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Insults and Epithets: Are They Protected Speech?

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I. INTRODUCTION

It is a privilege to offer a lecture in this series named for Edward J. Bloustein. Not many lecture series honor sitting university presidents who deliver the first lecture in the series; but President Bloustein is the very rare president whose long tenure in office has been accompanied by continuing academic productivity.[1] That achievement is remarkable.

When I tentatively chose this topic a year ago, I knew it involved the application of philosophical insights to serious practical questions, the kind of work that President Bloustein has done so well. I also knew that the search for those aspects of human dignity that warrant legal protection bears a connection to his well-known writing on the tort right of privacy. What I did not realize was that what I was attempting to carry out was actually an approach to the first amendment that he recommended in his lecture two years ago.[2] Considering Holmes and the clear-and-

* Cardozo Professor of Jurisprudence, Columbia University School of Law. I should like to thank the faculty and students of Rutgers School of Law for their thoughtful and helpful comments following the lecture.

1. On December 9, 1989, President Bloustein died after 17 years of service to the University.

2. *See* Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988).

present danger test, he spoke of a "pragmatic approach to speech . . . founded on how it truly worked, the role it played in human experience . . . . What matters for a legal system is what words do, not what they say . . . ."[3] These remarks strikingly capture my own aspirations here.

Extremely harsh personal insults and epithets directed against one's race, religion, ethnic origin, gender, or sexual preference pose a problem for democratic theory and practice. Should such comments be forbidden because they lead to violence, because they hurt, or because they contribute to domination and hostility? Or should they be part of a person's freedom to speak his or her mind? Any country with a liberal democracy faces this dilemma. In the United States, one forum for resolution is the judiciary, which applies the first amendment and analogous state constitutional provisions.

I shall look at insults and epithets in light of the different uses of language. This perspective hardly provides the last word about what insults and epithets should be allowed, but it helps illuminate what is at stake. I begin with some brief general comments about reasons for free speech and about uses of language.[4] I then address the force of insults and epithets in various contexts. I consider four claims about the damage they may do, as measured against their value as expression. I then tie the analysis to existing and possible first amendment doctrine.[5]

II. Reasons for Free Speech and Uses of Language

The reasons for free speech are central for proper principles of free speech. This is plainly true about legislative choice. Which communications a legislature should leave free will depend on why many communications should be free. Given language that is as open-ended as that of our free speech and free press clauses,

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3. *Id.* at 298-99. The lecture is mainly an interpretation of Holmes's approach, but Bloustein leaves no doubt that he approves of the approach reflected in the language I have quoted. Because it bears on my effort here, I should say I perceive a less close relation between Holmes's generally pragmatic approach and work done by philosophers of language such as Wittgenstein and J.L. Austin than that suggested in the lecture.

4. These comments outline major themes of a book entitled K. Greenawalt, Speech, Crime, and the Uses of Language (1989). A discussion of reasons for free speech appears in Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989).

5. My discussion of insults and epithets draws heavily on the chapters in *Speech, Crime, and the Uses of Language*, *supra* note 4. On many subjects, they contain a more detailed analysis and fuller citations.

the reasons for free speech also bear closely on the scope of constitutional principles that guide courts.

We can divide the reasons to give speech more protection than most other kinds of actions into consequential and nonconsequential reasons. Consequential reasons concern the good effects of a practice. Despite some modern challenges to this traditional idea, liberty of speech contributes to discovery of truth. Worries about inequality among communicators and about people's tendency to believe what is conventional and what serves irrational desires are well founded. But the government's suppression of what it deems to be false is hardly more conducive to growth in understanding than wide liberty of expression. Such liberty also promotes accommodation of interests. Despite causing occasional divisiveness, it can enhance social stability by reducing resentment. Freedom of thought and expression promote individual autonomy and the development of personality. Talk about one's ideas and feelings is a vital emotional outlet. Conventions of free speech may help teach a healthy tolerance of differences. In a liberal democracy, citizens can perform a responsible political role only if they have available a wide range of information and opinions. Free criticism of government officials and policy is a strong check on the abuse of political authority.

Nonconsequential reasons for liberties do not depend on what happens after a person is restricted. The simple denial of liberty is itself a wrong, and typically takes the form of an injustice or denial of right. It is argued that, under our dominant social contract theory, most speech is within a private domain, not subject to control by a government of limited powers. It is also claimed that restricting speech neither treats citizens as autonomous and rational nor accords them the dignity and equal status they warrant under a democratic government. I shall not today try to develop these claims and their reach. My judgment is that these arguments do not set clear standards for which communications should be left free. Together with the consequential reasons, they do help indicate what interferences with expression are most troublesome, and they operate as counters in favor of freedom.

