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#civilrightscybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media

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#CIVILRIGHTSCYBERTORTS: UTILIZING TORTS TO COMBAT HATE SPEECH IN ONLINE SOCIAL MEDIA

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"The Nigger scores again we riot #JoelWard"—brendmaitland 25/Apr/2012 07:41:41 PM PDT

"Nigger I hope you get hung #pusssy #bruinsbitch"—RealSteezyDubz 25/Apr/2012 07:26:53 PM PDT

"Fucking stupid arrogant, smelly, useless, waste of life, sad excuse for a NHL hockey playing NIGGER!!!!"—Grizzlymarshall 25/Apr/2012 07:32:18 PM PDT[1]

These tweets are only a few examples of many posted to Twitter after African-American Washington Capitals winger Joel Ward scored the game-winning goal in overtime against the Boston Bruins in game seven of the first round of the 2012 NHL Stanley Cup Playoffs.[2] Hate speech like this is not uncommon on Twitter,[3] and is not limited to public figures.[4] Nor is it limited to Twitter, as when college students attacked a Hispanic student via Facebook, threatening "to come find [him] and drag [him] behind [their] (expletive) car."[5] The rise of Twitter and Facebook provide new and unique forums through which individuals can target other individuals and spread hate, fear, and intimidation. The damage caused by social media hate speech is not trivial and can cause

* For PaPa, who inspired me to fight for justice when the scales are tipped; for Grandpa, who instilled in me the bravery to explore the darkness; for Pops, who trained me to practice the law with integrity; for Mama, whose love and support gives me the confidence to speak loudly; for Heather, who taught me to search for justice in love and compassion; and for Jake, whose light of life always leads me out of the darkness when I need to rest. I would like to thank Hannah Brooks for her help with the idea for this article, the editors of this article for their guidance, Professor Bryant for his advice on my constitutional law analysis, and Stu MacDonald for his patience and general awesomeness as a roommate. Any and all errors are attributable to the author alone.

1. robbercat, *Bruins Fans Calling Joel Ward the N-Word*, CHIRPSTORY (Apr. 25, 2012, 8:19 PM), http://chirpstory.com/li/6781#.

2. *Id.*

3. *See, e.g.*, Ugonna Okpalaoka, *Map Shows South Has Most Racist Post-Election Obama Tweets*, THE GRIO (Nov. 12, 2012, 4:46 PM), http://thegrio.com/2012/11/12/map-shows-south-has-most-racist-post-election-obama-tweets/ (reporting on the racist tweets posted after Barack Obama won the 2012 election).

4. The requirement that plaintiffs in defamation suits arising out of public speech must present proof of malice is presumed irrelevant here, both because most victims will be private figures and because racial epithets and hate speech against individuals do not address matters of public concern. *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 109–11 (2009).

5. *Id.* at 79 (internal quotation marks omitted).

serious physical, emotional, and economic harm to victims.

This Comment explores if, and how, tort law can be utilized to provide remedies to victims of social media hate speech. Proceeding under the belief that racial insults should have no First Amendment protection,[6] the Comment will examine how social media facilitates hate speech and the extent to which tort law has evolved to combat this malicious communication. It will address how torts can be used to combat three of the four major types of hate speech proscribed by governments: slurs against racial, religious, ethnic, or LGBT groups; incitement to racial, religious, ethnic, or LGBT violence; and hostile work or educational environments for racial, religious, ethnic, and LGBT minorities.[7] Although this author is unaware of any cases in which tort claims have been utilized to combat hate speech through social media, tort law may provide a unique mechanism for combating these novel assaults.

Part II of this Comment offers a background to Facebook and Twitter and the use of hate speech in social media. Part III provides an overview of the jurisprudence of Internet tort law and discusses the challenges of pursuing social media litigation, including the availability and limitations of damages. It then analyzes the practical viability of social media hate speech claims and provides a recommendation for legislatures to improve victims' access to civil remedies. Part IV discusses possible causes of action that can be utilized to sue individuals

6. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 172–79 (1982). Additionally, under international law, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires that states "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin . . . ." International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art. 4, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969). While the United States has signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the Senate made the following reservation upon ratification: "the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under article[] 4 . . . to restrict those rights . . . to the extent that they are protected by the Constitution and laws of the United States." *Status of Ratification, Reservations, and Declarations of the International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION (July 26, 2013, 7:36 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

7. *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 539 (2006). The article will only focus on hostile work and educational environments to the extent that social media hate speech can be used to detract a customer base from a minority's business and how it can be used to prosecute parents of students. It will not, therefore, address hostile work environment claims or school-related claims that will usually require more evidence than only social media speech. The fourth major type of hate speech, historical revisionism of events that affected religious or racial groups, is not addressed, as it usually does not target specific individuals, and is therefore not apt for a tort-based approach.

for social media hate speech and provides an analysis of the ability of each claim to combat social media hate speech using the hate speech tweets targeting Joel Ward as a case study. It then offers recommendations for legislation that would provide causes of action to combat social media hate speech. Finally, Part V concludes by discussing the law's potential to combat hate speech in social media.

II. BACKGROUND TO SOCIAL MEDIA AND INTERNET HATE SPEECH

A. Twitter and Facebook

In the past decade, the use of social media services has expanded tremendously within American society, impacting nearly every American's life and providing a new forum for interpersonal communication. Facebook and Twitter's unique structures, though, individualize, publicize, and facilitate hate speech to an extent that impacts the victims of hate speech more than other communication forums.[8] Present laws were not constructed to address social media, which has provided a completely new forum for speech.[9]

Facebook is a social networking service founded in 2004 that has expanded to over a billion monthly users, around twenty percent of whom are in the United States or Canada.[10] Facebook allows individual users to create their own web page that includes their own personal profile and a "wall." Users can post messages on other users' walls that can be seen by third party users, subject to privacy settings, and users can also send private messages.

Twitter is a real-time social networking service that allows individuals to create a personal profile and send 140-character long "tweets."[11] Tweets are then posted to the writer's profile, and users who "follow" the original writer will see those tweets in their Twitterfeed.[12]

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8. *See* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1105–06, 1112 (2011) ("Online abuses . . . disproportionately affect 'traditionally subordinated groups,' which include . . . minorities.") ("Cyber-attackers can utilize the Internet to harass their victims on a scale never before possible because of both the immediate effect of their conduct, and the speed and ease of the global dissemination of online information.").

9. *See* Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 19 (2011) ("[T]weeting and blogging are now more regularly replacing the face to face communications that so frequently occurred during the time of slander's origin.").

10. *Company Info*, FACEBOOK NEWSROOM, http://newsroom.fb.com/company-info/ (last visited May 19, 2014).

11. *About Twitter*, TWITTER, http://twitter.com/about (last visited July 15, 2013).

12. *Posting a Tweet*, TWITTER, http://support.twitter.com/articles/15367-how-to-post-a-twitter-update-or-tweet (last visited May 19, 2014); *FAQs About Following*, TWITTER, http://support.twitter.com/groups/52-connect/topics/213-following/articles/14019-faqs-about-following (last visited May 19, 2014).

