ingredients, and she told him that it included shrimps, fish fillet, and scallops.<sup>43</sup> When the dinner order arrived, Joe Wiggs questioned why the scallops were missing

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context of racial and sexual harassment, see Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Richardson, *Racism: A Tort of Outrage*, 61 ORE. L. REV. 267 (1982); Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988); Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

35. *Browning v. Slenderella Sys.*, 54 Wash. 2d 440, 442, 341 P.2d 859, 861 (1959).

36. *Alcorn v. Ambro Eng'g, Inc.*, 2 Cal. 3d 493, 479, 468 P.2d 216, 217, 86 Cal. Rptr. 88, 89 (1970).

37. *Ledsinger v. Burmeister*, 318 N.W.2d 558 (Mich. Ct. App. 1982).

38. *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977).

39. *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 340 S.E.2d 116 (1986).

40. *Stewart v. Thomas*, 538 F. Supp. 891 (D.D.C. 1982).

41. *Id.* at 893.

42. 355 F. Supp. 206 (S.D. Fla. 1973) (plaintiff originally sued for assault; court decided to instruct jury on intentional infliction of emotional distress theory under RESTATEMENT (SECOND) OF TORTS § 48 (1965) and allowed plaintiffs to amend pleadings to conform with proof).

43. *Wiggs v. Courshon*, 355 F. Supp. 206, 207 (S.D. Fla. 1973).

and told the waitress that he would not have ordered the platter had she told him that the restaurant was out of scallops. The waitress exclaimed: "You can't talk to me like that, you black son-of-a-bitch. I will kill you."<sup>44</sup> The waitress then turned away and stood motionless for five to ten seconds as she realized that she had violated company policy.<sup>45</sup> Another waitress escorted her to the kitchen, where she shouted repeatedly: "[T]hey are nothing but a bunch of niggers."<sup>46</sup> The plaintiffs left the dining room and complained to the manager. The manager subsequently did not charge the Wiggs for the meal. The plaintiffs checked out of the motel, went to lodging nearby, and left town the next day, cutting their vacation short by two days.<sup>47</sup> Kevin repeatedly asked questions about the incident. He had been taught not to use the profanity that the waitress had directed at his father, and he had witnessed the waitress humiliate his father in a setting where his father "was not free to 'strike back.'"<sup>48</sup>

All five family members sued for intentional infliction of emotional distress.<sup>49</sup> A jury composed of three blacks and three whites (four women and two men) returned a verdict of "no damages" for Barbara Wiggs and her parents,<sup>50</sup> \$5,000 compensatory damages and \$10,000 punitive damages in favor of Joe Wiggs,<sup>51</sup> and \$1,000 compensatory and \$9,000 punitive damages in favor of Kevin.<sup>52</sup> The trial court judge, however, ruled that the verdicts in favor of Joe and Kevin "shocked" the judicial conscience and granted defendant's motion for a new trial unless the plaintiffs stipulated to a reduction in the total amount of the verdicts from \$25,000 to \$2,500.<sup>53</sup> The trial court judge offered the following explanation of his decision to order a remittitur:

We all have ethnic and racial backgrounds and the court notes that there is at least one and usually several epithets ascribed to any ethnic group. . . . [If the court were to affirm the jury's verdict in this case,] a line would quickly form by members of any ethnic group to receive \$25,000 as balm for an ethnic or racial epithet.

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44. *Id.* at 208.

45. *Id.* at 208-09. She was discharged the next day. *Id.* at 209 n.2.

46. *Id.* at 208.

47. *Id.*

48. *Id.* at 208 n.1.

49. *Id.* at 207.

50. *Id.* at 210. The court observed that the jury verdicts in favor of these three plaintiffs for "no damages" compelled the conclusion that the damages awarded to the other two plaintiffs resulted from the insult at the table. *Id.* at 208.

51. *Id.* at 210. Presumably, Joe Wiggs received the highest verdict because he was the target of the insult at the table.

52. *Id.* Presumably, Kevin Wiggs received damages, whereas the adults sitting at the table did not because he was "less accustomed" to such language. See RESTATEMENT (SECOND) OF TORTS § 48 illustration 5 (1965) (child who overheard profane language in waiting room of train station could recover damages against railroad; her father could not).

53. *Wiggs*, 355 F. Supp. at 211. Joe Wiggs was to receive 15/25 of the \$2,500; Kevin Wiggs was to receive 10/25 of the reduced verdict.



The indefensibility of the size of the verdict is plainer still when we place it in context of an epithet delivered in a dispute over the ingredients of a dinner entree when that remark caused neither out-of-pocket expenses to the members of the ethnic group nor any apparent mental or emotional injury.<sup>54</sup>

The other case in which a black plaintiff adequately stated a cause of action for purely verbal abuse is *Bailey v. Binyon*.<sup>55</sup> A black man who was employed as a cook in a Chicago restaurant went to work early one morning. The boss told the cook that he was dissatisfied with the soups and sauces that had been prepared the day before.<sup>56</sup> When the cook responded that he was not responsible for preparing the soups and sauces, his boss stated: "[A]ll you niggers are alike."<sup>57</sup> The cook kept on walking toward the kitchen, and the boss followed him, calling the cook a "nigger."<sup>58</sup> The black cook told his boss that he objected to the racial epithets and wanted to be treated "like a human being."<sup>59</sup> The boss replied: "You're not a human being, you're a nigger."<sup>60</sup> At that point the cook left the restaurant and never returned.<sup>61</sup> His boss called out after him: "[Y]ou'd stay if you weren't a sissy. If you were a man, you'd stay."<sup>62</sup> The trial court denied the defendant's motion to dismiss the plaintiff's complaint.<sup>63</sup> Although the case involved an "isolated" incident of racial discrimination, the trial court ruled that the plaintiff could proceed with his cause of action.<sup>64</sup>

Thus, *Wiggs* and *Bailey* authorize juries to find that the utterance of racial epithets constitutes extreme and outrageous conduct. Early in the development of the law regarding racial harassment, defendants contended that the use of the slang epithet "nigger" should not be considered extreme and outrageous conduct because it was a matter of "common usage," along with such other racial characterizations as "chink" or "jap."<sup>65</sup> The courts rejected the argument, holding that racial epithets had become "particularly abusive and insulting in light of recent developments in the civil rights

54. *Id.*

55. 583 F. Supp. 923 (N.D. Ill. 1984). *Bailey* was an action for emotional distress damages that was filed under 42 U.S.C. § 1981. I have included it here because the court draws heavily on intentional infliction of emotional distress cases in deciding to allow recovery under § 1981. *Id.* at 931.

56. *Bailey v. Binyon*, 583 F. Supp. 923, 924-25 (W.D. Ill. 1984).

57. *Id.* at 925.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 925.

62. *Id.* Four other employees were in the restaurant when the plaintiff refused to stay. There is no indication as to whether the employees would have been more likely to support the plaintiff or the defendant if the plaintiff had chosen to stay.

63. *Id.* at 934.

64. *Id.* at 928-31 (plaintiff constructively was discharged due to "aggravated" nature of situation).

65. *Alcorn v. Ambro Eng'g, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

movement. . . .”<sup>66</sup> More recently, the defendant in *Bailey* contended that his remarks were “mere insults,” and thus not actionable. But the court ruled that the defendant’s distinction between “human beings” and “niggers” was so despicable that it rose well above the level of a “mere insult.”<sup>67</sup> The court emphasized that “such comments ‘are different qualitatively [from mere insults] because they conjure up the entire history of racial discrimination in this country.’”<sup>68</sup>

It is also obvious after reading *Wiggs* and *Bailey* that current tort law does not require proof of a “pattern of communication” in cases of racial harassment.<sup>69</sup> The plaintiffs in *Wiggs* were allowed to recover damages for a single outburst by the waitress,<sup>70</sup> and the jury in *Bailey* was allowed to impose liability for the defendant’s repeated utterance of a single racial epithet during a single moment in time.<sup>71</sup> Thus, the courts have taken the position that isolated utterances of racial epithets are sufficiently demeaning to warrant the imposition of tort liability. The Model Act, by contrast, would preclude the plaintiffs in *Wiggs* and *Bailey* from recovering damages on the theory that they were not the victims of a “pattern of communication evincing a continuity of purpose” to harass.<sup>72</sup>

If tort liability *may* be imposed for isolated utterances of racial epithets, does that mean that liability *must* be imposed for *every* racial insult? Courts have refused to so hold.<sup>73</sup> Instead, courts have examined each racially biased statement in context. Damages have been denied in certain circumstances. For example, in *Bradshaw v. Swagerty*<sup>74</sup> the defendant, a lawyer, was hired to collect an account owed by the plaintiff, a young black man. The plaintiff appeared in the defendant’s office, asserted the defense of infancy regarding his debt and “helped himself to candy from a dish . . . , much to defendant’s irritation.”<sup>75</sup> The discussion grew heated, and the defendant allegedly called the plaintiff a “nigger,” a “bastard,” and a “knot-headed boy.”<sup>76</sup> The court granted summary judgment for the defendant on the ground that the epithets were “‘mere insults’ of the kind which must be tolerated in our rough-edged society.”<sup>77</sup> No doubt, the *Bradshaw* court was influenced by

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66. *Alcorn*, 2 Cal. 3d 493, 498 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4. See also *Agarwal v. Johnson*, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979).

67. *Bailey*, 583 F. Supp. at 930.

68. *Id.* at 934.

69. See *supra* text accompanying note 1.

70. See *supra* text accompanying notes 44, 51-53.

71. See *supra* text accompanying notes 57-60, 63-64.

72. See *supra* text accompanying note 1.

73. *Robinson v. Hewlett-Packard Corp.*, 183 Cal. App. 3d 1108, 1130 n.19, 228 Cal. Rptr. 591, 605 n.19 (1986) (jury may determine whether supervisor engaged in extreme and outrageous conduct when she stated that “black people in general don’t like to work” and, therefore, plaintiff was “faking” back injury to avoid work).

74. 1 Kan. App. 2d 213, 563 P.2d 511 (1977).

75. *Id.* at 214, 563 P.2d at 513.