What communications do the reasons for free speech cover? In a liberal democracy, the need is great for freedom of discourse about public affairs, but the reasons for liberty of speech are much broader, reaching all subjects of human concern. They clearly cover general statements of fact, such as "rapid inflation

causes social instability," and particular statements of fact, such as "the Soviet Union exploded a nuclear device yesterday." They also cover general and particular assertions of value: "love is the greatest good" and "you should not lie to your friend about your grades." The reasons have much less force for assertions that the speaker knows or believes to be false.

The reasons for free speech hardly apply at all to some sorts of communications. Consider two people agreeing to commit a crime. Their words of agreement represent commitments to action, not assertions of fact or value. Their words change the normative environment they inhabit, creating new obligations and claims. The communications are situation-altering; they are much more "action" than "expression." It should come as no surprise that the punishment of ordinary conspiracies has rarely been thought to raise problems of free speech. Orders, offers of agreement, and invitations, such as "just try to hit me," are similar to agreements in their situation-altering character. I claim that these communicative activities may be regulated essentially without reference to principles of free speech. I make the same claim about what I call manipulative threats and offers. Suppose Gertrude tells Claude that she will give him two thousand dollars if he hires her or that she will disclose his criminal past if he does not hire her. Her comment to Claude sets in play consequences that would not otherwise occur; it is situation-altering.[6]

Hovering between situation-altering utterances and ordinary assertions of fact and value are what I call weak imperatives. These "weak imperatives" are requests and encouragements that do not sharply alter the listener's normative environment. If Gertrude says, "please hire Joseph" or "kill him, Claude," her immediate aim is to produce action, but she has not created new rights or new obligations or new consequences of Claude's behavior. Weak imperatives often indicate beliefs about values and facts and cannot always be disentangled from them. They are covered to a degree by a principle of free speech, but they may often be prohibited when assertions of fact and value must be free.

Forgive this speedy, superficial sketch of some general views about the uses of language and the reasons for free speech. It sets

6. On the other hand, if Gertrude merely warns Claude about what she would do in any event, "I am going to divorce you if you don't spend more time at home," her words reveal her natural response to circumstances and are like ordinary predictions about what will happen in the future. Such warning threats are covered by a principle of free speech.

the discussion of insults and epithets in a broader context.

III. Strong Insults and Group Epithets

One feature of strong insults and epithets is that they tend to shock those at whom they are directed *and* others who hear. They are not expressions that are used in civil conversation or academic discourse. A setting like this lecture presents a problem: how much to risk offending by speaking the upsetting words and phrases; how much to risk failure to come to terms with the real issues by avoiding the words that shock. I shall indicate briefly the sorts of remarks we are considering, and then use them sparingly. Many strong insults use coarse language in a highly derogatory way: "You are a stupid bastard," "cheating prick," "conniving bitch," "fucking whore." Others may be strong without any single shocking word: "You are as yellow as the sun;" "your mother must have discovered your father in a pigpen." Broadly, epithets are words and phrases that attribute good, bad, or neutral qualities; but usually epithets are thought of as negative. Some epithets denigrate on the basis of race, religion, ethnic origin, gender, or sexual preference. Among these are "wop," "kike," "spick," "Polack," "nigger," "pansy," "cunt," "honkey," "slant-eyes," and perhaps "WASP."

This summary account allows me to make some obvious points. Group epithets frequently strengthen other insulting words. Group epithets and other words of insult often are spoken against someone in a face-to-face encounter, but they are also used before friendly audiences to put down outsiders. The strength of insults and group epithets varies; much depends on tone of voice, context, and prior relationships. Saying just when words and phrases pass beyond the bounds of civil discourse at any moment in history is daunting. If the law is to restrict insults and group epithets, the task of categorizing which insults and group epithets should be restricted is formidable.

IV. Insults and Group Epithets as Uses of Language

I turn now to how insults and epithets function as uses of language. The *meaning* of most insults and epithets amounts to mixed assertions of facts and values. Words like "stupid" and "cheating" have fairly definite content. The significance of group epithets is much vaguer, but they call to mind whatever "nega-

tive" qualities are associated with a group, qualities such as laziness, greed, dishonesty, stupidity, vulgarity. They also indicate a harsh unfavorable judgment about members of the group. If insults and group epithets involve assertions of fact and value, then does it follow that they are covered by a principle of freedom of speech? Even if they are covered, their restriction *might* still be warranted because these comments are too dangerous or too misleading; but should we recognize candidly that restriction is an exception to the privilege speakers usually have to choose their own terms to express their views? When insults and group epithets are spoken about people who are not present, they are indeed an extremely crude way to attribute characteristics and render judgments.[7]

In contrast, when insults and epithets are employed face-to-face, the analysis of their use becomes more complicated. Indeed, in such encounters, abusive remarks often approach closer to action and may even amount to situation-altering utterances. At the extreme, social convention might establish that certain insults invite or even "demand" set responses: calling a man "chicken" to his face might be understood as a challenge to fight. In that event, uttering the insult would be a situation-altering utterance. The phrase, "you are chicken," seems to have some fact and value content, but if this just happens to be how one invites a fight, the insult could be little more than a challenge. In any event, the situation-altering aspect matters more than any message about the qualities of the person challenged. Probably no insults function generally with this kind of precision in modern western societies, but conventions among various subgroups may approximate this kind of clarity. In settings where a person utters abusive words that are understood by him and his listener to invite a fight, the communication is dominantly situation-altering.