Although users can delete their own tweets, they cannot delete other users' tweets.[13] Tweets can also contain hashtags (#) followed by a keyword or topic that will place the tweet in that hashtag category.[14] By clicking on a hashtag link, a user will see all messages containing that hashtag, and popular subjects become "trending topics."[15] Users can also "mention" other users by typing "@username" in their text.[16] Although mentions do not appear on the mentioned-user's profile page, users will see any mentions posted by a user they follow, and anyone can search and view all tweets mentioning a certain user.[17] Thus, a comment about an individual can be broadcast to thousands of people's Twitterfeeds, and those users can then rebroadcast it if they wish. Both Twitter and Facebook allow users to block other individuals, but the practical implications of blocking are limited.[18]

B. The Uniquely Public Targeting Nature of Facebook Posts and Twitter Tweets

The individualization of the Internet and social media through Facebook and Twitter has created a new forum for communication in America. Social media websites are public, like newspapers, as well as targeted and individualized, like letters. They also differ from traditional Internet chat rooms in that individuals' families and friends are more likely to be present on Twitter and Facebook. While social media networks provide greater interpersonal connectivity, they also provide electronic forums where users can individually and publicly

13. *Posting a Tweet*, *supra* note 12.

14. *Using Hashtags on Twitter*, TWITTER, http://support.twitter.com/articles/49309-using-hashtags-on-twitter (last visited May 19, 2014).

15. *Id.*

16. *What Are @replies and Mentions?*, TWITTER, http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/14023-what-are-replies-and-mentions (last visited May 19, 2014).

17. *Id.*

18. Blocked Twitter users cannot: (1) add the blocker's Twitter account to their list; (2) have their mentions or @replies shown in the blocker's mention tab (although these Tweets can still appear in a search); (3) follow the blocker; (4) see the blocker's profile picture on their profile page or in their timeline; or (5) tag the blocker in a photo. Because Tweets may still appear in a search and because of Twitter's reluctance to take down posts, Tweets remain available to the public indefinitely regardless of the harm they cause to a user. *Blocking People on Twitter*, TWITTER, http://support.twitter.com/articles/117063-blocking-people-on-twitter (last visited May 19, 2014). Blocking users on Facebook prevents the blocked user from viewing things the blocker shares on his or her timeline or tagging the blocker in posts or photos. Similar to Twitter, though, a Facebook block "may not prevent all communications or interactions, such as in apps or groups, and only affects your experience on Facebook, not elsewhere on the web." *Blocking People*, FACEBOOK, http://www.facebook.com/help/290450221052800/ (last visited May 19, 2014). Thus, if a Facebook group page is open to the public, blocked users may still post damaging remarks regarding blockers. Additionally, blocked users may still post remarks regarding the blocker on their own Facebook walls.

target other users. As the Supreme Court has noted: "Through the use of chat rooms, any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[19] Unlike traditional chat rooms and webpages, however, new social media provides direct access to victims' families, friends, employers, and clients.

C. The Public and Temporal Nature of the Social Media Forum

The geographic and temporal nature of the Internet enables messages to be broadcast across the world and engraved in the cyber realm until the user or the network voluntarily takes, or is compelled to take, the messages offline.[20] Sending messages is free and extremely easy. Facebook posts and Twitter tweets can be seen instantaneously by individuals all over the world, and, perhaps worse, by all members of an individual's local community. The size of the audience means the message reaches more people, which increases the chance of violent reactions[21] in addition to providing a larger audience to embarrass the victim. Likewise, by "friending" or following users, Facebook and Twitter also allow community building and organizing, which in turn facilitates group and localized violence.[22] Moreover, the "one-to-many" effect of social media websites and the lack of face-to-face contact causes speakers to be less restrained in their speech, while the moderating and rationalizing effect of the crowd on the speaker and listener is also absent.[23]

Facebook and Twitter have different policies for addressing and removing hate speech. Facebook is proactive in self-censoring anti-Semitic speech and will remove posts upon user and government requests.[24] Twitter, on the other hand, does not address user complaints regarding anti-Semitic hate speech, and is often uncooperative with governments.[25] Hate speech posts and tweets therefore remain accessible to a global community until the user or the social media website's company decides to remove them. This means that hate

19. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

20. *See* Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 148–50 (2011) (discussing the geographical contextual dislocation and spatial/temporal dimensions of social media, and the impact on users).

21. *Id.* at 149.

22. *Id.*

23. *Id.* at 149–50.

24. Nathan Guttman, *When Hate Speech Hits Social Media*, THE JEWISH DAILY FORWARD (June 4, 2012), http://forward.com/articles/157134/when-hate-speech-hits-social-media/?p=all.

25. *Id.*

speech continues to affect victims long after they "turn off" the computer or quit the social networking site.[26]

D. The Dangers of Internet Hate Speech

The purposes and types of hate speech in social media also differ from user to user. Users have posted hate speech to express political ideas, as when Twitter exploded with hate speech following some of President Obama's public addresses.[27] Hate speech can be used to target, insult, intimidate, or harass individuals, like the tweets attacking Joel Ward.[28] Hate speech on social media websites has been used to threaten groups or individuals and to intimidate them from engaging in certain activities,[29] such as the Facebook post threatening the Hispanic student,[30] as well as to incite hatred and even mass violence.[31]

Hate speech has a profoundly negative effect on victims and "can cause mental, emotional, or even physical harm to [its] target, especially if delivered in front of others or by a person in a position of authority."[32] Victims suffer immediate mental and emotional distress, and hate speech's ability to stir up and intensify previous stigmatization can cause long-term psychological harm.[33] Physical symptoms include "fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[34] Hate speech can cause victims to reject their identities and disassociate with other members of the victim-group.[35] Attacks can force victims to stop

26. Lipton, *supra* note 8, at 1113.

27. *'Take that N*gger Off TV': Racist Tweets Unleashed During President Obama's Sandy Hook Vigil Speech*, HUFFINGTON POST (Dec. 17, 2012, 2:47 PM), http://www.huffingtonpost.com/2012/12/17/take-that-nigger-off-tv-racist-tweets-obama_n_2317185.html.

28. robbercat, *supra* note 1; Citron, *supra* note 4, at 78–79.

29. Although not race-related, Hal Turner, a blogger and radio talk show host, was convicted of threatening to assault or murder three federal judges when he posted on his blog that they "deserved to be killed" for upholding a hand-gun ban and posted their photographs, phone numbers, work addresses, and room numbers. Lidsky, *supra* note 20, at 157 (internal quotation marks omitted).

30. *See supra* text accompanying note 5.

31. After the pastor Terry Jones issued a tweet declaring September 11, 2010, "Int[ernational] Burn a Koran Day," violent reactions in Afghanistan resulted in at least thirty deaths. Lidsky, *supra* note 20, at 150.

32. Delgado, *supra* note 6, at 143 (footnotes omitted).

33. *Id.* at 146.

34. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989). *See also* Kwiatkowski v. Merrill Lynch, No. L-1031-04, 2008 WL 3875417, at *5–6 (N.J. Super. Ct. App. Div. Aug. 13, 2008) (noting that a gay plaintiff experienced "panic attacks, sleeplessness, nightmares, depression, upset stomach, loss of appetite, shortness of breath, chest pain, weakness, and emotional instability" and was diagnosed with posttraumatic stress disorder after being called a "stupid fag").