76. *Id.*

77. *Id.* at 216, 563 P.2d at 514.

the fact that the defendant was acting in the role of a debt collector. It is generally understood that creditors may speak harshly to debtors who refuse to make payments.<sup>78</sup> In fact, the Restatement (Second) of Torts specifically provides that, if a creditor calls a debtor a "deadbeat," such a "rude and insolent" statement does not rise to the level of extreme and outrageous conduct.<sup>79</sup>

Another type of situation in which the courts have refused to impose liability for racial epithets is a heated argument between a sales clerk and a customer. In *Dawson v. Zayre Department Stores*<sup>80</sup> the court dismissed the complaint of a black woman who alleged that the defendant's sales clerk had called her a "nigger" in a dispute over a lay-away ticket.<sup>81</sup> The court refused to condone "the derogatory and offensive language," but believed that, under the circumstances, it amounted to no more than "insulting namecalling from which no recovery may be made."<sup>82</sup> The court specifically ruled that the law "does not invoke liability in a situation where, without other aggravating circumstances, one hurls an epithet at another during the course of a disagreement."<sup>83</sup>

### B. Ethnic Harassment

There are two cases in which the courts have held that plaintiffs who were the victims of ethnic slurs could go to trial on their causes of action for intentional infliction of emotional distress.<sup>84</sup> In *Gomez v. Hug*<sup>85</sup> the plaintiff, a Mexican-American, was employed as a supervisor at the county fairgrounds in Topeka, Kansas. The plaintiff went with his immediate supervisor, the fairgrounds administrator, to the administrator's office to make a phone call. The defendant, a white man who was a member of the Board of County Commissioners, was already in the administrator's office when the plaintiff and the administrator entered the office.<sup>86</sup> The defendant asked the administrator: "What is that fucking spic doing in the office?"<sup>87</sup> The defendant ordered the plaintiff to step toward him and again referred to

78. For a discussion of the law governing debt collectors, see RESTATEMENT (SECOND) OF TORTS § 46 comment e (1965).

79. *Id.* illustration 8. See also *Breeden v. League Serv. Corp.*, 575 P.2d 1374 (Okla. 1978) (summary judgment for defendant collection agency who called plaintiff debtor "deadbeat" and "God damned liar").

80. 346 Pa. Super. 357, 499 A.2d 648 (1985).

81. *Id.* at 359, 499 A.2d at 648. *Accord* *Irving v. J. L. Marsh, Inc.*, 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977) (complaint dismissed).

82. *Dawson*, 346 Pa. Super. at 360, 499 A.2d at 649.

83. *Id.* at 361-62, 499 A.2d at 650.

84. *Gomez v. Hug*, 7 Kan. App. 2d 603, 645 P.2d 916 (1982) (summary judgment for defendant reversed); *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981) (summary judgment for defendant reversed).

85. 7 Kan. App. 2d 603, 645 P.2d 916 (1982).

86. *Id.* at 603, 645 P.2d at 916.

87. *Id.* at 604, 645 P.2d at 918.

the plaintiff as a "fucking spic."<sup>88</sup> The plaintiff moved toward the defendant and asked him what he meant by that name. The defendant responded: "A fucking Mexican greaser like you, that is all you are. You are nothing but a fucking Mexican greaser, nothing but a pile of shit."<sup>89</sup> When the plaintiff stood silently in front of the defendant, the defendant said: "Are you going to do something, you coward, you greaser, you fucking spic? What are you going to do? Don't stand there like a damn fool. . . ."<sup>90</sup>

For five to fifteen minutes, the defendant repeatedly raised his fist and pounded the table as he spoke. The plaintiff "froze" because he was "afraid" of the defendant,<sup>91</sup> particularly because the defendant had made similar remarks during the previous day or two.<sup>92</sup> In the words of the plaintiff: "For the first time in my life, I was terrified of one man calling me that. I was afraid for my job. I was afraid for my family."<sup>93</sup> After the defendant stopped shouting, the administrator escorted the plaintiff from his office and took him home. The plaintiff began having serious medical problems, and he was hospitalized three months later. Seven months after the incident, the plaintiff resigned his job with the county.<sup>94</sup>

The defendant argued that the racial epithets were "mere insults."<sup>95</sup> The trial court agreed and held that the racial remarks were not actionable as a matter of law.<sup>96</sup> The appellate court reversed and held that "this vituperation was well beyond the bounds of freedom to blow off harmless steam."<sup>97</sup> The court justified its decision in the following language:

It is not a burden of American citizenship in the State of Kansas that such vitriolic bullying as was turned by Hug against Gomez, and its emotional and physical consequences, must be accepted without possibility of redress and accepted as often as it amuses the speaker to utter it. Kansas courts are not so impotent. At the very least the victim of such an attack has the right to have his grievance heard by a jury of average members of the community to know whether they would exclaim, "Outrageous!"<sup>98</sup>

Under Section 6-103 of the Model Act, Gomez might be able to bring a cause of action against Hug, but not for the reasons given by the Kansas appellate court. Rather, Gomez would have standing to sue Hug under the

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The court's opinion provides no facts as to what was said or as to the number of prior incidents.

93. *Id.*

94. *Id.* at 605, 645 P.2d at 918.

95. *Id.* at 609, 645 P.2d at 922.

96. *Id.* at 610, 612, 645 P.2d at 920, 922 (trial court granted defendant's motion for summary judgment).

97. *Id.* at 610, 645 P.2d at 922.

98. *Id.*

Model Act only because, fortuitously, Hug verbally abused Gomez on at least one occasion prior to Hug's outburst in the administrator's office.

In *Dominguez v. Stone*<sup>99</sup> the plaintiff was a twenty-two year old Mexican national who had been residing legally in the United States since she was three. She was the director of the Senior Citizens Program in the Village of Central, New Mexico and supervised five citizens of the United States working under her. The defendant was a white member of the Board of Trustees of Central that governed the village and supervised the Senior Citizens Program. The majority of the Board of Trustees were of Spanish or Mexican descent.

During a public meeting of the Village Trustees, the defendant learned by reading an affirmative action plan that the plaintiff was a Mexican, not a Spanish American.<sup>100</sup> The defendant was surprised and said: "Mexican, huh. What does that mean exactly?"<sup>101</sup> He then asked the plaintiff whether she had applied for citizenship and whether she had registered to vote in the United States.<sup>102</sup> When she declined to answer these questions, he became outraged and said: "I feel like that anybody who works for the City of Central should be a citizen and especially if she's over five American citizens. I think one of them should be the director."<sup>103</sup> The Village Trustees then went into a closed executive session. The trustees asked the plaintiff and others to leave the meeting room. The plaintiff sat outside the room and heard the defendant shout: "She's a Mexican. You see her? She's a Mexican. That is not fair. There's no way. Why should she be employed? She's a Mexican. She's a Mexican."<sup>104</sup> Later, the plaintiff heard the defendant say that the custodian, an American, should replace the plaintiff as director, and that the plaintiff should do the cleaning.<sup>105</sup>

The Village Trustees did not fire the plaintiff. She returned to work the next day.<sup>106</sup> However, she felt "very ill" and went to see a doctor who prescribed a painkiller for muscle tension.<sup>107</sup> The appellate court reversed the trial court's summary judgment for the defendant and recommended that the trial judge recuse himself, thereby allowing the supreme court to appoint another trial judge.<sup>108</sup> The appellate court explained: "It is common knowledge in New Mexico that the word 'Mexican' when used in circumstances similar to those in the instant case connotes prejudice and dispar-

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99. 97 N.M. 211, 638 P.2d 423 (1981).

100. *Dominguez v. Stone*, 97 N.M. 211, 217, 219, 638 P.2d 423, 429, 431 (1981). Presumably, the Village Trustees were considering an issue related to the operation of the Senior Citizens Program since the plaintiff was present at the meeting.

101. *Id.* at 219, 638 P.2d at 431.

102. *Id.* at 212, 218, 638 P.2d at 424, 431.

103. *Id.* at 218, 638 P.2d at 430.

104. *Id.* at 220, 638 P.2d at 432. The plaintiff took notes of what she overheard as she sat outside the meeting room.

105. *Id.* at 221, 638 P.2d at 433.

106. *Id.*

107. *Id.*

108. *Id.* at 216, 638 P.2d at 428.

agement.”<sup>109</sup> The court reprimanded the defendant by quoting the words of Franklin D. Roosevelt in an address to the Daughters of the American Revolution in 1938: “Remember, remember always, that all of us, you and I especially, are descended from immigrants.”<sup>110</sup>

Contrast this stirring opinion written by Judge Lopez with Section 6-103 of the Model Act. The Model Act would preclude the plaintiff in *Dominguez* from recovering damages for intentional infliction of emotional distress because the plaintiff was not the victim of “a pattern of communication evincing a continuity of purpose.” The plaintiff merely was the victim of an isolated, discriminatory incident.

*Gomez* and *Dominguez* tell us that the tort law governing racial epithets<sup>111</sup> extends to ethnic harassment. The utterance of an isolated ethnic epithet may be regarded as extreme and outrageous conduct. The best explanation for the judiciary’s decision to extend the law governing racial epithets to ethnic epithets is provided by *Contreras v. Crown Zellerbach Corp.*:<sup>112</sup>

As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as “mere insulting language.” Changing sensitivity in society alters the acceptability of former terms. . . . The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them. It is for the trier of fact to determine, taking into account changing social conditions and plaintiff’s own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage.<sup>113</sup>

### C. Sexual Harassment

Plaintiffs who have been allowed to proceed with a cause of action for intentional infliction of emotional distress based on the defendant’s utterance of a racial or ethnic epithet often have alleged only a single incident of discriminatory speech.<sup>114</sup> By contrast, plaintiffs that have sued successfully in tort for verbal sexual harassment almost always have alleged a pattern of discriminatory communication.<sup>115</sup> In this section I explore the reasons for the current common-law requirement of a “pattern of communication” in tort actions for verbal sexual harassment.

#### 1. Sexual Propositions

The “pattern of communication” requirement in tort actions for sexual harassment originated in cases involving requests for a sexual relationship.

109. *Id.* at 213, 638 P.2d at 428.

110. *Id.* at 214, 638 P.2d at 428.

111. See *supra* text accompanying notes 65-83.

112. 88 Wash. 2d 735, 565 P.2d 1173 (1977).

113. *Id.* at 741-42, 565 P.2d at 1177.