The circumstance is subtly different when a speaker, without overtly inviting a fight, hopes to provoke such anger in the listener that a fight will ensue.[8] If the speaker tries to manipulate

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7. This is true at least if the speaker's aim does not include having the comments relayed to those insulted.

8. For purposes of clarity, I am describing a sharp distinction that is clearly drawn and perceptively analyzed in J. FEINBERG, OFFENSE TO OTHERS 226-32 (1985). Often the two aspects, conventional challenge and anger provocation, will be mixed in such a way that even a thoughtful speaker aware of his own state of mind might have a hard time saying which he is doing.

the listener into fighting, his own expressive interests remain slim; but for the listener the import of the insult differs now. He is angered by the very bad things that have been said. *His* reaction is partly to the intense message of facts and values.[9]

Often a speaker consciously sets out to wound and humiliate a listener. He aims to make the other feel degraded and hated, and chooses words to achieve that effect.[10] In what they accomplish, insults of this sort are a form of psychic assault; they do not differ much from physical assaults, like slaps or pinches, that cause no real physical hurt. Usually, the speaker believes the listener possesses the characteristics that are indicated by his humiliating and wounding remarks,[11] but the speaker selects the most abusive form of expression to impose the maximum hurt. His aim diminishes the expressive importance of the words. He does not use words to inform, nor is he really attempting to indicate his feelings. His aim is to wound, and the congruence of what he says with his actual feelings is almost coincidental.[12]

Many speakers who want to humiliate and wound would also welcome a fight. But in many of the cruelest instances in which abusive words are used, no fight is contemplated: white adults shout epithets at black children walking to an integrated school; strong men insult much smaller women.[13]

For many persons, serious use of group epithets is regarded as reprehensible and is quite rare; and serious use of strongly insulting words face-to-face occurs only during moments of high emo-

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9. It has been suggested that "fighting words" trigger an automatic reaction. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.37, at 942-43 (3d ed. 1986); Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 8 (1974). No doubt these words can trigger intense responses that reduce control, but many listeners must still be able to use some judgment about their chances in a physical conflict, and are not likely to attack an abuser who is also pointing a gun at them.

10. *See generally* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985). *See also* J. FEINBERG, *supra* note 8, at 30, 89-91.

11. A speaker might not carry the attitudes the words imply. For example, a woman with no prejudice against Italian-Americans who wished to hurt a particular Italian-American man who annoyed her might say "You wop," hoping that expression would be wounding to him.

12. On this point, Donald Downs writes, *supra* note 10, at 651, "[W]hen the *primary* purpose of speech is not communication, but rather the infliction of harm, the law can no longer construe any resulting harm as a secondary result."

13. *See generally* A. MONTAGU, THE ANATOMY OF SWEARING (1967).

tion. Out of frustration and anger a person hurls words of intense feeling that are also meant to wound; he does not expect responsive physical force but is not careful to avoid it. Abusive words in these situations are a true barometer of feelings, and, as such, have substantial importance as expression.

I have suggested that the circumstances in which people insult each other vary a good deal. For some, the reasons for free speech are more relevant than for others.

The remainder of my discussion is organized around the harms that insults and group epithets can do. I review four main bases for suppressing abusive language: (1) the danger of immediate violence; (2) psychological hurt that one is the object of abuse; (3) general offense that such language is used; and (4) destructive long term effects from the attitudes reinforced by abusive remarks. I comment about existing law and sensible legislative and constitutional approaches.

V. The Danger of Violent Response

Insults and group epithets can cause listeners to react with violence. I concentrate on the situation in which violence is used against the speaker, and the person provoked to violence, or a friend, is the immediate object of abuse.[14] Words highly likely to provoke violence are ordinarily made criminal by breach of the peace or disorderly conduct provisions. Under the *Model Penal Code's* section on disorderly conduct, adopted in substance by some jurisdictions, one must purposely or recklessly create a risk of "public inconvenience, annoyance or alarm" by making "offensively coarse utterance, gesture or display" or by addressing "abusive language to any person present."[15] The Code also forbids harassment; one commits a violation if, with a purpose to harass, he "insults, taunts or challenges another in a manner likely to provoke violent or disorderly response."[16]

Much is unclear about how the first amendment applies to abusive remarks, but courts have steadily assumed that restriction is permissible if the danger of responsive violence is great. The leading case was decided almost half a century ago.[17] Chaplinsky, a

14. Thus, I am putting aside circumstances in which abusive remarks lead others to act violently against the victim of abuse.