35. Matsuda, *supra* note 34, at 2337.

using their online accounts, affecting both their ability to communicate[36] and their First Amendment right to freedom of speech and association. The large scale, immediate, and constant effects of social media communication exacerbate these harmful effects.[37]

The ability of social media communication to arouse anger and action against targets means that hate speech spread on Facebook and Twitter has a particularly acute ability to affect victims' employment. Hate speech targeting an individual or business's Facebook or Twitter account can lead to the user abandoning the use of social network sites, thereby decreasing access to a potential customer base.[38] It can suggest incompetence or conflict that could deter potential employers or customers, which can impact reputations permanently.[39] In short, social media hate speech can have seriously negative physical, emotional, and economic effects on victims.

III. CYBER-TORT HURDLES

A. Identity of Defendant

With the use of social media websites spreading faster and users being more willing to share intimate knowledge, Facebook and Twitter are vast depositories of personal information. This means litigation connected with social media websites involves serious privacy issues. Facebook and Twitter users can mask their identities using anonymous or pseudonymous profiles, and Facebook and Twitter have protocols to protect against the disclosure of users' identities.[40] Therefore, discovering the identity of anonymous users may pose the first hurdle in hate speech cyber litigation.

Unmasking perpetrators is not impossible, though, and at least two courts have ordered service providers to release the identities of users asserting defamatory statements about another user, while several others have considered the issue.[41] Anonymity, therefore, does not appear to

36. Citron, *supra* note 4, at 62.

37. Lipton, *supra* note 8, at 1112.

38. Citron, *supra* note 4, at 64, 80.

39. *Id.* at 62, 80.

40. Facebook will release private information in response to legal requests when it has a "good faith belief" that it is required to do so by law. *Data Use Policy, Some Things You Need to Know*, FACEBOOK, https://www.facebook.com/about/privacy/other (last visited May 9, 2014); Twitter will release private information when in believes it is "reasonably necessary" to comply with the law or legal request. *Twitter Privacy Policy*, TWITTER, http://twitter.com/privacy (last visited May 9, 2014).

41. *See* Doe I v. Individuals, 561 F. Supp. 2d 249, 257 (D. Conn. 2008) (When "the plaintiff has shown sufficient evidence supporting a prima facie case for libel," the plaintiff's interest in pursuing discovery "outweighs the defendant's First Amendment right to speak anonymously."); Cohen v.

be an insurmountable wall against discovery. Nevertheless, fake or pseudonymous accounts may still prevent liability when the user has provided false information to the social media website or service provider.

B. Jurisdiction

Asserting jurisdiction over defendants may also be problematic. In *Lyons v. Rienzi & Sons, Inc.*, the Eastern District of New York found that an Italian company's Facebook page alone does not constitute purposeful availment to satisfy New York's long-arm statute.[42] Thus, a Facebook profile does not mean the defendant has availed himself to every jurisdiction in the U.S. Whether posting social media messages about a user in another state would constitute personal availment is another question that courts have not answered.

Trials involving the Internet will often involve or be held in areas other than where plaintiffs live. The costs of discovery, including attempts to unmask anonymous defendants, could possibly make cases too costly to pursue, especially in distant jurisdictions.[43] Jurisdictional issues become even more difficult when one considers the limited number of judicial districts in which a social media hate speech cause of action is likely to succeed, which makes forum shopping crucial.[44]

C. Discovery

Once the identity of the defendant is revealed, additional discovery should not be difficult. In *Zimmerman v. Weis Markets, Inc.*, a Pennsylvania trial court ordered the plaintiff to provide the defendant with the plaintiff's password, username, and login names for all Facebook and MySpace accounts, indicating that privacy concerns do not protect information found on a social media website.[45] Access to defendants' accounts can, in turn, lead to identification of other victims.

Google, Inc., 887 N.Y.S.2d 424 (N.Y. Sup. Ct. 2009) (ISP ordered to disclose identity of blogger who made defamatory statements against plaintiff); *see also* Mallory Allen, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers*, 7 WASH J.L. TECH. & ARTS 75 (2011).

42. Lyons v. Rienzi & Sons, Inc., 856 F. Supp. 2d 501, 509 (E.D.N.Y. 2012).

43. Lipton, *supra* note 8, at 1131.

44. *See infra* Part IV.A–C.

45. Zimmerman v. Weis Mkts., Inc., No. CV-09-1535, 2011 WL 2065410 (Pa. Ct. Com. Pl. Northumberland Cnty. May 19, 2011). *See also* Patterson v. Turner Const. Co., 931 N.Y.S.2d 311 (N.Y. App. Div. 2011) (plaintiff's relevant Facebook information was subject to discovery despite the use of privacy settings).

D. Liability of Twitter and Facebook

Suing Twitter or Facebook for refusing to remove hate speech is precluded by § 230(c)(1) of the Communications Decency Act, which prevents treating any "provider or user of an interactive computer service . . . as the publisher or speaker of any information provided by another information content provider."[46] Thus, despite Twitter's lack of cooperation in removing anti-Semitic remarks from its service, the company cannot be held liable for any damage inflicted by those comments. When the actual speaker remains anonymous or lacks any monetary assets, a suit against a social media website does not provide an alternative and there may be no remedy available for the victim.[47]

E. Remedies and Limitations on Damages

Various remedies are available for victims of social media hate speech. Economic damages should be available to compensate victims for their physical and mental anguish.[48] Although these harms are often difficult to value,[49] expert testimony can be used to establish the mental and physical harm that hate speech can cause victims, while doctor and psychiatrist bills can also be used to substantiate damages. Punitive damages may often be available.[50] Economic damages caused to a plaintiff's business might be substantial, but difficult to prove without extremely detailed records. Attorney fees are available under some "Intimidation Based on Bigotry or Bias" statutes.[51] Equitable relief such as injunctions should also be sought to stop defendants from communicating about the victim on social media accounts.

Statutes may place limitations on damages. For example, Ohio Revised Code § 2307.70(B)(1), Ohio's "Intimidation Based on Bigotry or Bias" statute, caps parental liability at $15,000, costs, and attorneys' fees. States may also have other statutes that limit the amount of damages recoverable in certain tort actions.

There may be further constitutional limitations on recovery. In

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46. 47 U.S.C. § 230(c)(1) (2012).

47. Lipton, *supra* note 8, at 1133.

48. *See supra* Part II.D (providing examples of physical and mental harm).

49. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 102 (2003).

50. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").

51. *See, e.g.*, OHIO REV. CODE ANN. § 2307.70 (West 2013); CONN. GEN. STAT. ANN. § 52-571c(b) (West 2013). For more information on "Intimidation Based on Bigotry or Bias" statutes, see *infra* Part IV.C.1.