114. See *supra* Part II, §§ A & B (discussing racial and ethnic harassment).

115. See *infra* text accompanying notes 126-166.

*Reed v. Maley*<sup>116</sup> is one of the first reported cases in the United States to deal with the question of whether a woman should be allowed to sue in tort for a single sexual proposition. The plaintiff in *Reed* was a married woman who was sitting near the window of her house on a warm October day when the defendant "approached near it, and proposed to her to have sexual intercourse with him."<sup>117</sup> She indignantly refused the proposal.<sup>118</sup> As a result of the incident, she experienced fright, mortification, and shame.<sup>119</sup> She sued in trespass, and the court characterized the "novel" issue presented by the case as follows: "[W]ill a cause of action lie in favor of a woman against a man who solicits her to have sexual intercourse with him?"<sup>120</sup> Although the plaintiff's allegations failed to state a cause of action under then existing tort law,<sup>121</sup> the court was prepared to allow the recovery of damages "if the cause of action can be made to rest upon some sound principle of law."<sup>122</sup>

The plaintiff in *Reed* suggested that the court should recognize a cause of action for intentional infliction of emotional distress by drawing an analogy to the cases in which common carriers were held liable for wrongfully ejecting passengers in a "rude, offensive or high-handed manner."<sup>123</sup> The court rejected the suggested analogy without explanation. Instead, the court dismissed the complaint and justified its decision by referring to a different analogy:

[D]efendant . . . showed a purpose to seduce [the plaintiff] from the path of virtue. If A should solicit B, a reputable citizen, to join him in the commission of the crime of arson, larceny, or robbery, B would indignantly reject the solicitation. He might become excited, and feel humiliated and ashamed to have been thus approached, and might have worried over it for days and nights thereafter; but could he maintain an action against A for thus approaching him with such an infamous proposition? We think not. Suppose a bawd should solicit a man upon a public street to have sexual intimacy with her; he certainly could not maintain a civil action against her. If an action could be maintained by a woman against a man for such solicitation, the same right to maintain one

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116. 115 Ky. 816, 74 S.W. 1079 (1903).

117. *Id.* at 818, 74 S.W. at 1080. The defendant's exact words were: "Won't you meet me out somewhere? Won't you meet me alone somewhere?" *Id.* at 825, 74 S.W. at 1082 (Hobson, J., dissenting).

118. *Id.* at 818, 74 S.W. 1080.

119. *Id.*

120. *Id.*

121. *Id.* The defendant had not committed an assault because the defendant had created no immediate danger of harmful or offensive contact, nor had he trespassed on the plaintiff's property. *Id.*

122. *Id.*

123. *Id.* The law governing common carriers was stated later in RESTATEMENT (SECOND) OF TORTS § 48 (1965), the text of which is quoted in *supra* note 28.

would exist in his favor. Whilst he might not suffer the same anguish and humiliation on account of such solicitation as the woman, yet the right of recovery would be the same. The amount of it would only be determined by reason of the difference in effect such a solicitation would have upon one or the other. Society and the moral sentiments of the people strongly condemn conduct like that with which the appellee is charged, but there is no principle of law known to us which will enable a party to maintain a civil action upon facts like those here under consideration.<sup>124</sup>

The justification for the court's decision in *Reed* was reduced to a single sentence by Professor Magruder: "[T]here is no harm in asking."<sup>125</sup> Or, at least, there is no harm in asking once.

*Samms v. Eccles*<sup>126</sup> posed the question of whether there is harm in asking "repeatedly and persistently."<sup>127</sup> The court concluded that a continuous pattern of sexual solicitation should be actionable in tort.<sup>128</sup> The plaintiff in *Eccles*, like the plaintiff in *Reed*, was a married woman. For eight months the defendant called the plaintiff by phone at various hours of the day and night and solicited her to have illicit sexual relations with him.<sup>129</sup> The court held that the plaintiff had stated a cause of action for intentional infliction of emotional distress:

We quite agree with the idea that under usual circumstances the solicitation to sexual intercourse would not be actionable even though it may be offensive to the offeree. It seems to be a custom of long standing and one which in all likelihood will continue. . . .

But . . . situations . . . where tolerance for the conduct referred to is indulged . . . are clearly distinguishable from the aggravated circumstances the plaintiff claims existed here.<sup>130</sup>

Because the defendant repeatedly had solicited the plaintiff to have intercourse with him, and because the plaintiff repeatedly had rejected the defendant's advances, the majority of the court in *Samms v. Eccles* ruled that the plaintiff had satisfied the requirements of Section 46 of the Restatement of Torts.<sup>131</sup> That is, the plaintiff had alleged that the defendant intentionally had inflicted emotional distress<sup>132</sup> by actions "of such a nature

124. *Reed v. Maley*, 115 Ky. 816, 74 S.W. 1079, 1080 (1903).

125. Magruder, *supra* note 21, at 1055.

126. 11 Utah 2d 289, 358 P.2d 344 (1961).

127. *Id.* at 290, 358 P.2d at 345.

128. *Id.* at 294, 358 P.2d at 347.

129. *Id.* at 290, 358 P.2d at 345.

130. *Id.* at 294, 358 P.2d at 347.

131. *Id.* at 293-94, 358 P.2d at 346-47. The case was decided under the original version of Section 46. RESTATEMENT OF TORTS § 46 (Supp. 1948). For the history of the evolution of Section 46, see *supra* note 27.

132. The majority found that the defendant had "intentionally engaged in conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or (b) where any reasonable



as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."<sup>133</sup>

Modern tort cases involving purely verbal sexual harassment have not departed from the distinction drawn in *Samms* between single and repeated solicitations to sexual intercourse. Plaintiffs have recovered damages for intentional infliction of emotional distress only in those cases in which they have been the victims of a pattern of verbal harassment.<sup>134</sup> For example, a woman who was abused<sup>135</sup> verbally by her manager two or three times a week for a period of two years was allowed to recover \$10,000 in compensatory damages and \$50,000 in punitive damages when she sued her employer for intentional infliction of emotional distress.<sup>136</sup> And a secretary, whose plant manager repeatedly asked her to go out with him socially and generally endeavored to engage her in sexually related conversation, was allowed to proceed with her cause of action for intentional infliction of emotional distress against her employer.<sup>137</sup>

## 2. Sexual Epithets

The "pattern of communication" requirement that originated in the "sexual proposition" cases seems to have carried over into the "sexual epithet" cases. Although racial and ethnic slurs are sometimes actionable when spoken in a single incident,<sup>138</sup> the only actionable sexual epithets that I found in the reported cases were all spoken as part of a pattern of communication.

person would have known that such would result. . . ." *Samms*, 11 Utah 2d at 293, 358 P.2d at 347. The dissenting judge took the position that the evidence "fails to show that the defendant deliberately intended to injure the plaintiff by his unwelcome attentions" and that there was no evidence that the defendant "knew or should have known that his conduct would result in severe emotional distress to the plaintiff." *Id.* (Callister, J., dissenting).

133. *Id.*

134. See, e.g., *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983); *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989). Sexual harassment cases based on conduct or speech plus conduct have imposed liability for intentional infliction of emotional distress without requiring proof of a pattern of communication. See, e.g., *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986); *Stewart v. Thomas*, 538 F. Supp. 891 (D.D.C. 1982); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981); *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987); *Howard Univ. v. Best*, 484 A.2d 958 (D.C. 1984); *O'Reilly v. Executone of Albany, Inc.*, 121 A.D.2d 772, 503 N.Y.S.2d 185 (1986); *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 340 S.E.2d 116 (1986); *McCalla v. Ellis*, 129 Mich. App. 452, 341 N.W.2d 525 (1983).

135. *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989) (manager made sexually suggestive remarks and gestures toward plaintiff).

136. *Id.*

137. *Shaffer v. National Can Corp.*, 565 F. Supp. 909, 914-16 (E.D. Pa. 1983). *But see Bowersox v. P.H. Glatfelter Co.*, 677 F. Supp. 307, 311 (E.D. Pa. 1988) (plaintiff stated cause of action for intentional infliction of emotional distress because she alleged verbal harassment plus retaliation when she rebuffed defendant's advances; verbal harassment alone would have been insufficient to state cause of action).

138. See *supra* text accompanying notes 42-64, 99-110.

The historical origins of the implicit "pattern of communication" requirement in sexual epithet cases can be traced back to *Brooker v. Silverthorne*.<sup>139</sup> The defendant, a man who had become impatient with a telephone operator, shouted into the receiver: "You God damned woman! None of you attend to your business. You are a God damned liar. If I were there, I would break your God damned neck."<sup>140</sup> The court denied damages to the plaintiff, who alleged that she had suffered emotional distress and consequent illness. *Brooker* was cited by Professor Magruder to illustrate the proposition that courts should not impose tort liability for "insulting language" because it would be unfortunate if the law closed all the safety valves "through which irascible tempers might legally blow off steam."<sup>141</sup> The case then was utilized to illustrate comment d to Section 46 of the Restatement (Second) of Torts.<sup>142</sup>

Given the law's reluctance to impose tort liability for "mere insults," the victims of sexual epithets have recovered damages only in cases involving repeated verbal abuse. For example, in *Swentek v. USAIR, Inc.*<sup>143</sup> the plaintiff, a flight attendant, was permitted to go to the jury on allegations that the defendant, a pilot, told the plaintiff on separate occasions during a nine month period that she was "an outstanding snatch," called her a "cunt," and said that "I wish I were a coat so that I could wrap myself around your big tits."<sup>144</sup> The defendant also had made taunting remarks about the plaintiff's off-duty attire.<sup>145</sup> The trial court judge directed a verdict for the defendant on the theory that the plaintiff's allegations were not sufficiently outrageous to establish a claim for intentional infliction of emotional distress. The trial court noted that the defendant's "sexual banter" was "the kind of conduct that everybody at USAIR was engaged in" and that it was "not intended" to harass the plaintiff.<sup>146</sup> The appellate court reversed for the following reasons:

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139. 111 S.C. 553, 99 S.E. 350 (1919).

140. *Brooker v. Silverthorne*, 111 S.C. 553, 555, 99 S.E. 350, 351 (1919). Although a modern reader would see only profanity in the quoted passage, the term "woman" was deemed offensive in the nineteenth century. It was avoided as a Victorian sexual taboo because it had acquired the meaning, "paramour or mistress." Schulz, *The Semantic Derogation of Woman*, in *LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE* 64, 71 (B. Thorn & N. Henley ed. 1975). The word "female" was preferred over "woman" in the nineteenth century, but soon "female" was considered degrading, and it was replaced by "lady," which in turn became vulgarized. As a society we have now come full circle, and "woman," newly rehabilitated, is the term of choice for referring to a person of the female sex. See generally H. BOSMAJIAN, *THE LANGUAGE OF OPPRESSION* (1974); J. COATES, *WOMEN, MEN AND LANGUAGE* (1986); R. LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975); C. KRAMARAE, *WOMEN AND MEN SPEAKING* (1981); A. NILSEN, H. BOSMAJIAN, H. GERSHUNY & J. STANLEY, *SEXISM AND LANGUAGE* (1977); P. ROTHENBERG, *RACISM AND SEXISM* (1988).

141. Magruder, *supra* note 21, at 1053.

142. For the full text of the RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965), see *supra* text accompanying note 29.

143. 830 F. 2d 552 (4th Cir. 1987).

144. *Id.* at 555 n.2.