15. Model Penal Code § 250.2(1)(b) (1962).

16. *Id.* § 250.4(2).

17. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Jehovah's Witness, was annoying some people with his proselytizing. A city marshall warned him to "go slow."[18] Chaplinsky replied that the marshall was "a God damned racketeer" and "a damned Fascist," and that the whole government of Rochester was comprised of Fascists.[19] He was convicted under a statute that forbade addressing "any offensive, derisive or annoying word to any other person . . . [or] call[ing] him by any offensive or derisive name. . . ."[20] Despite the political nature of Chaplinsky's remarks and their being addressed to an official, who presumably was trained to restrain himself, the Supreme Court upheld the conviction. It said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[21]

Reasoning that the state court had construed the statute only to cover words that "men of common intelligence would understand [to be] likely to cause an average addressee to fight," the Supreme Court decided that the statute was neither too vague nor an undue impairment of liberty.

Two major developments have occurred since *Chaplinsky*. In *Cohen v. California*,[22] the Supreme Court overturned the conviction of a young man who wore a jacket saying "Fuck the Draft." It stressed the emotive elements of communication and their constitutional protection. Given *Cohen*,[23] not all remarks that amount to fighting words can be simply dismissed as lacking any expressive value. The second development was a series of per curiam opinions in which the Court invalidated statutes directed

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18. State v. Chaplinsky, 91 N.H. 310, 313 (1941).
19. *Chaplinsky*, 315 U.S. at 569.
20. *Id.*
21. *Id.* at 571-72.
22. 403 U.S. 15 (1971).
23. Of course, the Supreme Court might at some future time decide to abandon the reasoning of *Cohen*.

at offensive language as overbroad and vague.[24] The Court emphasized the lack of danger of immediate violence.

The prospect of immediate responsive violence is a proper basis for restricting abusive words, but when is such restriction warranted? I shall focus on three aspects: the speaker's aims and understanding, the probability of violence, and the breadth of circumstances against which that probability is assessed.

I have suggested that when a speaker tries to provoke a fight, his expressive interest is slight; his remarks represent a course of action and may be punished. What if the speaker is not aiming to start a fight, but understands, or should understand, that his words may have that effect? The lowest appropriate standard of culpability would require some understanding of danger by the speaker. A speaker who was actually *unaware* that the sorts of words he used might provoke violence should be protected. If persons are punished for speaking words they do not realize can cause harm, open communication is threatened. As far as the Constitution is concerned, it should be enough that the speaker know the propensity of his words, even if, in his rage, he did not consider their likely effect. Ignorance about the effect of words should provide a constitutional defense, but a failure to bring one's understanding to bear should not.

How likely should responsive violence have to be for remarks to be punished on that basis? The *Chaplinsky* court wrote of "words likely to cause an average addressee to fight."[25] This phrase has ambiguities and is probably not to be taken literally. The first ambiguity concerns the persons to be counted among potential addressees: everyone, only people to whom a phrase really "applies," or all those likely to be angered by having the label applied to them? Someone of French origin reacts differently to being called a "Polack" than someone of Polish origin. Unless an epithet is one to which most people react with great anger,[26] "average addressee" should include only those to whom the epithet might apply. Another ambiguity is how an "average addressee" is to be conceived. The *Chaplinsky* language reflects the propensity

24. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974). *See also* Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

25. State v. Chaplinsky, 91 N.H. 310, 320 (1941).

26. Sometimes it can be an insult to place a person in a category which both speaker and listener know is literally inappropriate. Calling a boy or man "a little girl" may be a way to impute cowardice or other "weakness."

of courts to imagine male actors for most legal problems. Women, as well as children and older people, are potential addressees for most abusive phrases; but outside of quarrels among intimates, abusive words are very often spoken by and to younger men, frequently after alcohol has been drunk. The average person to whom insulting words *are actually* addressed may be more ready to fight than the average *potential* addressee. Even if we focus on those actually addressed,[27] probably no words now cause the average listener to respond with violence. In any event, that is too stringent as a minimum constitutional test. Suppose a study showed that twenty percent of listeners respond violently to certain words spoken in certain contexts. That should be enough to restrict. The standard should be whether provoking violence is a substantial probability.

Against what situations is the likelihood of violence to be gauged? If this danger is the overriding reason for restraint, the simplest approach is exemplified by the *Model Penal Code*: make the likelihood of violence an inquiry into particular circumstances. This approach, however, is deeply troubling. Imagine that in an area where few blacks live,[28] a twenty-five year old white man of average size and strength waits for a bus with a single black person, and the white directs a torrent of insults and racial epithets at his black companion. Does it matter if the black listener is (1) a strong twenty-year old man, (2) a seventy-year-old man on crutches, (3) a very small woman of fifty, or (4) a child of nine? Only in the first setting is violence likely. Can the same remark be punishable if directed at the one person able to respond and constitutionally protected if directed at people not able to match the speaker physically? Even asking this question suggests two propositions. The first, to which I shall return, is that proper reasons for restraint go beyond preventing immediate violence. The second is that even if preventing such violence is the main reason for restraint, some principle of "equalization of victims" is called for. Inquiry should not concentrate on the per-

27. To quantify crudely why it matters which group counts: if 80 percent of young men respond by fighting and only 20 percent of the much larger remaining pool of potential addressees respond in that way, and if the abusive words are addressed to young men more than the remaining pool together, then the average potential addressee (the whole pool) would not fight, but the average actual addressee would fight.