Snyder v. Phelps, the Supreme Court found that the First Amendment's protection of speech regarding matters of public concern precluded the Westboro Baptist Church from being found liable for intentional infliction of emotional distress or intrusion upon seclusion when it picketed a soldier's funeral.[52] The church members held offensive signs, including one labeled "God Hates Fags," and the Church posted an online account addressing the Snyder family directly.[53] Although not addressing social media, *Snyder* may present an obstacle to finding liability against social media users who intertwine political rants with hate speech, especially if the user does not direct the comment at another user.

F. Analysis of the Potentially Fruitful Tort Realm of Twitter and Facebook

Facebook and Twitter, recording billions of interactions between millions of citizens a day, have presented a brand new area of tort law. Hate speech, furthermore, has permeated social media. Serious and repeated incidents of hate speech directed at individuals will undoubtedly occur, and can cause serious economic, psychological, and physical harm. The ability of individuals to communicate to thousands of individuals at once means that the psychological harm caused by insults is severe, the economic harm caused by lost clients and employers is substantial, and the possibility of physical harm caused by mob violence is real.

Cyber torts provide both obstacles and opportunities for hate speech suits. Anonymity can usually be overcome through court orders, but can nevertheless present an insurmountable obstacle in some cases. Obtaining personal jurisdiction over the defendant could be challenging, and pursuing cases in inconvenient forums will be expensive. Proving damages may be difficult, but once established the damages could be high monetary sums. And while there are damage limitations in some situations, in most cases they will not completely prevent access to remedies. Although there are substantial obstacles, they will usually not make recovery in hate speech claims impossible.

Furthermore, e-discovery has unique benefits. If the case advances past the summary judgment stage, attorneys should utilize discovery to uncover potential clients whom the defendant has targeted, which could lead to new plaintiffs with supplemental causes of action against the same defendant. As *Zimmerman* demonstrates, courts are willing to

52. Snyder v. Phelps, 131 S. Ct. 1207, 1219–21 (2011).

53. *Id.* at 1225–26 (Alito, J., dissenting).

grant access to the other party's Facebook and Twitter accounts for discovery purposes, and the permanency of cyber communications means that allegations that the plaintiff is making false claims will be easy to rebut. Thus, the difficulties of cyber litigation should not prevent attorneys from pressing claims against perpetrators of hate speech in social media and may in fact provide promising opportunities to uncover evidence and new clients.

G. Recommendation to Facilitate Social Media Hate Speech Victims' Access to Civil Remedies by Amending the Communications Decency Act

Congress should amend the Communications Decency Act to permit server liability for refusing to remove hate speech.[54] Any abrogation to server liability, though, should be carefully restricted to hate speech in order to prevent censorship of legitimate free speech. Social media sites such as Twitter will be much more willing to take down offensive messages if it means they could be held liable for monetary damages.

IV. CYBER-TORTS AVAILABLE TO COMBAT HATE SPEECH

A. Intentional Infliction of Emotional Distress

1. Discussion on Intentional Infliction of Emotional Distress Claims Involving Hate Speech

Intentional infliction of emotional distress (IIED) offers a promising avenue for combating social media hate speech by providing a cause of action against "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another . . . ."[55] The cause of action may stand on its own[56] and a post or tweet that is "extreme and outrageous" and "intentionally or recklessly causes severe emotional distress to another" would create liability for its author.[57] Given the individualized nature of Facebook wall posts and Twitter mentions, social media hate speech is by definition a more personalized, and therefore intentional, infliction of distress.

The issue remains, though, whether the conduct is sufficiently outrageous. The Restatement (Second) of Torts notes that IIED "does

54. *See supra* Part III.D.

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

56. *Id.* § 46 cmt. b.

57. *Id.* § 46(1).

not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" so that there is "a safety valve . . . through which irascible tempers may blow off relatively harmless steam."[58] As such, IIED only extends to conduct that is "utterly intolerable in a civilized community."[59] However, Comment (f) states, "[t]he extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."[60]

IIED will generally cover severe threats[61] and has been successfully used in the past to combat online threats.[62] Thus, if a Facebook or Twitter post alleges serious and disturbing threats to a minority, an IIED claim will usually succeed.

The question is whether racial epithets and less-than-severe threats are merely harmless insults, or whether they target individuals who are peculiarly vulnerable due to some physical attribute. The answer will depend on the tribunal's perception of the hate speech—whether it is merely name-calling, or whether it invokes a history of hate that specifically targets and impacts a minority and should not be tolerated in civilized communities. Regrettably, most courts have found that racial slurs are "mere insults" and do not qualify as outrageous enough to sustain an intentional infliction of emotional distress cause of action.[63] For example, in *Bradshaw v. Swagerty*, a Kansas court of appeals found that "the trial court was fully justified in regarding the [racial] epithets complained of here as 'mere insults' of the kind which must be tolerated in our roughedged society."[64] Numerous federal courts have found that verbal racial epithets in employment or public situations do not amount to intentional infliction of emotional distress,[65] which reflect the many

58. *Id.* § 46 cmt. d.

59. *Id.*

60. *Id.* § 46 cmt. f.

61. *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 284–86 (Cal. 1952).

62. Citron, *supra* note 4, at 88.

63. *See, e.g.*, Adams v. Vertex, Inc., No. 04-01026 (HHK), 2007 WL 1020788, at *5 (D.D.C. Mar. 29, 2007) (internal quotation marks omitted).

64. Bradshaw v. Swagerty, 563 P.2d 511, 514 (Kan. Ct. App. 1977).

65. *See, e.g.*, Bongam v. Action Toyota, Inc., 14 Fed. App'x 275, 283 (4th Cir. 2001) ("Marcatili's single alleged utterance of the slur, standing alone, is not the sort of 'major outrage . . . essential to the tort' of IIED."); Walker v. Thompson, 214 F.3d 615, 628 (5th Cir. 2000) ("In the case at bar, although the appellee's racial harassment of the appellants may have been illegal . . . it does not rise to the level of extreme and outrageous conduct under Texas law."); Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (supervisor calling employee "wetback" and "Mexican" did not give rise to an intentional infliction of emotional distress claim); Watkins v. City of Southfield, 221 F.3d 883, 890 (6th Cir. 2000) ("The alleged use of a racial epithet gives us some pause, but we are satisfied that the district court did not err in granting summary judgment in favor of defendants on this claim."); Harris v. Sutton Motor Sales & RV Consignments Corp., 406 Fed. App'x

and various state courts that have come to similar conclusions.[66]

Nevertheless, several state courts have held that in an employment context, due to the special relationship between the employer and the employee, racial epithets do constitute intentional infliction of emotional distress. The Supreme Courts of Washington,[67] New Jersey,[68] and California[69] have held that racial epithets in the workplace can constitute intentional infliction of emotional distress. The Supreme Court of California noted the evolving connotations of racial biases, stating, "[a]lthough the slang epithet 'nigger' may once have been in common usage . . . [it] has become particularly abusive and insulting in light of recent developments in the civil rights' movement . . . ."[70] The Supreme Court of Washington similarly concluded: "[a]s we as a nation of immigrants become more aware of the need for pride in our diverse

181, 183 (9th Cir. 2010) ("Harris' claims fail because, although unquestionably offensive, the [racially charged] comments [complained of] do not amount to the required 'extraordinary transgression of the bounds of socially tolerable conduct.'"); Bouie v. Autozone, Inc., 959 F.2d 875, 877 (10th Cir. 1992) ("On this appeal we must hold that the evidence provided no basis for a cause of action for outrageous conduct [in] New Mexico . . . [because] the racial slurs relied on were not made to the plaintiff by the defendants, nor in his presence, nor within his hearing."); Vance v. S. Bell Tel. & Tel. Co., 983 F.2d 1573, 1574 n.2, 1575 n.7 (11th Cir. 1993) (finding that hanging a noose in the plaintiff's workspace did not constitute intentional infliction of emotional distress).