145. *Id.* at 555.

146. *Id.* at 562.

We agree with the trial court that claims of bad manners, rude behavior and hurt feelings do not state a claim for emotional distress. The workplace is not a Victorian parlor, and the courts are not the arbiters of its etiquette. In this case, however, plaintiff claimed something beyond the ordinary run of insult and offense which people are expected to encounter.<sup>147</sup>

Similarly, in *Hall v. Gus Construction Co.*<sup>148</sup> the plaintiffs, who worked as "flag persons" on the defendant's road construction sites, were allowed to recover damages for intentional infliction of emotional distress after the male crew members repeatedly called them "fucking flag girls," wrote "Cavern Cunt" and "Blond Bitch" on the car in which they rode, and repeatedly asked them if they "wanted to fuck" or engage in oral sex.<sup>149</sup> Male crew members also flashed pornographic pictures of naked couples engaged in oral intercourse at the women.<sup>150</sup> The appellate court noted that plaintiffs had anticipated hearing a good deal of profanity on the job but that the plaintiffs did not expect "the unrelenting pattern" of verbal and psychic abuse to which the plaintiffs ultimately were subjected.<sup>151</sup> The court concluded that the pattern of verbal abuse went "well beyond the bounds of what any person should have to tolerate."<sup>152</sup>

Since tort actions for purely verbal sexual harassment almost always involve a "pattern of communication," the adoption of Section 6-103(b) of the Model Act would not have the same type of adverse impact on the reported cases of sexual harassment as it would on the reported claims for racial and ethnic harassment. However, one might question whether a "pattern of communication" requirement ought to be imposed in all sexual harassment cases. For example, is it really necessary for a defendant repeatedly to utter demeaning sexual epithets before they rise to the level of extreme and outrageous conduct? Why is it actionable to call a black man a "nigger," but not actionable to call a black woman a "black bitch" or a "Cavern Cunt"? Are not isolated racial or ethnic epithets every bit as degrading as isolated racial or ethnic epithets?<sup>153</sup> Surely these sexual epithets cause the same type of adverse impact on the victim's sense of self-esteem,<sup>154</sup> and they reinforce the same types of historical patterns of oppression as racial or ethnic epithets.<sup>155</sup>

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147. *Id.*

148. 842 F.2d 1010 (8th Cir. 1988).

149. *Id.* at 1012.

150. *Id.*

151. *Id.* at 1018.

152. *Id.*

153. See *supra* note 140.

154. See generally Davis, *Law as Microaggression*, 98 YALE L. J. 1559 (1989).

155. See generally *Words That Wound*, *supra* note 1, at 157. But see Wolman, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U. L. REV. 245, 269-71 (1988).

Similarly, is it really necessary for a defendant repeatedly to communicate pornographic messages before the conduct can be called "extreme and outrageous"? Why should the female flag persons in *Hall* not be entitled to monetary relief for that moment when male crew members "flashed obscene pictures of naked couples engaged in oral intercourse at the women"?<sup>156</sup> Why should a plaintiff not be entitled to damages if her supervisor leaves a pornographic picture or magazine on her desk?<sup>157</sup> Don't such isolated discriminatory communications create "an atmosphere in which women are viewed as men's sexual playthings, rather than as their equal workers"?<sup>158</sup>

Finally, is it really true that there is "no harm in asking"?<sup>159</sup> Consider the fact pattern in *Monge v. Superior Court*.<sup>160</sup> In *Monge* one of the two plaintiffs, Allison Patton, received a message on her computer screen: "How about a little head?"<sup>161</sup> Patton believed that the officers of the corporation "had conspired to create the message" and that the message "was directed to her as a sexual proposition."<sup>162</sup> She complained to her immediate supervisor, plaintiff Martha Monge, who transmitted the complaint to the officers. After refusing to investigate the alleged act, the officers engaged in a "systematic course of retaliation"<sup>163</sup> against both Allison Patton and Martha Monge. As a result, both employees were "forced to resign."<sup>164</sup> The court ruled that both plaintiffs had stated a cause of action for intentional infliction of emotional distress.<sup>165</sup> The plaintiffs in *Monge* were allowed to go to trial because they had alleged "speech plus conduct"—a single sexual proposition plus retaliatory conduct.<sup>166</sup> But what if there had been no retaliation? What if there had been only the single sexual proposition? Was

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156. See *supra* text accompanying note 150.

157. *Shrout v. Black Clawson*, 689 F. Supp. 774 (S.D. Ohio 1988).

158. *Barbetta v. Chemlawn Serv. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987).

159. See generally Comment, *The Harms of Asking: Towards Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988).

160. 176 Cal. App. 3d 503, 222 Cal. Rptr. 64 (1986).

161. *Id.* at 507, 222 Cal. Rptr. at 65.

162. *Id.*

163. *Id.* The defendant officers "changed the plaintiffs' working environment, hours, lunch and other privileges, and demoted the [p]laintiffs to lesser positions." *Id.*

164. *Id.*

165. *Id.* at 511, 222 Cal. Rptr. at 68.

166. *Id.* Accord *Bowersox v. P.H. Glatfelter Co.*, 677 F. Supp. 307 (N.D. Pa. 1988).

Such cases are analogous to *quid pro quo* sexual harassment, in which a defendant makes a request for sexual favors and threatens to take adverse action against the plaintiff if the plaintiff does not grant the defendant's request.

I have been informed by Jill Talbot that Section 2-101 of the Model Act is intended to allow recovery of damages in a case involving "speech plus retaliatory conduct." Letter of January 15, 1990, from Jill S. Talbot to Jean C. Love (on file with author). I would suggest that Section 6-103 of the Model Act be amended to provide that a "course of conduct" means either "a pattern of communication or any type of communication plus conduct that evinces a continuity of purpose" to harass. If amended, a case like *Monge* would be actionable under Section 6-103, and the plaintiff could ignore Section 2-101. Jill Talbot has expressed her approval of my proposed amendment. *Id.*

this communication really a "good faith" solicitation to sexual intercourse? Surely the three officers of the corporation did not expect an affirmative response from Allison Patton. When a single "sexual proposition" is communicated so obviously in bad faith, it makes no sense to require its repetition as a prerequisite to the imposition of tort liability.

#### D. Religious Harassment

The Model Act prohibits harassment or intimidation of an individual on account of religion.<sup>167</sup> Professor Robert O'Neil points out that there are many types of religious expression that enjoy varying levels of constitutional protection.<sup>168</sup> Professor O'Neil would classify the Model Act as a prohibition on "speech that offends religious feelings"—a type of speech that historically has been subject to state regulation despite the first amendment.<sup>169</sup> Most obviously, the Model Act would impose tort liability for the utterance of religious epithets. The following types of taunts would be actionable under Section 6-103: "Christ killer,"<sup>170</sup> "Jew-boy,"<sup>171</sup> "kike,"<sup>172</sup> and "god-damn Jew."<sup>173</sup> Jews have been persecuted not only on the basis of their religion, but also on the basis of their national origin and race.<sup>174</sup> Therefore, although the preceding epithets are illustrative of religious harassment, they also might be actionable as instances of racial or ethnic harassment.<sup>175</sup> Just as racial epithets were once a matter of "common usage,"<sup>176</sup> so anti-Semitic sentiments were once considered "acceptable even in polite society."<sup>177</sup> But as a result of the civil rights movement, religious harassment is now no more acceptable than harassment on the basis of race or ethnicity.<sup>178</sup>

I have been unable to find a case in which a plaintiff brought a tort action for intentional infliction of emotional distress based upon purely

167. See *supra* text accompanying note 1.

168. O'Neil, *Religious Expression: Speech or Worship—or Both?*, 54 Mo. L. Rev. 501 (1989). Professor O'Neil identifies four types of religious expression: 1) speech that offends religious feelings; 2) religious publications; 3) religious silence; and 4) religious speech on public property.

169. *Id.* at 506-08.

170. *Weiss v. United States*, 595 F. Supp. 1050, 1053 (E.D. Va. 1984) (Title VII action; judgment for plaintiff).

171. *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158 (S.D. Ohio 1976) (Title VII action; judgment for plaintiff).

172. *Id.*

173. *Id.* For a discussion of an action for religious harassment by a Catholic plaintiff, see *Slamon v. Westinghouse Elec. Corp.*, 386 F. Supp. 174 (E.D. Pa. 1974).

174. A. HERTZBERG, *THE JEWS IN AMERICA: FOUR CENTURIES OF AN UNEASY ENCOUNTER* (1989); A. KAYS, *THE JEWISH EXPERIENCE IN AMERICA* (1969).

175. Comment, *Racial Discrimination under 42 U.S.C. § 1982: Proof or Perceptions?* *Shaare Tefila Congregation v. Cobb*, 5 LAW & INEQUALITY 161 (1987).

176. See *supra* text accompanying note 113.

177. *United States v. Heller*, 785 F.2d 1524, 1528 (11th Cir. 1986) (declaring mistrial due to jury misconduct in form of racial and religious slurs).

178. *Id.* See also *supra* note 174.

verbal religious harassment.<sup>179</sup> However, the issues that would be raised by such a case are fully explored in *Imperial Diner, Inc. v. State Human Rights Appeal Board*,<sup>180</sup> a cause of action for emotional distress damages<sup>181</sup> brought under New York's state employment discrimination statute.<sup>182</sup> The plaintiff in *Imperial Diner* was a mother of three who was attending graduate school and working for the defendant as a waitress on the weekends. The plaintiff had been assigned to work behind the counter, a less desirable position, on both Saturday and Sunday. She complained to the defendant, the president, who apparently did nothing. However, the head waitress decided to assign her to a table station. Later, when the plaintiff saw the president, she thanked him, thinking that he was responsible for the reassignment. He responded by saying that the complainant thought she was special because she was Jewish, "just like all the other fucking Jewish broads around here."<sup>183</sup> When she expressed shock and disbelief, he told her that she had heard correctly; that all the "fucking Jewish women" at the diner "think they are something special and deserve more than the others."<sup>184</sup> He refused to apologize. She left the diner and went home. The defendant never agreed to apologize, and the plaintiff never returned to work.<sup>185</sup>

The Human Rights commissioner ordered the defendant to pay \$500 in damages for the "shock, humiliation and outrage" that the plaintiff experienced.<sup>186</sup> The award was reversed by the appellate division because "the record is devoid of evidence showing a systematic exclusion or restriction, or a generalized pattern of unlawful discrimination, or any evidence of persistent religious or other unlawful discrimination directed at the complainant."<sup>187</sup> The court of appeals reinstated the commissioner's award on the ground that "the statute prohibits discrimination, and not just repeated discriminatory acts."<sup>188</sup> The court of appeals justified its interpretation of

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179. Actually, there is a case recently decided that almost falls into this category. The plaintiff, the only Jewish woman in her department, was called a "Hebe" and a "kike" (pure speech) before she was denied promotions and allegedly forced to resign (speech plus conduct). *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 548 N.Y.S.2d 513 (1989) (2-1 decision). The appellate division found that she had failed to prove extreme and outrageous conduct. *Id.*

180. 52 N.Y.2d 72, 417 N.E.2d 525 (1980).

