

Governing Language

'Fighting words' are protected by the Oregon Bill of Rights By David Fidanque

The ACLU doesn't represent William Charles Johnson in his criminal case, and we find his words racist, bigoted and utterly detestable. Such verbal abuse causes deep and longstanding pain. It occurs far too often – in our schools, on our public streets, in our offices and homes – both casually and caustically, and its pain endures.



But words are not physical violence. Yes, words can hurt; but outrageous and even dangerous words can also create change and even have been known to start revolutions. If we allow words alone to be punished as criminal, our right to think and speak freely will be diminished. Oregon's Constitution doesn't allow it, and ACLU's mission is to uphold the Constitution.

Article 1, Section 8, of the Oregon Constitution guarantees greater free speech protection than does the federal Constitution. It provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

This provision is crystal clear, and Oregon courts have said that without a credible threat of physical violence, verbal harassment – no matter how heinous or bigoted the words – cannot be made criminal in this state.

The very nature of protecting free speech is that the ACLU is often called upon to do so in extreme situations. Speech that a majority of the public would support is rarely the focus of government punishment or censorship; it is almost always disfavored expression that is targeted by the government – in this case, egregiously bigoted language.

Keep in mind that criminal laws targeting speech have been used for centuries to isolate and punish disfavored minorities – including those who have organized to resist racist and homophobic laws and government policies. To give up our free speech protections based on the words used by Johnson – however foul – is shortsighted.

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The ACLU has worked for decades in Oregon to end discrimination based on race, color, national origin, religion and sexual orientation.

We were instrumental in rewriting Oregon's hate-crime law in 1983, known as "Intimidation," to ensure its constitutionality. In 1989, we succeeded in expanding the law to protect people targeted because of their sexual orientation. In 1992, when that law was challenged, ACLU filed an amicus brief in support, and the Oregon Supreme Court upheld it.

The Johnson case involves a different law, the so-called "fighting words" provision of Oregon's Harassment statute. That law makes it a crime to "harass or annoy ... by publicly insulting" a person using "abusive words or gestures ... intended and likely to provoke a violent response."

The Oregon Court of Appeals threw out an earlier version of the law in 1984, and we urged the Legislature to repeal it in 1985. Instead, the Legislature chose to rewrite it, despite our warnings that the revisions were unconstitutional. State v. Johnson is the first appellate challenge in the 22 years since.

Had Johnson threatened physical violence, his actions could – and should – have been prosecuted as a hate crime under Oregon's Intimidation law.

It is not up to the criminal courts to govern language; it is up to us, as a society. We must, each of us, exercise our own power of free speech by speaking out against any and all bigotry, from the casual, so-called "joke" to the vile language used by Johnson.

The letters to the editor in the *Weekly* have been the forum for just such a challenge, and rightly so, regarding the intentionally provocative "iAsk A Mexican!" column. In these pages, in our homes and in our everyday interactions – that is where the struggle to address racist and homophobic speech belongs. Not in our criminal courts, unless there is actual physical violence or the threat of it.

David Fidanque is executive director of the American Civil Liberties Union of Oregon and has worked for the ACLU in Eugene since 1982.

Words as Violence

The intent to create harm is not protected By Alan Brown

Consider this: Can words be violence?

Ask any woman/man who is the victim of spousal abuse that question, and you will undoubtedly get a strong affirmative. Abusers don't only use physical violence to attack their victims but also verbal violence and intimidation as well. It's all about power and control. If the words are not accompanied by physical violence or threats of physical violence, are they still abuse? Once again, what would the real experts/victims on the subject say?

When racist epithets are used to provoke a violent response, isn't this also a form of verbal violence? I'm sure that the communities of color have some very

strong opinions about this form of harassment as they try to live their lives as members of our community.

When gays and lesbians are verbally harassed and intimidated in our community for simply existing, isn't that too a form of verbal violence? As a gay man I know my personal opinion on that subject. I want to live my life in peace without the threat of assault, intimidation and harassment I face simply trying to be myself. I will probably never know that as a reality in my life time.

Should verbal violence be protected as "free speech?" This is not a drill, folks. Arguments on this subject will be presented before the Oregon Supreme Court on Jan. 7.

In August 2003, William Charles Johnson was convicted of a class B misdemeanor of harassment under ORS 166.065(1)(a)(B) for his verbal harassment of two women in the Portland area on August 11 during bumper-to-bumper stop and go traffic. The women had a rainbow sticker on their bumper from which he inferred their sexual orientation. He started by tailgating the women with his pickup truck, potentially putting their lives and the lives of others at risk. At the same time he made gestures directed at the women with his tongue. Using a bull horn to amplify himself, he called the African American woman driver of the car a "black bitch," "pussy-licking nigger," "lesbian dyke," and other names. This went on for several minutes, attracting the attention of other drivers and passersby. Johnson was clearly trying to provoke the driver.

Under the Oregon Harassment Statute ORS 166.065(1)(a)(B), a person is guilty of harassment when he or she "harasses or annoys another person by ... publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response." Johnson's attorney argued in court that he was merely exercising his free speech. The court did not agree, and he was convicted.

Johnson's attorney appealed the case to the Oregon Court of Appeals. In May of 2007 the Oregon Appellate Court upheld his conviction. In an opinion written by Judge David Schuman, the court agreed that the Legislature had the authority to prevent this form of harm based on its intent to provoke violence.

The U.S. Supreme Court has also ruled that there are limits to free speech under the First Amendment when there is a specific intent to create harm. You can't yell "fire" in a crowded theater, nor can you create a hostile work environment using sexually suggestive remarks.

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In less than a month arguments will be presented by Johnson's attorney to the Oregon Supreme Court challenging the appellate ruling. Accompanying the ruling will be an amicus curiae brief provided by the American Civil Liberties Union agreeing that his free speech was violated and that the ORS is unconstitutional under Article 1 Section 8 of the Oregon Constitution.

Normally, I have a great deal of respect for the work of the ACLU. In this instance, however, I strongly disagree. This is not some intellectual game. This is about specific behavior that adds to the violence in our society. The ACLU argues that the defendant did not threaten the driver with any harm. I wonder how the ACLU Board would have felt being maliciously tailgated by the defendant's truck, a potentially lethal weapon? The intent of Johnson's speech and actions are clear.

ORS 166.065 is an important statute, and it needs to remain intact. If it doesn't, all Oregonians will be at risk.



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