66. *See, e.g.*, Graham v. Guilderland Cent. Sch. Dist., 681 N.Y.S.2d 831, 831 (N.Y. App. Div. 1998) ("[The d]efendant's utterances[,] made during a frank classroom discussion of prejudice[] in an attempt to illustrate the hurtful nature of such comments, [are] not enough to trigger [an IIED] claim."); Lay v. Roux Labs, Inc., 379 So.2d 451, 452 (Fla. Dist. Ct. App. 1980) (defendant's use of racial epithets, including "nigger," against the plaintiff in an argument over a parking space does not reach the necessary level of outrageousness); Paige v. Youngstown Bd. of Educ., No. 93 C.A. 212, 1994 WL 718839, at *2 (Ohio Ct. App. Dec. 23, 1994) ("We do not dispute that racial slurs should be considered as part of Felton's overall conduct toward Paige. However, these comments alone do not rise to the level of conduct which went 'beyond all possible bounds of decency' or which was 'utterly intolerable in a civilized community.' As a matter of practicality, as part of living in our society, we must tolerate a certain amount of offensive expression.").

67. Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1177 (Wash. 1977) ("[A]ppellant's claim that he was subjected to intentional or reckless conduct on the part of respondent which was beyond all reasonable bounds of decency and caused him severe emotional distress by reason of acts of intimidation, demotions, humiliation in public and exposure to scorn and ridicule, when respondent's agents knew or should have known that by reason of his Mexican nationality and background he was particularly susceptible to emotional distress as a result of respondent's conduct, is within the parameters of the tort of outrage . . . .").

68. Taylor v. Metzger, 706 A.2d 685, 696 (N.J. 1998) ("In light of the potency of racial slurs and defendant's authority as sheriff, a jury could reasonably determine that defendant's conduct was extreme and outrageous.").

69. Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 499 (Cal. 1970) (footnote omitted) ("Although it may be that mere insulting language, without more, ordinarily would not constitute extreme outrage, the aggravated circumstances alleged by plaintiff seem sufficient to uphold his complaint as against defendants' general demurrer."); Agarwal v. Johnson, 25 Cal. 3d 932, 947 (Cal. 1979) ("Agarwal here presented substantial evidence that French's use of the racial epithet was outrageous and that French acted knowingly and unreasonably with the intention to inflict mental distress and abused his position to humiliate Agarwal and also to recommend Agarwal's termination for reasons that were not true.").

70. *Alcorn*, 2 Cal. 3d at 498 n.4.

backgrounds, racial epithets which were once part of common usage may not now be looked upon as 'mere insulting language.'"[71]

At least one state court has held that racial epithets alone and in a nonemployment situation can constitute intentional infliction of emotional distress, albeit in an unreported case. *Jones v. Hirschberger* involved a neighbor calling his African-American neighbor "nigger," "monkey," and "orangutan."[72] The Second District Court of Appeals for California found that, "[w]hile important, the distinction between the employment context and this case is not dispositive," and held that the cumulative impact of multiple racial epithets over a one year period could be considered outrageous by a trier of fact.[73] Thus, at least in California, a plaintiff may have an intentional infliction of emotional distress cause of action against another private individual for using racial epithets in a nonemployment context, such as a social media situation.

Religious harassment has not been found to be "outrageous" enough to satisfy an intentional infliction of emotional distress claim. In *Vaughn v. Ag Processing, Inc.*, the Supreme Court of Iowa found that a manager who called an employee "a 'goddamn stupid fuckin' Catholic'" and a different employee as "'[a]nother dumb Catholic,'" along with other comments denigrating Catholicism, did not constitute an intentional infliction of emotional distress claim.[74] The *Vaughn* court did not interpret religious harassment to constitute intentional infliction of emotional distress, but the case did not involve the use of a religious hate-epithet.

Courts are split as to whether homophobic slurs constitute a claim for intentional infliction of emotional distress. In *Moye v. Gary*, the Southern District of New York found that, in a private conversation, a supervisor calling a heterosexual employee a "fag" and "poor woman" in front of her daughter did not "go beyond all possible bounds of decency [as] to be regarded as atrocious and utterly intolerable in a civilized community."[75] In *Kwlatkowski v. Merrill Lynch*, however, the Superior Court of New Jersey found that a supervisor muttering "stupid fag" to a gay employee under her breath may constitute IIED because the plaintiff's psychiatrist had testified to the severe stress it had

71. *Contreras*, 565 P.2d at 1177.

72. Jones v. Hirschberger, No. B135112, 2002 WL 853858, at *3 (Cal. Ct. App. May 6, 2002) (internal quotation marks omitted).

73. *Id.* at *9.

74. Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 631, 636 (Iowa 1990).

75. Moye v. Gary, 595 F. Supp. 738, 739–40 (S.D.N.Y. 1984) (internal quotation marks omitted).

caused.[76] Whether or not a homophobic epithet can constitute intentional infliction of emotional distress may therefore depend on the victim's sexual orientation and the ability of the plaintiff to demonstrate emotional injury.

2. Analysis of Intentional Infliction of Emotional Distress Claims' Ability to Combat Social Media Hate Speech

Pursuing an IIED claim for targeted hate speech in social media is possible but will be very difficult without a serious, direct threat. It will also depend on the circumstances of the case and the jurisdiction of the court. While single tweets or messages are actionable, series of exchanges will provide a better showing of intent and the distress caused, as the court in *Jones* noted the multiple interactions between the neighbors over a year.[77]

The unique distress caused by the message may depend upon who sent the message, tags within the message, and the forum within Facebook or Twitter, such as whether a Facebook post was made on the plaintiff's wall, the defendant's wall, or within a special group page. Tagging a user means that not only will the victim see the message, but also that the victim's family and friends are much more likely to see the message as well, creating an increased potential for mental anguish. Posting hate speech in certain group pages, hate speech targeting a plaintiff's business's account, and social media hate speech by employers could all affect employment situations, and as *Contreras*, *Alcorn*, *Agarwal*, and *Taylor* highlight, if the post occurred in an employment context, an intentional infliction of emotional distress claim would be much more likely to state a cause of action. Thus, the manner the message was sent would affect the audience the message reaches, which in turn would have different effects on the damage caused to the victim and the outrageousness of the conduct.

Tweets or Facebook posts consisting of serious threats probably will constitute a claim of intentional infliction of emotional distress, and a single, serious threat may be enough evidence to provide summary judgment for the plaintiff. Less serious threats, however, probably will not, considering that one court has previously found that hanging a noose in a plaintiff's work place was insufficient to state a claim.[78] The tone of the threat and whether the wording is likely to incite readers to violence will determine whether the message is outrageous.