181. The plaintiff also sought back pay and an apology. *Id.* at 74-75, 417 N.E.2d at 527-28.

182. N.Y. EXEC. LAW § 296(1)(a). Unlike Title VII, the New York law allows the recovery of compensatory damages for discriminatory acts.

183. *Imperial Diner*, 52 N.Y.2d at 76, 417 N.E.2d at 527.

184. *Id.*

185. *Id.*

186. *Id.* at 76, 417 N.E.2d at 528. The commissioner also awarded back pay and ordered the defendant to apologize in writing to the plaintiff. *Id.* at 76, 417 N.E.2d at 527-28. The dissenting judges thought that the directive to apologize might be in violation of the defendant's first amendment right to remain silent, but the issue had not been raised by the defendant, and, therefore, was not before the court. *Id.* at 80, 417 N.E.2d at 529.

187. *Id.* at 77, 417 N.E.2d at 528.

188. *Id.* at 78, 417 N.E.2d at 528.

the statute by observing that "[t]his type of vilification is humiliating, not only when it is done wholesale, but also and perhaps especially, when it is directed at a lone individual in an isolated incident."<sup>189</sup>

It is interesting to speculate on how a case like *Imperial Diner* might be decided under Section 46 of the Restatement (Second) of Torts.<sup>190</sup> If *Imperial Diner* were regarded as a case of sexual harassment, the plaintiff might be precluded from recovering damages because she failed to establish a "pattern of communication."<sup>191</sup> Rather, she was the victim of an isolated sexual epithet. But if the action were characterized as a case of a religious slur, then the plaintiff might be allowed to recover damages by analogy to the cases in which the victims of a single racial<sup>192</sup> or ethnic<sup>193</sup> epithet have been awarded monetary relief. Thus, *Imperial Diner* poses the classic problem of how to classify a cause of action that is brought by a plaintiff against whom the defendant has discriminated on two grounds simultaneously.<sup>194</sup> It also illustrates the way in which the law encourages such a plaintiff to ignore her sex and focus on her race, ethnicity, or religion because she is more apt to prevail if she deemphasizes the former and highlights the latter.<sup>195</sup>

Regardless of how *Imperial Diner* might be decided under Section 46 of the Restatement (Second) of Torts, the plaintiff's cause of action unquestionably would be barred by Section 6-103 of the Model Communicative Torts Act because the plaintiff did not stay in the diner long enough to experience a "pattern of communication." Even though she suffered discrimination on two grounds simultaneously, the Model Act would preclude the recovery of damages. Section 6-103 contains no provision providing that cumulative acts of discrimination are the equivalent of a "pattern of communication."

### E. Summary

The comment to Section 6-103 proudly proclaims that "[t]he Section offers protection that current law does not adequately provide." Quite to the contrary, however, the preceding discussion demonstrates that Section

189. *Id.*

190. See *supra* note 179.

191. See *supra* Part II, § C. Note that I have criticized the rigid imposition of a "pattern of communication" requirement on all actions for sexual harassment. I have been particularly critical of the requirement in the context of sexual epithets.

192. See *supra* Part II, § A.

193. See *supra* Part II, § B.

194. For a discussion of discrimination against black women, see Austin, *Sapphire Bound*, 1989 WISC. L. REV. 539 (1989); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

195. The statement in the text is true particularly with regard to constitutional litigation under the fourteenth amendment because sex-based classifications are subjected to a lower standard of judicial review than race-based classifications. Scales-Trent, *supra* note 194, at 20-35.

6-103, in fact, precludes liability for isolated racial, ethnic, and religious slurs, whereas current tort law sometimes affords relief.<sup>196</sup> Moreover, the Model Act, at best, codifies current case law regarding tort liability for verbal sexual harassment.<sup>197</sup> It provides no protection for isolated instances of such egregious misconduct.

In addition to restricting liability for discriminatory speech, the Model Act also curtails existing remedies.<sup>198</sup> Under current tort law, a plaintiff who sues for intentional infliction of emotional distress is entitled to compensatory and punitive damages, plus injunctive relief in appropriate circumstances.<sup>199</sup> By contrast, a plaintiff who sues under Section 6-103 is restricted to the recovery of only compensatory damages plus injunctive relief. Furthermore, attorneys' fees are not recoverable under Section 9-106. Consequently, the plaintiff who brings an action under Section 6-103 will have to pay the attorney out of the compensatory damage award. Because such awards are typically modest in amount,<sup>200</sup> Section 9-106 will serve as a substantial disincentive to the pursuit of claims under Section 6-103.<sup>201</sup>

Based on my analysis, I would recommend against the enactment of Section 6-103 as written. Instead, I would favor the codification of the common-law action for intentional infliction of emotional distress. In the next Part, I discuss the advantages of retaining or codifying the common-law tort action. I also consider the issues that are apt to arise if victims of discriminatory speech are allowed to pursue claims for intentional infliction of emotional distress.

### III. INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

Section 46 of the Restatement (Second) of Torts provides that "one who by extreme and outrageous conduct intentionally . . . causes severe emotional distress to another is subject to liability for such emotional distress."<sup>202</sup> The primary advantage of Section 46 over Section 6-103 of the Model Act is its inclusiveness. Anyone who has sustained severe emotional distress under the proscribed circumstances may file a complaint under Section 46. The plaintiff need not allege that the defendant harassed the plaintiff on the basis of race, sex, ethnicity, or religion.<sup>203</sup> Instead, the

196. See *supra* Part II, §§ A, B, D.

197. See *supra* Part II, § C.

198. See *supra* text accompanying note 2.

199. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3(1),(2),(5) (2d ed. forthcoming).

200. See *supra* text accompanying notes 50-53, 136, 186.

201. Attorneys' fees typically are recoverable in most types of civil rights litigation precisely because awards of compensatory damages are small in amount. See generally D. DOBBS, *supra* note 199, at § 7.4(5). Plaintiffs who bring actions for intentional infliction of emotional distress under current law usually pay their attorneys out of their punitive damage awards. See generally D. DOBBS, *supra* note 199, at § 7.3(2).

202. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

203. See *supra* text accompanying note 1.



plaintiff could claim harassment on the basis of such factors as sexual orientation,<sup>204</sup> weight,<sup>205</sup> or handicap.<sup>206</sup> Moreover, the plaintiff would not have to claim harassment on the basis of membership in any oppressed group. It would be sufficient to claim a violation of the plaintiff's individual sense of personhood resulting in severe emotional distress.<sup>207</sup>

The second advantage of Section 46 over Section 6-103 of the Model Act is that Section 46 does not require proof of a "pattern of communication." Thus, under Section 46, monetary relief would be available to the black cook who was told by his boss: "You're not a human being, you're a nigger."<sup>208</sup> A cause of action could be stated both by the woman who was called a "Mexican" in a disparaging tone of voice<sup>209</sup> and by the man who was called a "fucking spic" and a "fucking Mexican greaser" by his employer.<sup>210</sup> Liability for damages could be established by the woman who was told that she was a "fucking Jewish broad."<sup>211</sup> The flight attendant in *Swentak*<sup>212</sup> could premise a cause of action upon the pilot's calling her a "cunt." The female flag persons in *Hall*<sup>213</sup> could claim damages for the road crew's isolated act of writing "Cavern Cunt" and "Blond Bitch" on their car. Compensatory and punitive damages would be recoverable by the black lawyer who was called a "black son-of-a-bitch" in the motel restaurant.<sup>214</sup> Furthermore, the lawyer's wife and son, as members of his immediate family, would be entitled to recover damages for intentional infliction of emotional distress, provided they could prove that they in fact had sustained severe emotional distress.<sup>215</sup> Moreover, his in-laws could claim damages for intentional infliction of emotional distress, provided the in-laws could prove that they had sustained severe emotional distress resulting in bodily harm.<sup>216</sup>

A final advantage of imposing liability under Section 46 is that the victim of a dually discriminatory epithet may sue as a "whole person."<sup>217</sup>

204. See, e.g., *Moye v. Gary*, 595 F. Supp. 738 (S.D.N.Y. 1984); *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121 (Ala. 1985).

205. See, e.g., *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989); *King v. Burris*, 588 F. Supp. 1152 (D. Colo. 1984).

206. See, e.g., *Paris v. Division of State Compensation Ins. Fund*, 517 P.2d 1353 (Colo. Ct. App. 1973).

207. See, e.g., *Margita v. Diamond Mortgage Corp.*, 159 Mich. App. 181, 406 N.W.2d 268 (1987) (plaintiff called "ignorant" and "stupid"; summary judgment for defendant reversed); *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983) (defendant revealed premarital pregnancy of ex-spouse; judgment for plaintiff reversed) (dissenting opinion); *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 462 N.E.2d 392 (1984) (defendant threatened to "tear face off" of plaintiff; defendant's motion to dismiss claim denied).

208. See *supra* text accompanying note 60.

209. See *supra* text accompanying note 109.

210. See *supra* text accompanying notes 87-90.

211. See *supra* text accompanying notes 183-84.

212. See *supra* text accompanying notes 144-45.

213. See *supra* text accompanying notes 148-49.

214. See *supra* text accompanying note 44.

215. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).

216. *Id.*

217. See generally *Scales-Trent*, *supra* note 194.

For example, if a black female prison guard were to be called a "black bitch" by her co-workers,<sup>218</sup> she would be entitled to claim damages as the victim of both a racial and a sexual epithet.<sup>219</sup> Similarly, if a Hispanic female were to be called a "bitch," a "spic," and a "thief" by the employees of a retail store who erroneously suspected her of shoplifting, she would be entitled to claim damages as the victim of three interrelated epithets.<sup>220</sup> The damages recoverable by such plaintiffs would be measured by the cumulative effect of the discriminatory communication.<sup>221</sup>

Since the purposes of tort law are vindication, compensation, deterrence, and punishment, it is better to impose liability under an all-inclusive rule of law than under a statute that sanctions only certain categories of discriminatory speech. Section 46 will allow any victim of hurtful speech who has sustained severe emotional distress to obtain both vindication and compensation, provided the plaintiff can prove that the defendant's conduct violated society's norms of civility. At the same time, Section 46 will deter and punish all types of extreme and outrageous conduct.