28. I add this fact to reduce the possibility that a defenseless black might call on others who are on, or waiting for, the next bus for retaliation.

ceived capacity of a particular victim to respond physically.[29] The test should be whether remarks of that sort in that context would cause many listeners to respond forcibly. Neither statutory nor constitutional standards should require that a particular addressee be, or appear, likely to react violently.

VI. Wounding the Listener Who Is Abused

Abusive words can be deeply wounding to their victims, but is that a proper basis for criminal penalties or civil liability? Much harsh language is a natural part of heated personal exchanges and strong disagreements about ideas. Since few of us are able and inclined to modulate our discourse to the magnitude of a subject, the law must tolerate many words that hurt. The Supreme Court has been right to invalidate criminal provisions that reach broadly to offensive or opprobrious language.

If the use of any words can be punished because they wound, it is only a small subcategory of all those that hurt, a category narrowed in terms of the speaker's aims, damage to the listener, the way language is used, or some combination of these criteria. Suppose that four men think humiliating a Hispanic woman who is standing alone would be "fun." They use their harshest words to insult her gender and ethnic origin, and call her a "whore." Their words wound deeply. Remarks whose dominant object is to hurt and humiliate, not to assert facts or values, have very limited expressive value. Their harm can be serious. Viewed alone, behavior like this should not be constitutionally protected against punishment.[30] This conclusion fits the actual language of *Chaplinsky*, which speaks of words "which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace."[31] But line-drawing problems are severe. The speaker's motives may be mixed, and separating an intent to humiliate from an honest but crude statement of views is often difficult. A general criminal prohibition of abusive words designed to hurt and humiliate probably should be judged unconstitutional.[32] However, penalties are proper when, as in my example, someone has initiated contact with a person just to harass him or her;[33] they are also proper

29. Subsequently, I consider the relevance of bystanders and their attitudes.

30. *See, e.g.*, Downs, *supra* note 10; Delgado, *supra* note 10 (on civil liability).

31. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added).

32. *See* State v. Harrington, 67 Or. App. 608, 680 P.2d 666 (1984).

33. This behavior bears some resemblance to making a telephone call in order to harass.

when abusive language accompanies a clear intent to intimidate someone from exercising legally protected rights.

My conclusions about remarks that tend to provoke violence have a crucial bearing here. I have recommended a principle of equalization of victims. That principle, which would protect some victims not likely to respond with physical force, implicitly recognizes the legitimacy of protecting against deep hurt. The test whether words would cause many listeners to fight is a good test for whether remarks have passed the boundaries of what innocent citizens should be expected to tolerate. The hurt in a particular instance may not correlate with a willingness to fight; indeed, words may hurt the defenseless more than those who are able to strike back. However, the sorts of comments about which *some* listeners do fight are the ones that hurt the most. The propensity to generate a violent response is partly a measure of the intensity of hurt; this is a powerful reason why a listener's apparent capacity to fight back should not be an element of the speaker's crime.

If the particular victim's fighting capacity should be disregarded, so also should some other features of confrontational situations. The number of people supporting the abusive speaker and the presence of bystanders who might help the victim should be irrelevant, though these affect the likelihood of a physical clash. A more subtle point concerns groups whose members are generally less likely to fight. Suppose women, or members of a particular ethnic group, are much less likely to fight than are men, or members of other ethnic groups. That does not mean the listeners are less hurt when insulted. I have proposed that the difference in likely physical response is irrelevant for words that apply generally, but what of abusive words that apply peculiarly to the group in question? Is equivalent abuse more protected if the broad class of addressees is less likely to fight? The answer should be "no." An ethnic slur should be treated like other ethnic slurs of similar viciousness.[34] Calling a woman a "cunt" should be treated like calling a man a "prick." When the question is asked if words "of this sort" would lead many addressees to fight, the inquiry about the words should abstract from the inclinations to fight of the particular class abused.

It has been assumed that this behavior is punishable, even though the prospect of immediate violence is absent.