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76. Kwiatkowski v. Merrill Lynch, No. L-1031-04, 2008 WL 3875417, at *4, 18 (N.J. Sup. Ct. App. Div. Aug. 13, 2008).

77. *Jones*, 2002 WL 853858, at *9.

78. *See* Vance v. S. Bell Tel. & Tel. Co., 983 F.2d 1573, 1574 n.2, 1575 n.7 (11th Cir. 1993).

Messages containing only racial or religious hate speech, without serious threats, are only likely to succeed in California or a minority of other jurisdictions where courts have found that racial epithets alone can constitute intentional infliction of emotional distress. "Fag," however, may be sufficiently outrageous if it is made against a homosexual, as *Kwlatkowski* portrays. Barring the presence of a serious threat, therefore, an IIED claim for hate speech in social media is unlikely to have much case support. Social media, however, is a new forum, and notwithstanding the case law, plaintiffs should press the boundaries of what hate speech courts will find outrageous.

The hate speech tweeted by brendmaitland, RealSteezyDubz, and Grizzlymarshall would probably not constitute claims for intentional infliction of emotional distress in most jurisdictions outside of California, but they nevertheless present novel considerations for a tribunal. Both brendmaitland and RealSteezyDubz make "mere" threats, and the compounded effect of hundreds of these "mere" threats over Twitter may constitute an immediacy and distinctness that suffices to cause the same distress as one "serious" threat made in person. Brendmaitland added the hashtag "#JoelWard" to his post, meaning that any search for Joel Ward on Twitter can bring up that tweet, which could affect the immediacy of the threat and the distress caused. The employment context surrounding the tweets could also affect the level of distress caused by the tweet if Joel Ward experienced this hate speech every time he played an NHL game, as well as damages if Ward could show that the distress caused by the tweets affected his ability to play hockey.

A claim for intentional infliction of emotional distress against Grizzlymarshall is unlikely to be successful since it is a single, isolated racial epithet, does not contain a threat, and does not mention Joel Ward. Claims against brendmaitland and RealSteezyDubz for intentional infliction of emotional distress are also unlikely, but due to their unique context may constitute a claim in more progressive jurisdictions.

IIED claims against social media hate speakers should emphasize the public and indefinite nature of tweets and Facebook posts, how they target specific individuals, and their expanded audience. Plaintiffs should also analyze and expound the social media context of the comments at issue, including the audience the message could reach, as well as the relationship between the plaintiff and the defendant. Any threats or consequences to the victim's employment should be noted, as the negative effects of both are exacerbated by social media. Expert evidence presented by doctors, psychiatrists, and sociologists will be helpful in portraying how damaging hate speech can be, and can also establish damages.

Because of the reluctance of courts to find that racial epithets are outrageous, and the action's inapplicability to "mere threats," IIED plaintiffs outside of California face an uphill battle when asserting intentional infliction of emotional distress claims. Nevertheless, society's definition of outrageous conduct is constantly in flux. The Restatement (Second) of Torts specifically notes that the law of intentional infliction of emotional distress "is still in a stage of development" and that it "intended to leave fully open the possibility of further development of the law . . . ."[79] As the Washington Supreme Court stated in *Contreras*: "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."[80] Plaintiffs should bring intentional infliction of emotional distress claims for social media hate speech in order to allow judges and juries the opportunity to decide whether hate speech in this new, unique forum is acceptable in modern society.

B. Defamation and Disparagement

1. Discussion on Defamation Claims Involving Hate Speech

Defamation provides a cause of action when a defendant's false statements harm the plaintiff's reputation.[81] There are two forms of action for defamation: libel and slander.[82] Libel applies to written or printed words, while slander applies to spoken words.[83] The difference is not just nominal, as libel does not require special damages to be actionable, while slander usually does.[84] Generally, however, courts have ruled that Internet postings injuring an individual's reputation are libel, and therefore do not require proof of special damages.[85]

Courts have come to mixed conclusions regarding whether racial

79. RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

80. Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1177 (Wash. 1977).

81. RESTATEMENT (SECOND) OF TORTS §§ 558–559 (1977).

82. PROSSER, WADE AND SCHWARTZ'S TORTS 886 (Victor E. Schwartz et al. eds., 12th ed. 2010) [hereinafter PROSSER].

83. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 568 (1977). The Restatement (Second) of Torts established a cause of action when an individual "publishes matter defamatory of another in such a manner as to make the publication a libel . . . ." *Id.* § 569.

84. PROSSER, *supra* note 82, at 886.

85. Garfield, *supra* note 9, at 29; *see also* RESTATEMENT (SECOND) OF TORTS § 568(3) (1977) ("The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander."). Slander does not require proof of special damages if the publication imputes: (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with one's business; or (4) serious sexual misconduct. *Id.* § 570(a)–(d).

epithets qualify as defamation. The primary issue is whether a racial epithet is an identifier, and therefore per se true, or whether it has an underlying connotation worse than merely identifying race and is therefore per se false. A statement that is true is a defense to defamation, meaning the difference is critical to whether a hate-epithet would qualify as defamation.

Some courts have found that racial epithets are merely a form of identification, and are therefore true, or are insults not amounting to defamation. For example, the Michigan Court of Appeals has held that the term "nigger" has a "natural and ordinary import . . . as a slang term referring to members of the Negro race, a meaning that is not defamatory."[86] Viewing racial epithets as insults, on the other hand, the Northern District of Ohio found that racially based epithets were "mere verbal abuse of the sort that is not actionable as defamation."[87] These courts have refused to look at the underlying history and harm of racial epithets in analyzing whether they are actionable as defamation.

While most courts have found that racial epithets are not defamatory, an emerging line of cases has held to the contrary. For example, in *Diversified Communications Services, Inc. v. Landmark American Insurance Co.*, the Central District of California found that "[a]s the substance of a racial epithet is never true (i.e., that one's race necessarily dictates her abilities and/or status in society), it seems that racial epithets can always be proven false."[88] Citing Richard Delgado, the court noted: "[R]acial epithets are not simply a means of identification. No, because they 'conjure up the entire history of racial discrimination in this country,' racial epithets are much more than that."[89]

Courts have also come to mixed conclusions regarding whether homophobic slurs constitute defamation. The Southern District of South Carolina found that "fag" and "faggot" do not constitute defamation.[90] Other courts have found homophobic slurs to be defamation, but with less than progressive reasoning. Noting that imputing homosexuality used to be a crime, and therefore per se defamation under Texas law, the Northern District of Texas held in *Robinson v. Radio One, Inc.* that the

86. Ledsinger v. Burmeister, 318 N.W.2d 558, 563 (1982). The court found, however, that the plaintiffs stated a claim for IIED. *Id.* at 562.

87. Garraway v. Diversified Material Handling, Inc., 975 F. Supp. 1026, 1034 (N.D. Ohio 1997).

88. Diversified Commc'ns Servs., Inc. v. Landmark Am. Ins. Co., No. CV 08-7703 PSG (Ssx), 2009 WL 772952, at *6 (C.D. Cal. Mar. 17, 2009).