For these reasons, I prefer Section 46 as the vehicle for redressing harms caused by words that wound. Nonetheless, Section 46 is not a perfect means to that end. I now turn to some of the problems posed by the three basic elements of the common-law cause of action for intentional infliction of emotional distress: (1) intent, (2) extreme and outrageous conduct, and (3) severe emotional distress. With respect to each element, I recommend that the common-law action be modified in certain ways in order to make it a more effective vehicle for vindicating the rights of the victims of discriminatory speech. As I make my analysis, I draw on the lessons that can be learned from the language of Section 6-103 of the Model Act.

#### A. *Extreme and Outrageous Conduct*

The critical issue in a cause of action brought under Section 46 is whether the defendant has engaged in "extreme and outrageous conduct."<sup>222</sup> If so, it is relatively easy to prove both the requisite intent and the severity of the plaintiff's emotional distress.<sup>223</sup> However, the requirement of proving extreme and outrageous conduct can be quite problematic for victims of discriminatory speech.

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218. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (Title VII action).

219. *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989) (§ 1981 case).

220. *Jefferson Ward Stores v. Khorozian*, 519 So. 2d 627 (Fla. Dist. Ct. App. 1984) (intentional infliction of emotional distress action).

221. Note that a plaintiff who has experienced dual discrimination may be entitled to a greater award of damages than a victim of a single type of discrimination.

222. 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 (1982). See also RESTATEMENT (SECOND) OF TORTS § 46 comments d, i, j (1965).

223. RESTATEMENT (SECOND) OF TORTS § 46 comments d, i, j (1985).

Victims of discriminatory speech are practically always members of minority or oppressed groups. Yet the test of liability under Section 46 is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'outrageous!'"<sup>224</sup> Not surprisingly, there are reported cases of racial, ethnic, and religious epithets in which the victim's claim has been dismissed, even though members of the minority community to which the plaintiff belongs surely would have exclaimed, "Outrageous"!

For example, in *Lay v. Roux Laboratories, Inc.*<sup>225</sup> a black woman alleged that, when she parked her car in a reserved space in the company parking lot, a white male supervisor began to threaten her with the loss of her job, and then began to use "humiliating language, vicious verbal attacks, racial epithets and called plaintiff a 'nigger. . .'"<sup>226</sup> The court dismissed her complaint, stating that "although the alleged conduct is extremely reprehensible, we do not think that the alleged conduct reaches the level of outrageousness. . . ." <sup>227</sup>

And in *Leibowitz v. Bank Leumi Trust & Co.*<sup>228</sup> the plaintiff, a Jewish woman who was denied promotion in her department, alleged that she had been called a "Hebe" and a "kike."<sup>229</sup> The majority of the court upheld the dismissal of her claim for the following reasons:

While we share the indignation of our dissenting colleague over the use of the religious and ethnic slurs "Hebe" and "kike," the particular conduct complained of in this case did not rise to such an extreme or outrageous level as to meet the threshold requirement for the tort. Although the occasional use of such derogatory and demeaning remarks reflects a certain level of narrowmindedness and meanspiritedness, this is not a case "where severe mental pain or anguish [was] inflicted through a deliberate and malicious campaign of harassment or intimidation". . . . Certainly the use of any religious, ethnic or racial slur must be strongly disapproved and condemned. However, the fact that we view the alleged conduct as being deplorable and reprehensible does not necessarily lead to the conclusion that it arose to such a level that the law must provide a remedy. "[I]t is manifestly neither practical nor desirable for the law to provide a remedy against any and all activity which an individual might find annoying." [Citation omitted.]<sup>230</sup>

The dissenting judge found it "inconceivable" that calling a person a "Hebe" or a "kike" "in her place of employment, or anywhere else for

224. *Id.* § 46 comment d.

225. 379 So. 2d 451 (Fla. Dist. Ct. App. 1980).

226. *Id.* at 452.

227. *Id.*

228. 152 A.D.2d 169, 548 N.Y.S.2d 513 (N.Y. App. Div. 1989).

229. *Id.* at \_\_\_\_\_, 548 N.Y.S.2d at 514.

230. *Id.* at \_\_\_\_\_, 548 N.Y.S.2d at 521.

that matter, ” could be characterized as a “mere insult, indignity, or annoyance.”<sup>231</sup>

These two cases are particularly troubling because the plaintiffs were denied the opportunity to have their claims heard by a jury of their peers. In both cases, the trial and appellate court judges ruled as a matter of law that the defendants had not engaged in extreme and outrageous conduct. Imagine how it would feel to be the female victim of a deliberately demeaning racial or religious epithet, only to be told by a white male judge that you have suffered a harm that the law does not recognize.

There are several possible solutions to the problem presented by the majoritarian test of “outrageousness.” One possibility is the solution adopted by the drafters of the Model Act.<sup>232</sup> Having abolished the cause of action for intentional infliction of emotional distress, the drafters created a similar cause of action for discriminatory speech in Section 6-103. The Model Act’s cause of action for discriminatory speech is limited to cases involving verbal harassment on the basis of race, sex, ethnicity, or religion. No “extreme and outrageous” requirement is imposed. The practical effect of this approach is to presume that these statutory categories of discriminatory speech constitute extreme and outrageous conduct.

My chief difficulty with the approach adopted by the Model Act is that it will preclude the recovery of damages in cases that fall outside the categories listed in Section 6-103. Consider, for example, the plight of Robert Logan. Robert is a gay male who operates a beauty salon in Birmingham, Alabama. He received a call from a female employee of Sears, Roebuck and Company who wanted to know whether he had made his monthly charge account payments. While he was looking for his checkbook, he heard the woman tell someone on her end of the line: “This guy is as queer as a three-dollar bill.”<sup>233</sup> Robert is barred from filing a claim under Section 6-103 because his claim is not based on the utterance of a racial, sexual, ethnic, or religious epithet. Rather, his claim is based on a homophobic epithet.

To protect the interests of the Robert Logans and other potential victims of verbal abuse, I prefer to retain the common-law cause of action for intentional infliction of emotional distress. However, in order to minimize the problems caused by the majoritarian test of outrageousness, I would propose a solution similar to that of Section 6-103. I would recommend that the judiciary modify the common-law cause of action by adopting a rebuttable presumption that certain categories of discriminatory speech meet the extreme and outrageous conduct requirement. Specifically, if a member of a group protected by existing antidiscrimination laws files an intentional

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231. *Id.* at \_\_\_\_\_, 548 N.Y.S.2d at 522 (Harwood, J., concurring in part and dissenting in part).

232. *See supra* text accompanying notes 1-17.

233. *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121 (Ala. 1985) (summary judgment for defendant in action for intentional infliction of emotional distress).

infliction of emotional distress claim alleging that the plaintiff has been harassed or abused on the basis of membership in that group, the court will presume that the defendant's conduct was extreme and outrageous.

The effect of the presumption will be to preclude a court from dismissing a claim, entering a summary judgment, or directing a verdict on the ground that the defendant's conduct was not "extreme and outrageous." The presumption will drop out of the case, however, once the case goes to the jury. The presumption will have no impact whatsoever on the issues of intent or severe emotional distress. In other words, a court could still dismiss a claim, enter summary judgment for the defendant, or direct a verdict for the defendant on the ground that the plaintiff had failed to allege or prove the requisite elements of intent and severe emotional distress.

Consider the impact of my proposed presumption on the claims filed by Donesta Lay,<sup>234</sup> Alma Leibowitz,<sup>235</sup> and Robert Logan.<sup>236</sup> Because federal, state, and local laws prohibit discrimination on the basis of race and religion, Donesta Lay and Alma Leibowitz will be assured of a jury trial on the issue of extreme and outrageous conduct, provided that they put on sufficient evidence of intent and severe emotional distress. By contrast, Robert Logan will not receive the benefit of my proposed presumption because neither the federal government, nor the state of Alabama, nor the City of Birmingham prohibits discrimination on the basis of sexual orientation.

Nevertheless, Robert Logan is better off under my proposal than under Section 6-103 of the Model Act because my proposal does not preclude Robert Logan from filing a claim for intentional infliction of emotional distress under Section 46. Rather, my proposal just denies him the benefit of the presumption until such time as the federal, state, or local government enacts legislation prohibiting discrimination on the basis of sexual orientation.

I do not mean to minimize the difficulties that gay and lesbian people will encounter in attempting to establish the element of extreme and outrageous conduct without the benefit of my proposed presumption. In Robert Logan's case, for example, the trial court granted the defendant's motion for summary judgment.<sup>237</sup> The appellate court affirmed the trial court's ruling for the following reasons:

We are unwilling to say that the use of the word "queer" to describe a homosexual is atrocious and intolerable in civilized society. We recognize that there are other words favored by the homosexual community in describing themselves, but the word "queer" has been used for a long time by those outside the community. It has been in use longer than the term "gay," which has recently become the most frequently used term to describe

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234. See *supra* text accompanying notes 225-27.

235. See *supra* text accompanying notes 228-31.

236. See *supra* text accompanying note 233.

237. *Logan*, 466 So. 2d at 124.

homosexuals.<sup>238</sup>

Since Logan is admittedly a homosexual, can it be said realistically that being described as "queer" should cause him shame or humiliation? We think not. In order to create a cause of action, the conduct must be such that [it] would cause mental suffering, shame or humiliation to a person of ordinary sensibilities, not conduct which would be considered unacceptable merely by homosexuals.<sup>239</sup>

I do not believe that members of the gay and lesbian community would concur in the court's reasoning. As a member of that community myself, I find this passage troublesome for at least two reasons. First of all, the court's discussion of the descriptive terms "queer" and "gay" ignores the full context in which the epithet at issue was spoken. The incident was one in which a service provider at Sears gratuitously maligned a customer by saying, "He's as 'queer as a three-dollar bill.'" Secondly, the test of outrageousness adopted by the court assumes that only heterosexuals are "persons of ordinary sensibilities." Under this test, no gay or lesbian person will be able to establish liability under Section 46 as long as there is a well-established practice of homophobic verbal abuse by the dominant, heterosexual community.

In sum, I propose the retention of the tort action for intentional infliction of emotional distress in cases involving purely verbal harassment. I also propose retention of the requirement that the harassment be extreme and outrageous. I do this fully mindful of the problems that some victims will encounter in satisfying this requirement. In order to minimize those difficulties, I propose the adoption of a rebuttable presumption that verbal harassment is "outrageous" whenever it is linked to membership in a class protected by antidiscrimination laws.