34. I do not underestimate how difficult it may be to decide what slurs are similarly vicious.

Words that wound may lead to civil recovery in place of, or in addition to, criminal penalties. A standard for civil damages can be vaguer than is acceptable for criminal liability. Presently, the main vehicle for recovery in tort is infliction of emotional distress.[35] That tort requires extremely outrageous conduct and severe emotional distress. When these conditions are met, liability for abusive words is appropriate. However, an absolute privilege is needed for some communications with general public significance, as the Supreme Court has held for parodies of important public figures.[36]

Do some abusive expressions hurt so generally in face-to-face conversations that they should be singled out as actionable? The most obvious candidates are racial and ethnic epithets and slurs. Similar remarks directed at religion, sexual preference, and gender might also be reached. Even for race and ethnicity, determining which expressions should be treated as wrongful is worrisome. One problem is that those secure in a favored status can accept denigrating terms that apply to their privileged position with less distress than can those who know the terms reflect a wide dislike of their group. "Honkey" hurts a lot less than "nigger," and "WASP" hurts a lot less than "kike."[37] Despite these line-drawing difficulties, a substantial argument exists for a special rule allowing recovery when speakers seriously try to injure and demean with racial and ethnic insults.[38]

VII. Offensiveness

The third possible basis for restricting strong insults and group epithets is "general offensiveness." When the words and phrases I have mentioned are seriously used, they shock. They disturb people who are not the subject of abuse and they do so regardless of their message. However, determining what words are acceptable depends heavily on social context; and conventional restraints on language have loosened considerably in the last few decades. In the United States, no words or expressions should be illegal simply because they offend those who hear them.[39] Someone's dis-

35. *See generally* Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 Colum. L. Rev. 1749 (1985).

36. *See* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).

37. *See* Delgado, *supra* note 10, at 180.

38. *See id.*

39. *See, e.g.*, M. Nimmer, Nimmer on Freedom of Speech 2-30 (1984); Rutzick, *supra*

quiet at listening to objectionable language is not nearly as great as his distress that he or his loved ones are the direct object of humiliating language. People who strongly wish not to be exposed to coarse language should avoid settings where use of that language is likely. In certain more formal settings, constraints on use of language are appropriate. Lawyers in court may not curse opposing counsel or judges, because curses are destructive of civility in court proceedings. A more debatable situation is a public meeting at which citizens are free to speak. If other citizens need to attend the meeting, flagrantly abusive language is directed toward a kind of captive audience and it may undermine the attempt to maintain reasoned discourse. However, it is arguable that citizens participating in open meetings should probably have the freedom of more informal settings.

Cohen v. California[40] and other cases indicate that the Constitution does not permit prohibition based on the offensiveness of language alone. However, the Supreme Court supposes that offense can be the basis for restriction in limited settings. It has upheld discipline of a high school student for offensive remarks at a school assembly[41] and federal restrictions on the broadcast of coarse words on daytime radio.[42] Both decisions are highly questionable. People are free to switch their dials and few children listen to daytime radio; the school remarks were part of a campaign speech that exceeded good taste but was neither shockingly abusive nor extremely coarse.[43] Nevertheless, the Court's general

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note 9, at 27. For an elaborate and sophisticated account of varieties of offensiveness and the circumstances in which offensive behavior may properly be punished in a liberal society, see J. FEINBERG, *supra* note 8, at 1-96.

40. 403 U.S. 15 (1971).

41. Bethel School Dist. v. Fraser, 478 U.S. 675, (1986).

42. FCC v. Pacifica Found., 438 U.S. 726 (1978).

43. The student gave the following speech at a high school assembly in support of a candidate for student government office:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax—, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Bethel School Dist., 478 U.S. at 687, (Brennan, J., concurring).

position that there should be regulation in some narrow settings is sound.

VIII. Long-Term Harms

The fourth reason for suppressing strong insults and group epithets is the avoidance of long-term harms. I shall say a brief word about the quality of public discourse before concentrating on harms that relate to social resentment and inequality. Some have argued that *Cohen v. California* gave insufficient weight to maintaining a civil quality to public discourse.[44] Coarseness and abuse may negatively affect reasoned discourse, but the government should not be in the business generally of setting standards for acceptable speech.[45] It is no coincidence that the less privileged and more radical are those who often use words and phrases that might be judged to impair civil discourse. Drawing distinctions between what is civil and what is not is difficult, and government control of the terms of discussion should not sanitize expressions of outrage.

The more troubling question involves the long-term effects of insults and epithets that reinforce feelings of prejudice and inferiority and contribute to social patterns of domination. Although repetition of some personal insults, such as "you fat slob," can undermine self-esteem, the effect of most such insults is contained and dissipates fairly quickly. Epithets and more elaborate slurs that reflect stereotypes about race, ethnic group, religion, sexual preference, and gender may cause continuing hostility and psychological damage. The harms need not depend on whether listeners are the objects of the epithets or slurs. All-male conversations in which women are denigrated can support male prejudices, and women's feelings of resentment and inferiority may derive from knowing how they are talked about as well as reacting to how they are talked to. If one focuses on these long-run harms, the particular audience is not of primary importance; laws in other countries that are specifically directed against racial, ethnic, and religious epithets and slurs[46] do not make the

44. *See, e.g.*, A. Bickel, Morality of Consent 72-73 (1975).