89. *Id.* at *5 (citation omitted). *See also* Nat'l Union Fire Ins. Co. of Pittsburgh v. Starplex Corp., 188 P.3d 332, 347 (Or. Ct. App. 2008) (finding that racial epithets were sufficient to show defamation); N. Ind. Pub. Serv. Co. v. Dabagia, 721 N.E.2d 294, 307 (Ind. Ct. App. 1999) (Robb, J., concurring) (finding that "camel jockey" is defamatory).

90. Dewese v. Sci. Applications Int'l. Corp., No. 2:11-3024-DCN-BHH, 2012 WL 1902264, at *1–2 (D.S.C. May 2, 2012).

"imputation of homosexuality might as a matter of fact expose a person to public hatred, contempt or ridicule" and could therefore constitute defamation.[91] As the plaintiff was referred to as the "gay security guard" on a radio program,[92] this ruling appears to find the homophobic slur defamatory not because of its innate falsehood and ability to conjure up a history of discrimination, but rather because it could label a straight person as homosexual, which is viewed extremely negatively by some parts of our society.

2. Discussion on Disparagement Claims

Similar to defamation, racial epithets used to affect a plaintiff's business may constitute the claim of disparagement. A claim for disparagement is recoverable when the defendant makes a false and injurious statement discrediting and detracting from the plaintiff's character, property, product, or business that causes a third party to take an action resulting in a pecuniary loss to the plaintiff.[93] Hate speech can instill fear in third parties not to purchase goods from the defendant, as well as cast the defendant in a negative light, thereby deterring third parties from commercially interacting with the defendant.[94] Thus, if a defendant posts a racial epithet on a plaintiff's business's Facebook page, or tweets them at a plaintiff's business's Twitter account, the defendant could be held liable for disparagement. Damages may be difficult to prove, but could be shown with records of lowered sales of products or services.

3. Analysis of Defamation and Disparagement Claims' Ability to Combat Social Media Hate Speech

Defamation and disparagement appear to be the most viable causes of action to combat hate speech in social media. Courts are not reluctant to find social media messages defamatory.[95] Moreover, the fact that defamatory postings are often considered libel precludes the need to prove special damages. Defamation and disparagement, therefore, are potentially powerful tools to combat hate speech in social media.

Hate speech posts or tweets that contain homophobic slurs could

91. Robinson v. Radio One, Inc., 695 F. Supp. 2d 425, 428 (N.D. Tex. 2010).

92. *Id.* at 426.

93. BLACK'S LAW DICTIONARY 239 (4th Pocket ed. 2011).

94. *See Starplex*, 188 P.3d at 348 (although the plaintiff raised the claim of disparagement in the context of an individual shouting racial epithets in a busy airport in order to detract from business, the court declined to comment on the issue because it had already found these actions accounted for special damages to constitute a slander cause of action).

95. *See* Doe I v. Individuals, 561 F. Supp. 2d 249, 257 (D. Conn. 2008).

provide liability for defamation. *Robinson v. Radio One, Inc.* portrays that courts have found that homophobic slurs impute the trait of homosexuality, which affects a victim's character in the eyes of society. Although this line of reasoning should be abandoned in favor of a view that treats homophobic slurs like the *Diversified Communications Services, Inc.* analysis of racial slurs (i.e., that they impute other unwanted characteristics besides homosexuality and are therefore per se false), it is at least one possible avenue to pursue civil claims.

Racial epithets are increasingly likely to constitute defamation. As *Diversified Communications Services, Inc.* makes clear, courts are becoming more open minded to the idea that racial epithets are objectionably false and actionable as defamation. In these jurisdictions, with evidence readily available from Facebook or Twitter, plaintiffs should have very strong cases against hate speech perpetrators.

Brendmaitland, RealSteezyDubz, and Grizzlymarshall all use the word "nigger" to describe Ward in their tweets, therefore claims against all three for defamation could very well succeed in some jurisdictions. Furthermore, because they were about Ward's employment performance, they may also constitute a claim for disparagement. The objectively defamatory nature of hate epithets and the public permanency of social media mean that defamation and disparagement are very good causes of action to fight hate speech on Facebook and Twitter.

C. "Intimidation Based on Bigotry or Bias" Statutes

1. Discussion on "Intimidation Based on Bigotry or Bias" Statutes

States have begun to enact statutes permitting private causes of action based on crimes motivated by bigotry. For example, Ohio Revised Code § 2307.70(A) provides a private cause of action for victims who suffer injury to person or property as a result of ethnic intimidation, which includes perpetrating criminal menacing and criminal mischief by reason of the race, color, religion, or national origin of another person or group of persons.[96] State statutes such as these that target actions, not speech, have been upheld as constitutional and should be applicable to

96. OHIO REV. CODE ANN. § 2927.12 (West 2013). Criminal menacing includes causing "another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's family." *Id.* § 2903.22(A). Criminal mischief entails defacing, destroying, or otherwise improperly tampering with another's property. *Id.* § 2909.07. *See also* CONN. GEN. STAT. ANN. § 52-571(c) (providing a cause of action for damages resulting from intimidation based on bigotry or bias and stating that the court shall award treble damages and may, at its discretion, provide equitable relief and attorney's fees).

social media hate speech.[97] Furthermore, O.R.C. § 2307.70(B)(1) provides a cause of action against the parents of a minor who causes the plaintiff to suffer injury to person or property as a result of ethnic intimidation.[98] The parental liability statute caps damages at $15,000 in addition to court costs, expenses, and attorney's fees.[99] Thus, plaintiffs can probably recover against minors in addition to adults for racially motivated threats to their person or property, and may be able to recover for other hate speech posted on their social media profiles by arguing the perpetrator defaced their property.

2. Analysis of "Intimidation Based on Bigotry or Bias" Claims' Ability to Combat Social Media Hate Speech

"Intimidation Based on Bigotry or Bias" statutes provide a possible avenue to recover damages for hate speech in social media. Since hate speech threats will often be considered "mere threats," but can nevertheless make the victim believe they or a loved one is at risk of physical violence, bigotry statutes that include criminal menacing cover a broader range of hate speech threats not apt for IIED claims. Additionally, if plaintiffs can establish that their social media accounts are their personal property, and that posting hate speech on their Facebook profile or in Twitter mentions "defaces" that property, then bigotry statutes that cover criminal mischief could also provide a cause of action for social media hate speech that does not entail threats or even racial epithets. When the targeted social media profile represents the plaintiff's business, a claim that hate speech defaces the plaintiff's property is even more likely to succeed given that the social media account represents the plaintiff's business property on the World Wide Web like a virtual sign.

As Washington D.C. and Massachusetts do not have "Intimidation Based on Bigotry or Bias" statutes, the liability of brendmaitland, RealSteezyDubz, and Grizzlymarshall under this cause of action is doubtful and will depend on whether the plaintiff could establish jurisdiction in a venue, such as the defendants' home state, that has such a statute. Supposing that the plaintiff has established jurisdiction in Ohio over all three defendants, then brendmaitland and RealSteezyDubz could be found liable due to their threatening tweets if the tweets made Ward believe that he was at risk of physical violence. It is unlikely,

97. *See* Citron, *supra* note 4, at 113; Laura Pfeiffer, *To Enhance or Not to Enhance: Civil Penalty Enhancement for Parents of Juvenile Hate Crime Offenders*, 41 VAL. U. L. REV. 1685, 1696–97 (2007).