### B. Intent

If a court chooses to adopt my proposed presumption of extreme and outrageous conduct for discriminatory speech, then the question of intent will become a more critical issue under Section 46. Defendants who have argued that their conduct was not extreme and outrageous as a matter of law will now argue that they did not intend to cause severe emotional distress. It is, therefore, important to recognize that the test of intent under Section 46 is not the exceedingly restrictive test of intent developed in equal protection litigation under the fourteenth amendment.<sup>240</sup> Rather, it is the

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238. *Id.* at 123. At this point in the opinion, the court inserts the following footnote: "Webster's Ninth New Collegiate Dictionary . . . dates 'queer' to about 1812 and 'gay' to 1953." *Id.* at 123 n.1.

239. *Id.* at 123.

240. For a discussion and critique of the test of intent under the fourteenth amendment, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). See also Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

test of intent developed by the common-law courts in intentional tort actions. The plaintiff must prove that the defendant acted for the purpose of causing severe emotional distress or knew that such distress was substantially certain to result.<sup>241</sup>

The operation of the torts test of intent in cases involving discriminatory speech can best be illustrated by a set of hypotheticals. First, imagine that one football player called another a "nigger" in the heat of anger during a fight on the field and apologized immediately after the game was over.<sup>242</sup> Under such circumstances, it is most unlikely that the plaintiff could prove the requisite intent because the defendant did not deliberately utter the epithet and did not act for the purpose of causing severe emotional distress, as evidenced by his apology. Second, imagine that one black judge affectionately said to another black judge in the privacy of the judicial chambers: "You nigger."<sup>243</sup> Once again, it is most unlikely that the plaintiff could prove the requisite intent. In this case, the defendant meant to utter the statement, but did not act for the purpose of causing severe emotional distress.

Now, by contrast, imagine that a black woman parked in a space reserved for her white male supervisor because there was no other place to park her car in the company parking lot. He became enraged and called her a "nigger."<sup>244</sup> He made no effort to apologize. Although he may not have acted for the purpose of causing her severe emotional distress, nevertheless he knew that such distress was substantially certain to result. Finally, imagine that a student returned an item to the defendant's retail store, where a clerk required him to sign a slip on which the following words were written: "Arrogant nigger refused exchange—says he doesn't like products."<sup>245</sup> In this last hypothetical, the plaintiff would be able to prove that the defendant acted for the purpose of inflicting severe emotional distress.

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241. RESTATEMENT (SECOND) OF TORTS § 8A (1965). See also *Words That Wound*, *supra* note 1, at 145.

242. In a recent incident, Eric Andolsek of the Detroit Lions called Sam Jones of the Houston Oilers a "nigger" during a fourth-quarter scuffle on the football field. Andolsek said: "I was upset. You're playing as hard as you can possibly play and when things don't go right, you start pushing and shoving. Things go. It's the first thing I said. I apologize; what can I do?" *Austin American-Statesman*, Nov. 7, 1989, at E1 & 8.

243. The hypothetical was inspired by dictum in *Ledsinger v. Burmeister*, 114 Mich. App. 12, 19 n.2, 318 N.W.2d 558, 562 n.2 (Mich. Ct. App. 1982):

Indeed, words that generally refer derogatorily to racial or ethnic classes may, in some instances, not even rise to the level of insult. For example, I may refer to one of my colleagues by way of ethnic slang without any intended or resulting slur, insult or vilification. Rather, that remark would instead express the warmth and admiration I feel for that colleague, and would proudly acknowledge that persons of different ethnic origins can work together and engender mutual respect.

244. The hypothetical was inspired by *Lay v. Roux Laboratories, Inc.*, 379 So. 2d 451 (Fla. Dist. Ct. App. 1980) (complaint dismissed).

245. The hypothetical was taken from the facts in *Irving v. J.L. Marsh, Inc.*, 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977) (complaint dismissed; affirmed).

Shifting the focus of litigation in discriminatory speech cases from the issue of extreme and outrageous conduct to the issue of intent will be beneficial in at least two respects. First of all, if the legislature has enacted an antidiscrimination statute, it will be more appropriate to exonerate the defendant from liability on the ground that the defendant did not intend to cause severe emotional distress than on the ground that the defendant's conduct was not extreme and outrageous. Second, if the defendant raises a first amendment defense, the plaintiff's state court judgment will be more apt to withstand constitutional scrutiny if the court has made a factual finding regarding the defendant's intent to cause severe emotional distress.<sup>246</sup>

The effect of shifting the focus of litigation from the issue of extreme and outrageous conduct to the issue of intent may be illustrated by reference to *Gaiters v. Lynn*.<sup>247</sup> Loretta Lynn was sued for intentional infliction of emotional distress by a black man whose security assignment required him to remain in one spot at the foot of the stage throughout the defendant's concert in the Richmond, Virginia Coliseum. At one point during the concert, Lynn spotted Gaiters, asked him to stand, and said: "If you people don't know what coal looks like, here is somebody who knows what coal is all about. . . . Black is beautiful, ain't it honey."<sup>248</sup> These comments drew a laugh from the audience, and after the concert, the plaintiff became the object of jokes and was called "coal miner's daughter" by his peers.<sup>249</sup>

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246. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). For discussions of the impact of the first amendment on the tort of intentional infliction of emotional distress, see LeBel, *Emotional Distress, The First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315 (1989); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423 (1988); Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

For discussions of the impact of the first amendment on civil or criminal actions for racist or sexist speech, see K. GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 141-57, 287-313 (1989); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, ch. 12 (2d ed. 1988); Balkin, *Some Realism About Pluralism: Deconstructive Approaches to the First Amendment* (forthcoming in DUKE L.J.); Delgado, *Words That Wound*, *supra* note 1; Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); Heins, *supra* note 1; Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Lawrence, *When Racism Dresses in Speech's Clothing: Reconciling the First and Fourteenth Amendments* (forthcoming in DUKE L.J.); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Strauss, *Sexist Speech in the Workplace* (forthcoming); Wolman, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U.L. REV. 245 (1988); Wright, *Racist Speech and the First Amendment*, 9 MISS. C.L. REV. 1 (1988); *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337 (1988/89).

247. 831 F.2d 51 (4th Cir. 1987).

248. *Gaiters v. Lynn*, 831 F.2d 51, 52 (4th Cir. 1987).

249. *Id.*



The trial court ruled as a matter of law that the plaintiff had failed to allege "extreme and outrageous" conduct and dismissed the complaint.<sup>250</sup> The appellate court affirmed based upon the following analysis:

Whether particular conduct arguably involving racial slurs and innuendo meets this stringent test of outrageousness has presented particularly difficult and sensitive questions for courts. Racial allusions do not fall *per se* on either side of the line. As with other admittedly hurtful conduct, racial allusions may be found not actionable as at worst "mere insult," or actionable as "intolerably atrocious conduct," depending upon the context. . . .

We are therefore left essentially to our own independent legal judgment in freely reviewing the district court's dispositive determination. . . .

Exercising that judgment, we agree with the district court. In explanation, we identify the principal factors that for us tip the scales in the direction of, at most, "mere insult". . . .

First, in context, the remarks, while calling attention to Gaiter's race, particularly his blackness, are not manifestly disparaging or demeaning of either race or color. The words spoken contained none of the shameful, explicit racial epithets that sadly still afflict some segments of our society and whose well understood, traditional, unmistakable purpose has been to disparage, to demean, to humiliate and to hurt. Neither did the words in context convey the suggestions of incompetence or inferiority sometimes evident in sly innuendo or specific references to race or color. Indeed, the words are as susceptible on their face to suggestions of friendly identification of speaker with subject in their common backgrounds of hard work and humble origins, as to any attempt to disparage or demean. And we simply cannot say that the phrase "black is beautiful," though celebratory on its face, was converted by its context here to the sort of mean-spirited humiliation that might be considered an atrocious affront to accepted standards of decency. [Citations omitted.]<sup>251</sup>

Under my proposed presumption, the court would not be allowed to dismiss the complaint on the ground that the plaintiff failed to allege "extreme and outrageous conduct." That question would be preserved for the finder of fact. The issue then would shift to the question of whether Loretta Lynn spoke for the "purpose" of inflicting severe emotional distress or, alternatively, knew that such distress was "substantially certain" to result.<sup>252</sup> The critical question of intent would present a question of fact

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250. *Id.* at 53.

251. *Id.* at 53-54.

252. Intent under my proposal would be defined by Section 8A of the RESTATEMENT (SECOND) OF TORTS (1965).

that could not be resolved on a motion to dismiss the plaintiff's complaint.<sup>253</sup> Instead, the case would have to go to a summary judgment proceeding or to a trial on the issue of intent.<sup>254</sup> The plaintiff would be allowed to submit evidence regarding the surrounding circumstances that would permit a reasonable juror to find that Loretta Lynn "must have known" that her words would cause severe emotional distress. The defendant would be allowed to deny that she intended any harm. And the factors identified by the appellate court, including the context in which the words were spoken, would become relevant to the final determination of whether Loretta Lynn had the requisite intent.

Generally speaking, in a case involving the utterance of an explicit racial, ethnic, or religious epithet, intent will be a relatively easy issue to resolve. In a case involving an ambiguous communication, such as the words spoken by Loretta Lynn, intent will be a highly controverted issue, and one that will be relatively difficult to resolve.<sup>255</sup> The parties will have to prove all of the facts and circumstances surrounding the communication of the allegedly outrageous message. In deciding the question, the trier of fact will have to pay particularly close attention to the context in which the message was delivered to the plaintiff.

Cases involving sexual propositions will raise particularly difficult questions regarding intent. Ordinarily, of course, the utterance of a request for sexual intimacy will not entail an intent to cause severe emotional distress. Rather, such a request will be spoken with an intent to initiate a sexual relationship. Indeed, depending upon the context, repeated sexual propositions might not even evidence an intent to cause severe emotional distress.<sup>256</sup> They simply might reflect a particularly persistent desire to initiate a sexual relationship. At some point, however, a pattern of repeated, rejected sexual propositions will become actionable in tort.

Although it will be easier to prove intent to cause severe emotional distress if the plaintiff can show a pattern of sexual propositions or epithets, it should not be necessary to prove such a pattern in order to establish liability under Section 46. Rather, if a plaintiff proves that a single sexual proposition or epithet was communicated with intent to cause severe emotional distress, the plaintiff should be entitled to establish the remaining elements of liability under Section 46.<sup>257</sup>

Cases involving the communication of pornographic messages also may raise difficult issues regarding intent. Sometimes the defendant will have no intent to cause severe emotional distress. For example, a manager might give a worker a "sexually explicit" or "pornographic" gift as part of a

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253. I am assuming that the issue of intent has been properly pleaded in the plaintiff's complaint.