45. *See, e.g.*, Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 Duke L.J. 283.

46. *See generally* E. Barendt, Freedom of Speech 163-65 (1985); L. Bollinger, The Tolerant Society 38-39 (1986); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281, 283-84; Note, *A Communitar-*

audience critical.

Whether a law of this type would be held unconstitutional in the United States is very dubious. In *Beauharnais v. Illinois*,[47] in 1952, the Supreme Court did uphold a conviction under a law that forbade publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [in a way that exposes those citizens] to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[48] Beauharnais had organized distribution of a leaflet asking city officials to resist the invasion of the Negro and warning that if "the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[49] The Court assimilated this speech to group libel, instances in which something defamatory is said about a small group in such a way that the damaging remark falls on members of the group: for example, "the [fifteen member] firm of Mix and Nix is a bunch of crooks."[50] The Court mentioned the danger of racial riots which a legislature might reasonably think is made more likely by racist speech.[51] In subsequent years, the

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ian Defense of Group Libel Laws, 101 HARV. L. REV. 682, 689-94 (1988). In a Public Order Act of 1986, the British Parliament amended previous enactments to provide that "[a] person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting is guilty . . . if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby." Public Order Act, 1986, ch. 64, § 18. A similar standard governs publication or distribution of material, public performance or recording of plays, and radio and television broadcasts. *Id.* §§ 19-22. For the Federal Republic of Germany, relevant statutes and interpretations, as well as recent legislative reform, are carefully described in Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies,"* 85 MICH. L. REV. 277 (1986). Although some foreign legislation seems very broad to American eyes, Lee Bollinger has observed that other countries are able to distinguish racist rhetoric from other speech: "It seems a significant piece of corroborating evidence that virtually every other western democracy does draw such a distinction in their [sic] law; the United States stands virtually alone in the degree to which it has decided legally to tolerate racist rhetoric." *See* L. BOLLINGER, *supra*, at 8.

47. 343 U.S. 250 (1952).

48. *Id.* at 251.

49. *Id.* at 252.

50. *See generally* Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591 (1985).

51. *Beauharnais*, 343 U.S. at 259. The Court sustained the refusal of the Illinois courts to entertain truth as a defense, on the ground that a state might, and did, require "good motives" and "justifiable ends" as well as truth, and if these requisites could not be satisfied the court did not need to consider evidence of truth. *Id.*

This aspect of the Court's opinion is unsatisfying, because the trial court did not indi-

Court's protection of civil libel, the *Cohen* case, and invalidations of breach of the peace and disorderly conduct statutes that lacked reference to immediate danger of violence, have largely undermined the authority of *Beauharnais*. The case has occasionally been cited in peripheral contexts, but the prevailing assumption has been that a statute as broad as that one from Illinois would not stand, and that a publication like the one in that case would be protected. In cases that arose out of the intense controversy over whether Nazis might march in uniform in Skokie, a city inhabited by many Jewish survivors of the Holocaust, appellate judges acted on these premises, striking down ordinances designed to keep the Nazis out and indicating that a Nazi march could not be altogether foreclosed.[52]

During the last two decades the Supreme Court has emphasized that discrimination among communications on the basis of content is constitutionally suspect. When a law is directed at group epithets and slurs, words are made illegal because they place people in certain categories and are critical of members of those categories. This is certainly content discrimination. It may be said in response that much of the harm of these abusive words derives from nonconscious response to their force, not from conscious consideration of the overall message.[53] Nevertheless, if a law forbids comments made generally or to third persons about members of groups, and it covers the "ordinary" language of the publication in *Beauharnais* as well as harsh epithets, what is being suppressed really is a message whose content and intensity is judged hurtful and obnoxious. This language cannot be characterized as "low value" speech, except by virtue of a judgment about its substantive message.

Some proponents of laws of this type have argued that if such speech is tolerated, the government implicitly endorses a message that is contrary to our fundamental values.[54] That is not so. The government permits all kinds of speech contrary to our constitutional values; that is an aspect of freedom of speech. The govern-

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cate that it would consider truth if Beauharnais also made a showing of "good motives" and "justifiable ends." I assume that courts cannot reject motives and ends as unjustifiable because they disapprove of the political program that is urged.

52. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); *see also* D. RICHARDS, TOLERATION AND THE CONSTITUTION 191-92 (1986).

53. Also, people are left free to express any facts or values about members of the group in less obnoxious words.

54. *See, e.g.*, Note, *supra* note 46, at 690-91.

ment can promote equality by its own actions, by education and advocacy, by regulating actions other than speech. Allowing racist rhetoric does not show support of racism. It is true that in a society where less privileged members of minorities may identify the majority with the government, government passivity may be perceived as support. But more emphasis on the government's direct commitment to positive values of equality is a better way to show support than silencing speakers.