98. OHIO REV. CODE ANN. §§ 2307.70(B)(1), 2927.12 (West 2013).

99. *Id.* § 2307.70(B)(1).

however, that a claim against Grizzlymarshall would succeed, as the tweet did not contain a threat and did not mention Ward, which would make it especially hard to prove that Ward was threatened or that his property was defaced.

While the availability of "Intimidation Based on Bigotry or Bias" statutes will vary from state to state, they nevertheless provide a strong possibility for civil liability of speakers of hate speech in social media. "Intimidation Based on Bigotry or Bias" statutes could cover social media hate speech threats that are not serious enough to constitute IIED, and could also possibly be used to combat hate speech that would not constitute defamation or threats but nevertheless defaces the plaintiff's social media profile. Furthermore, some of these statutes, like Ohio's, may provide limited liability against the parents of minors espousing social media hate speech. As the public becomes more unwilling to accept hate speech, more states should be adopting these statutes in the future, providing a promising future for combatting hate speech in social media.

D. 42 U.S.C. § 1981

1. Discussion on 42 U.S.C. § 1981

Plaintiffs may be able to utilize 42 U.S.C § 1981 to establish a cause of action when defendants interfere with their ability to enter into contracts because of their race.[100] A § 1981 claim, unlike a 42 U.S.C. § 1983 claim, does not require state action and is actionable against private parties.[101] At least one court has upheld damages where masked men used intimidation to inhibit racial minorities from pursuing their livelihoods.[102] Ensuring justice and compensation for loss of employment or business due to hate speech on a minority's commercial or personal Facebook or Twitter account directly relates to ensuring minorities equal contracting power to whites, so if minority plaintiffs can show that hate speech directed at their social media account lost them employment or sales, then they may have a viable § 1981 cause of action.

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100. Citron, *supra* note 4, at 91. Section 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (West 2013).

101. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (holding that § 1981 prohibited racial discrimination in the making and enforcement of private contracts and did not violate the First Amendment when African-American plaintiffs sued segregated schools to accept nonwhite students).

102. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1007 (S.D. Tex. 1981) ("When aliens are the victims of racial or other forms of discrimination actionable under [§] 1981, they have standing to sue under this section.").

2. Analysis of 42 U.S.C. § 1981 Claims' Ability to Combat Social Media Hate Speech

42 U.S.C. § 1981 provides an interesting, although unlikely, avenue to liability for social media racial hate speech. Threats or hate epithets could lead to clients or employers viewing victims as conflict prone or incompetent, which in turn could interfere with the victims' right to make contracts because of their race—an actionable claim under § 1981. If the hate speech affects a victim's business's social media page, § 1981 could provide a cause of action to pursue the perpetrator, and the loss of business could amount to substantially more damages than only personal injury damages. Difficulty will very likely arise, however, in proving that the hate speech caused the loss in contracts, as well as proving the specific damages resulting from the hate speech. Additionally, § 1981 claims are only available for race-based hate speech.

Pursuing claims against brendmaitland, RealSteezyDubz, or Grizzlymarshall would therefore be difficult, since it would be hard to establish that their tweets specifically resulted in less fans coming to Joel Ward's hockey games or that owners were deterred from contracting with Joel Ward due to the defendants' specific hate speech. Nevertheless, testimony that fans avoided Ward's hockey games or that owners did not contract with Ward because of the increased likelihood of conflicts or scandal caused by the hate speech surrounding him could provide a basis for § 1981 claims against brendmaitland, RealSteezyDubz, and Grizzlymarshall. 42 U.S.C. § 1981 therefore provides a possible, although unlikely, cause of action against social media hate speech.

E. Recommendations for Legislatures to Provide Causes of Action Allowing Liability Against Social Media Hate Speech Perpetrators

In 1982, Richard Delgado called for an independent tort to be instituted for racial slurs,[103] and the need for such a cause of action has not abided. *R.A.V. v. City of St. Paul*, however, calls into question the constitutionality of such a law, as categories of speech such as defamation can be regulated because of its constitutionally proscribable content, but may not be regulated based on hostility towards a message it contains.[104]

Congress has previously considered a bill to prohibit communication "with the intent to coerce, intimidate, harass, or cause substantial

103. Delgado, *supra* note 6, at 180.

104. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383–84 (1992).

emotional distress to a person; using electronic means to support severe, repeated, and hostile behavior," but it did not pass.[105] Providing a cause of action for victims of such crimes may prove more palatable than an outright criminal ban, and could also help to severely curtail social media hate speech and cyber bullying.

States should continue to pass "Intimidation Based on Bias or Bigotry" laws that provide victims with civil remedies, and ensure that these laws also provide for parental liability for minor offenders. In doing so, they would not only deter adults, but also ensure that children are being taught the harms of targeting other people with hate speech. They are, therefore, crucial to ensuring that hate speech is eradicated from social media.

V. CONCLUSION: A NEW FORUM FOR A NEW SOCIETY

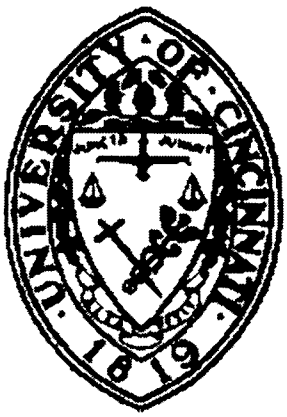
If law is a reflection of society, then this article has unveiled a disturbing (but perhaps accurate) picture of America. Most American courts have found hate speech to be acceptable in our "civilized" society, despite the rest of the world disagreeing,[106] and have found racial epithets to not defame the victim, despite their history and connotations. The term "fag" is not defamatory because of the extremely negative history and animosity it imparts on the victim, but because being considered homosexual is so frowned upon in our country that it would project the victim's reputation in a negative light. Victims' communications are affected by hate speech, but the American judiciary has chosen to protect the rights of perpetrators rather than the rights of victims. American courts, perhaps like many American citizens, have consistently refused to consider the truly horrific impacts of hate speech and have consistently found hate speech acceptable in American society.

Social media has brought to light new harms caused by hate speech. When the harms caused by hate speech are exacerbated and magnified by a new communication forum, they have a much better chance at being perceived as truly egregious by judges. These judges should be more reluctant to grant hate speech the acceptability found in other areas of society to a forum that has profoundly new impacts on receivers of information, especially when these receivers of information largely consist of the next generation. Attorneys should press claims against social media hate speech perpetrators at every opportunity, judges should be more open minded when considering the effects of hate speech on victims, and legislatures should continue to enact laws that

105. Lipton, *supra* note 8, at 1121 (internal quotation marks omitted).

106. *See supra* text accompanying note 6.

provide civil remedies to victims of social media hate speech in order to ensure that this virulent communication is eventually eradicated from the marketplace of ideas.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