254. Of course, if all reasonable jurors would decide the case in the same way on the evidence submitted, the court could enter a directed verdict on the issue of intent.

255. See *supra* text accompanying notes 247-51.

256. For example, the recipient may never have explicitly rejected any of the propositions.

257. See *supra* text accompanying note 161.

one-time sexual proposition and claim that the gift was intended to make the proposition more attractive.<sup>258</sup> Or a supervisor might post a picture of a naked woman in his locker and claim that he did not intend to communicate a pornographic message to anyone. By contrast, if the supervisor were to post the same picture on the wall in his office, a court could find that he acted with the intent to cause severe emotional distress to any woman subject to his supervision.<sup>259</sup>

### C. Severe Emotional Distress

Section 46 of the Restatement (Second) of Torts recognizes a cause of action for intentional infliction of emotional distress only if the plaintiff's distress is "severe." And distress is regarded as "severe" only when the distress is "so severe that no reasonable man could be expected to endure it."<sup>260</sup> The "extreme and outrageous character" of the defendant's conduct is in itself "important evidence that the distress existed."<sup>261</sup>

The application of these principles to actions for discriminatory speech can best be illustrated by a sequence of cases brought by black men for intentional infliction of emotional distress. In *Irving v. J.L. Marsh, Inc.*<sup>262</sup> the plaintiff was a black student who returned merchandise to the defendant's store. In order to obtain a refund, he was required by the defendant's salesman to sign a slip on which the salesman had written the following notation: "Arrogant nigger refused exchange—says he doesn't like products."<sup>263</sup> The court dismissed the plaintiff's complaint on the ground that the defendant's conduct did not possess the "degree of severity" that is necessary to establish a cause of action for intentional infliction of emotional distress.<sup>264</sup> The case illustrates the interrelationship between the nature of the defendant's conduct and the nature of the plaintiff's harm. One cannot tell from reading the court's opinion whether the complaint was dismissed due to a lack of "extreme and outrageous conduct" or due to a lack of "severe emotional distress." The two concepts have become inextricably intertwined in the statement of the court's holding.

In *Alcorn v. Anbro Engineering, Inc.*<sup>265</sup> the plaintiff was a black man employed as a truck driver by the defendant. The plaintiff, a member of the Teamster's Union, told his boss that, in his capacity as shop steward, he had told another Anbro employee that he should not drive a certain truck to the job site. The plaintiff's boss shouted at the plaintiff in a "rude and insolent" manner: "You goddam 'niggers' are not going to tell me

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258. See *Clay v. Advanced Computer Applications, Inc.*, 370 Pa. Super. 497, 536 A.2d 1375 (Pa. Super. 1988).

259. *Barbetta v. Chemlawn Serv. Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987).

260. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

261. *Id.*

262. 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977).

263. *Irving v. J.L. Marsh, Inc.*, 46 Ill. App. 3d 162, 164, 360 N.E.2d 983, 984 (1977).

264. *Id.* at 167, 360 N.E.2d at 986.

265. 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

about the rules. I don't want any 'niggers' working for me. I am getting rid of all the 'niggers'; go pick up and deliver that 8-ton roller to the other job site and get your pay check; you're fired."<sup>266</sup> The defendant moved to dismiss the complaint on the ground that the plaintiff, as a truck driver, "must have become accustomed to such abusive language."<sup>267</sup> In other words, the defendant sought to avoid liability on the ground that the plaintiff, as a tough truck driver, could not prove the fact of emotional distress. Although the court refused to dismiss the complaint, the court did note that the plaintiff's "susceptibility to racial slurs" would be a question for the trier of fact.<sup>268</sup> Thus, in order to recover damages for intentional infliction of emotional distress, the plaintiff in *Alcorn* was required to prove that he in fact had suffered mental anguish.

The truck driver in *Alcorn* probably was able to prove emotional distress at the trial because he alleged that he had become "sick and ill for several weeks thereafter, was unable to work, and sustained shock, nausea and insomnia."<sup>269</sup> But not all victims of racial discrimination who have alleged emotional distress have sustained such resulting physical manifestations. For example, in *Gray v. Serruto Builders, Inc.*<sup>270</sup> a black man was told politely that no apartment was available, and the defendant then rented an apartment to a white couple the very same day.<sup>271</sup> The court awarded only \$500 in damages because the testimony did "not persuade" the court that the plaintiff had sustained a legal injury for which substantial damages should be awarded.<sup>272</sup> The court said that the plaintiff's inability to persuade the court that he was entitled to substantial compensatory damages was "a tribute to the plaintiff himself."<sup>273</sup> The judge went on to explain that the plaintiff had taken advantage of his educational opportunities to become a minister and that he was a "man not likely to be bowled over by a single set-back."<sup>274</sup> The court drew an analogy to torts involving "bodily force," in which "a blow hard enough to injure seriously an aged or frail person . . . might be borne by a strong man with no bad effects beyond a temporary, though painful, bruise."<sup>275</sup> The court concluded: "I think plaintiff's position in this case is that of the strong man, not that of the weakling."<sup>276</sup>

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266. *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 496-97, 468 P.2d 216, 217, 86 Cal. Rptr. 88, 89 (1970).

267. *Id.* at 498-99 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.

268. *Id.*

269. *Id.* at 497-98, 468 P.2d at 217, 86 Cal. Rptr. at 89.

270. 110 N.J. Super. 297, 265 A.2d 404 (1970).

271. *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 302, 265 A.2d 404, 407 (1970).

272. *Id.* at 318, 265 A.2d at 416.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* For another case in which a black plaintiff, this time a woman, was denied a substantial sum of money because the plaintiff was a "strong" person, see *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P.2d 859 (1959).

Thus, if a "tough" or "strong" person is the victim of discriminatory speech, that person may well find it difficult to prove the fact of emotional distress. Nevertheless, that person has sustained a real harm. That person has experienced "the kind of hurt that happens on a level that can't even produce tears, because it's much farther down than that."<sup>277</sup> I will call that type of hurt "dignitary harm."

I would recommend that the concept of "severe emotional distress" be expanded to encompass the concept of dignitary harm. I also would recommend that plaintiffs who bring intentional infliction of emotional distress actions for "dignitary harm" be allowed and encouraged to speak in their own voices about the nature of that very serious harm. If these recommendations are adopted, stoic victims of discriminatory speech will not be barred automatically from recovering damages by their inability to show that they "fell apart." Instead, judges and juries will have the opportunity to listen to these plaintiffs empathetically and then assess damages in accord with the very real hurt that these plaintiffs have sustained. For example, if the black lawyer in *Wiggs*<sup>278</sup> had been allowed to speak in his own voice about the indignity of being called a "black son-of-a-bitch" in front of his family as he was celebrating his graduation from law school and sitting for the bar exam, he might have been able to describe the harm more accurately than when he was confined to the language of severe emotional distress. And if the trial court judge had heard him describe the pain that goes deeper than tears, the judge might not have reduced the jury's total verdict from \$25,000 to \$2,500 dollars.<sup>279</sup>

#### CONCLUSION

In this article I have written a critique of Section 6-103 of the Model Communicative Torts Act. Contrary to the representations of the drafters of the Model Act, I have found that Section 6-103 is more restrictive than the common-law tort of intentional infliction of emotional distress in vindicating the rights of the victims of discriminatory speech. In particular, the Model Act requires proof of a "pattern of communication," while tort

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277. The quote is taken from an interview with Claudia Pryor, an ABC news producer who supervised the shooting of the 1989 television documentary "Black in White America." She was describing her reaction as she watched young black children in Atlanta take the "doll test." The children were shown pictures of identically dressed children, one white, one black, and they were asked to pick the pretty one, the ugly one, the clean one, the dirty one, the smart one, the stupid one. Claudia Pryor said:

The tests deeply disturbed me. . . . It was the kind of hurt that happens on a level that can't even produce tears, because it's much farther down than that. [Had I been asked the same questions as a child,] I know I would have picked the white girl. I'm sure I would have wanted the long, straight, blond hair. Doing this segment made me realize how damaged I was, how damaged I am.

Carter, *Black Americans Hold a TV Mirror Up To Their Life*, N.Y. Times, Aug. 27, 1989, § 2, at 1, col. 2.

278. See *supra* text accompanying notes 42-48.

279. See *supra* text accompanying note 53.

law allows recovery for an isolated incident of discriminatory speech. Furthermore, the Model Act restricts the recovery of damages to plaintiffs who were harassed on the basis of race, sex, ethnicity, or religion, while tort law permits recovery by a broader class of victims. Therefore, as an alternative remedy, I have recommended the codification or retention of Section 46 of the Restatement (Second) of Torts with certain modifications designed to ensure that Section 46 will provide adequate protection for all victims of discriminatory speech.

My modest proposal addresses only the tort of intentional infliction of emotional distress. It does not consider actions for group libel, nor does it discuss the criminal or administrative regulation of discriminatory speech. I have chosen to focus on the tort of intentional infliction of emotional distress because I believe that the cause of action is well suited to vindicate the rights of the victims of discriminatory speech.

My discussion of the historical development of the tort of intentional infliction of emotional distress demonstrates that courts generally are unwilling to impose tort liability for discriminatory speech until an individual presents clear evidence that society in general disdains such speech. For example, courts often look to the sentiments of a majority of society to determine whether the particular insult in the case before the court constitutes sufficiently outrageous conduct under the common law. Now that the civil rights movement has given us antidiscrimination legislation, society has spoken with regard to its sentiments about the inappropriateness of particular types of discriminatory action. The existence of antidiscrimination legislation can serve as a basis for the courts to tailor the cause of action for intentional infliction of emotional distress to meet the needs of the victims of discriminatory speech.

I have suggested two modifications of existing tort law. First, I have recommended the recognition of a rebuttable presumption that certain categories of discriminatory speech constitute extreme and outrageous conduct. Specifically, such a presumption would arise whenever a member of a group protected by existing antidiscrimination legislation claims that he or she verbally was harassed or abused on the basis of membership in that group. The adoption of this proposal would make it easier for members of minority groups to recover damages under the majoritarian test of "outrageousness." It also would put the spotlight on the issue of intent. Second, I have proposed that the concept of "severe emotional distress" be expanded to encompass the concept of dignitary harm. The adoption of this proposal would allow even the stoic victims of discriminatory speech to recover damages for the hurt that they have experienced.

I have not addressed the first amendment issues raised by my proposal. That is a topic for another article. Fortunately, Professor Smolla has written a piece for this Symposium on the constitutionality of regulating racist and sexist speech. I believe that my proposal is consistent with the guidelines set forth in the conclusion of Professor Smolla's article.

