

## **IN MY OPINION OREGON'S CONSTITUTION Free-speech - Oregonian, The (Portland, OR) - August 22, 2008 - page B05**

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IN MY OPINION OREGON'S CONSTITUTION Free-speech ruling

may add to friction

On Aug. 11, 2003, a man named William Charles Johnson was angered when a car occupied by two women pulled in front of his truck as the road narrowed from two lanes to one. Johnson immediately tailgated the car and, with the use of an amplification device, began shouting obscenities and racial slurs, which he accompanied by obscene gestures.

This harassment lasted more than five full minutes on a traffic-jammed road. Following a complaint to the police, Johnson was charged with a misdemeanor under an Oregon statute making it a crime to intentionally harass another person by using abusive words or gestures in a manner intended and likely to provoke a violent response.

Last week, the Oregon Supreme Court reversed Johnson's conviction, holding that the statute was unconstitutional under Oregon's constitution.

In invalidating the statute, the court read the constitution to provide greater free speech protections than does the First Amendment to the U.S. Constitution. The First Amendment does not protect personally abusive speech that is likely to provoke a violent response.

But the U.S. Constitution provides only the floor for constitutional protections, not the ceiling: the Oregon Constitution may not deprive individuals of the freedoms protected by the federal Constitution, but it can certainly expand them. And at a time when the U.S. Supreme Court appears poised to contract civil liberties, the Oregon court's reluctance to toe the federal line should be applauded.

Nevertheless, the decision reversed a criminal conviction for conduct few would like to see go unpunished. Moreover, while the principal difficulty the court saw in the statute was its potential applicability to political, social and economic confrontations, it seems that when a person hurls abusive epithets at another with the intent to harass and in a manner intended and likely to provoke a violent response, the limits of legitimate expression have been crossed. So, was this decision justified?

The answer is yes. First, we can certainly imagine legitimate political expression that has harassment as its purpose.

Over the past few years, anti-Iraq war protesters have been known to follow, heckle and shout abuse at President Bush and other top administration officials. These protesters certainly act with

the intent to harass and yet most of us would agree that these protests are perfectly legitimate political expressions, and should be constitutionally protected.

But can legitimate political expression also involve the intent to provoke violence?

The Iraq war protesters I mention may not intend to provoke violence, but they are certainly aware of the possibility. The officials they confront are surrounded by often-aggressive security details, and belligerent protesters are sometimes handled roughly. Now it's true that belligerence and willingness to face violence are different than having the intention to provoke it, and yet this distinction can be razor-thin in practice.

Consequently, hostile judges or juries faced with confrontational protesters might be only too willing to detect the required intent. Johnson's is a good case in point: The description above contains essentially all the relevant facts of the case, but a judge found that there was an intent to provoke violence and an appeals court was happy to affirm.

Johnson's despicable conduct is a far cry from legitimate social or political expression, but his case exemplifies the potential dangers of the invalidated statute. Sometimes bad people are let off so that good people do not run into trouble.

As we all know, freedoms can be abused. This is why extensive freedoms require a civilized public and also why too many cases like this may one day cost us such freedoms.

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