Many countries have reasonably concluded that suppression of messages of race and ethnic hate is warranted, at some cost to free speech, because values of equality and dignity are so central and so vulnerable.[55] The issue is close, but my own judgment coincides with the prevailing academic assumption that a law like that in *Beauharnais* should be held unconstitutional. Part of the reason is the difficulty in seeing how the line of permissible restriction would be drawn once the harm of messages was treated as a proper basis for suppression.

One conceivable way to meet this objection to restricting messages of fact and value would be to forbid only "false" speech about members of groups.[56] Such speech would lack "full value" because of falsity, and prohibiting it would not open the door for broad prohibitions of speech. Unfortunately, aiming at false speech of this kind would either be ineffectual or dangerous. Suppose that the "false" remarks to be criminalized were those that asserted definite facts about members of groups that were demonstrably false and were known to be false by those making the assertions, for example, "Every single black person in this country scores lower on standard intelligence tests than the worst scoring white person." Punishing those who make such false assertions would have a very slight effect on hate literature. To have any bite, the law's coverage of punishable false statements would have to include matters of opinion or much vaguer and ambiguous factual assertions. As far as free speech is concerned, opinions may not be labeled true or false. With respect to vague factual assertions, trials would afford merchants of hate an opportunity to indicate their meanings in full detail, using that public forum to present damaging facts about the group they despise as un-

55. *See supra* note 46.

56. *See, e.g.*, Note, *supra* note 46.

sympathetically as possible.[57] Two conclusions emerge. If falsity is an aspect of criminal liability, people should be punishable only for clear assertions of fact, and much vague scurrilous comment about groups would remain unpunishable. Trials about truth could easily do much more damage than the original communications. Whatever the constitutional status of a law precisely limited to false assertions of fact, adopting such a law would be senseless.

If racial and ethnic epithets and slurs are to be made illegal by separate legal standards, the focus should be on face-to-face encounters, targeted vilification aimed at members of the audience.[58] As to these, expressive value is slight, because the aim is to wound and humiliate, or to start a fight. Since fighting words are already punishable and the tort of extreme emotional distress is available, what would be the significance of separate provisions for the language of group vilification? They could stand as symbolic statements that such language is peculiarly at odds with our constitutional values; and they could relieve prosecutors, or plaintiffs, from having to establish all the requisites of a more general offense or tort.[59]

Some lesser showing of immediate injury is appropriate for words that historically have inflicted grave humiliations and damage to ideals of equality and continue to do so. Of course, special

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57. *Beauharnais* is instructive as to these difficulties. The leaflet in question asserted, among other things, that "if the need to prevent being mongrelized by the Negro did not unite white people, the rapes, robberies, knives, guns and marijuana of the Negro, surely will." 343 U.S. 250, 252 (1952). The *desirability* of white people uniting is a matter of opinion; the likelihood that that will happen is a prediction of vague and uncertain future facts that cannot be punished. Exactly what Negroes are said to be doing to bring about "mongrelization" is much too unclear to amount to a punishable assertion of facts. That leaves the statement about the "rapes, robberies," et cetera. What exactly is being claimed here: that all Negroes engage in these bad acts, that most do, that a higher proportion of Negroes than whites do? The first proposition is absurd and the second is probably demonstrably false, but Beauharnais might say at his trial: "Well, all I meant factually is that the percentages are a lot higher among Negroes and that for this reason, the safety of neighborhoods will deteriorate if Negroes move in." I do not know what was true in Chicago around 1950, but we do know that Beauharnais offered to prove truth, and that around 1989, at least judged by convictions, the percentage of blacks who commit many serious crimes is higher than the percentage of whites who do so.

58. *See* Delgado, *supra* note 10; Downs, *supra* note 10.

59. *See* Delgado, *supra* note 10, at 151-57. For criminal liability, I am inclined to think that either a purpose to initiate contact in order to humiliate or an attempt to intimidate should be constitutionally required. That is, punishment should not be allowed if during a heated conversation a person decides to wound another with such remarks, unless the remarks also are of a sort that often lead to violence.

treatment for class-based insults in face-to-face settings would be a modest exception to "content neutrality," but one that is warranted in light of the values involved.

In closing, I want briefly to consider the import of an ideal of civic courage, an ideal eloquently propounded by Justice Brandeis, for strong insults and group epithets.[60] If a principle of free speech *assumes* that people are hardy or *aims* to help them become so, perhaps coarse and even hurtful comments should be protected in the rough and tumble of vigorous dialogue. But group epithets and slurs designed to wound listeners are another matter. Being impervious to epithets when one is a member of a privileged majority is much easier than when one belongs to a reviled minority, and a general encouragement of civic courage may be more likely if targeted racial and religious abuse is not allowed. Even "courageous citizens" should not be expected to swallow such abuse without deep hurt, and being the victim of such abuse may not contribute to hardiness in ways that count positively for a democratic society.

60. *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).