Introduction

Sticks and stones will break your bones, but words will never hurt you.

Unfortunately, that is not true, which is why I need to start this book with a "trigger warning." The reader will feel pain, anxiety, anger, depression, and indignation as I remind us of the pervasive insults that have been thrown at disadvantaged members of our society forever.

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More than thirty years ago, on July 26, 1990, on a bright and sunny day, many hard-working members of the disability rights movement celebrated during an outdoor ceremony in the wheelchair-accessible Rose Garden when President George H. W. Bush signed into law the Americans with Disabilities Act (ADA). In an unprecedented moment, Reverend Harold Wilke accepted one of the signatory pens from President Bush with his left foot. Disability activists Evan J. Kemp Jr., Justin Dart, and Sandra Swift Parrino were elevated onto the national stage in a moment of bipartisan support. The ADA created broad-ranging reform that protected people with disabilities from discrimination in both the private and public sectors in both employment and access to public spaces.

Congress enacted those reforms at a time when it was still politically commonplace to demonize people with disabilities. The term "retard" could be heard on the playground as an accepted epithet to utter at another child. But disability epithets were not limited to the playground. For example, Senator William Armstrong (R-Colo.) felt comfortable complaining on the Senate floor that the proposed ADA would cover those with "alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder, cocaine intoxication, cocaine delirium, [and] disillusional disorder."[1] Conflating the term "disability" with demonized patterns of behavior, Congress insisted that homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, compulsive gambling, kleptomania, and pyromania be specifically listed as disorders that would not be covered by the statute.[2]

In response to these insulting characterizations of the people who would be assisted by the statute, Congress agreed to certain compromises. One, to ensure passage of the accessibility provisions, was to limit plaintiffs to injunctive relief (without monetary damages) through a private (rather than public) enforcement model.[3] In other words, a disabled person who could not access a public space had to find a private lawyer who would bring a lawsuit, in which the only available relief was an order to make the facility accessible. Even so, when private lawyers used these limited mechanisms to enforce the statute, the media and defense counsel attacked them for "gaming" or "plaguing" the system, "abusive" tactics, and "shakedown" litigation, merely because they would seek attorney's fees *after* demonstrating that the facility was inaccessible. An entire *60 Minutes* segment was devoted to criticizing these so-called abusive plaintiffs and their lawyers in December 2016,[4] even though they were enforcing the statute with exactly the limited scope of relief that Congress provided.

In the framework of this book, the public insult campaign at the time that the ADA was enacted in 1990 acted as a headwind to effective reform. Advocates were forced to accept bizarre exemptions and an ineffectual enforcement scheme. And the public insult campaign that proceeded in the postenactment era served as a dead weight to effective enforcement of the limited rights provided by Congress. As Jasmine Harris has argued, the ADA may have been better able to obtain effective relief in the first

place if a stronger public media campaign had acted as a headwind during its journey through Congress.[5] With hindsight, we can also see that a public, rather than private, enforcement scheme may have blunted the dead weight effect of public insults in undermining ADA enforcement. Without an effective public media campaign, the public insult campaign has gone largely unanswered.

I argue in this book that the political left needs to account for the power of public insults when it crafts a theory of social and political change. Through many examples—ranging from disability accessibility to immigration reform—I argue that the political left has failed to account for the power of public insults when it designs its strategies to attain progressive reform. Rather than being overly concerned with what counts or doesn't count as an insult, I focus on the *impact* that people whom I characterize as "power bullies," through their deployment of public insults, have had on the ability of the political left to achieve structural reform, particularly in the civil rights arena. I broaden C. Wright Mill's phrase "power elite"[6] to the term "power bullies" to capture the way that the military, economic, political, and media elites, irrespective of their political views, can use their power to undermine structural reform. Public insults act as a headwind and dead weight to the sustained achievement of civil rights advances. As a headwind, they make the achievement of effective reforms quite difficult and then, after such reforms have been crafted into law, they act as a dead weight to preclude their effective enforcement. They can also be an important deflecting strategy by moving attention to the question of whether someone was insulted and away from a structural civil right being undermined.

This book provides a detailed cataloging of the way public insults have been used against people with disabilities, immigrants, women seeking abortions, individuals who are sexually harassed, members of the LGBTQ community, and of course, African American people. Every chapter requires a trigger warning because every chapter repeats these demeaning public insults. I do not convey these insults to cause discomfort or pain to the reader, but so that so we can better understand their comprehensive power. They are a tactic. They are fundamental to the power bullies' playbook. Hence, we need to think deeply about their impact in order to develop an equally powerful response.

In cataloging the power of insults to undermine civil rights reform, this book owes tribute to other scholars who have documented the power of words to wound. In 1993, Charles Lawrence, Mari Matsuda, Richard Delgado, and Kimberlè Crenshaw coauthored a groundbreaking book called *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Like many young scholars at the time, I was mesmerized by this book because it challenged the traditional understanding of the First Amendment and reflected what Matsuda so aptly called "outsider jurisprudence." Rather than seeking to offer a balanced view of the First Amendment, they sought to "present a dissenting view grounded in our experiences as people of color and ask how those experiences lead to different understandings of racism and law."[7] Their work was grounded in the emerging movement called "critical race theory."

They placed their book in their experiences on college campuses and elsewhere of assaultive speech being used to injure racial minorities as a group. For example, Lawrence was alarmed when a Stanford University poster was defaced with the word "niggers" and the university responded that the students who defaced the poster and engaged in other hateful speech could not be disciplined under university discipline rules because their actions constituted protected speech. Lawrence, however, argued that the students' hate speech was not for the purpose of advancing debate. It was an example of speech being used to intimidate and stifle intellectual exchange. Taking Lawrence's storytelling in a new direction and foreshadowing the #MeToo movement that was decades away, Matsuda emphasized the importance of first listening to the voice of the victims of hate speech in developing an appropriate response.

By the time their book was published, Lawrence had helped to push Stanford to adopt a regulation that provided sanctions for some kinds of derogatory student speech that the regulation described as "harassment by vilification." While Lawrence recognized that some people thought this kind of regulation constituted the work of the "thought police," he defended it as regulating speech that lies outside of the First Amendment.[8] In a later chapter, Delgado tried to craft remedies against this kind of hate speech by arguing that there should be a tort action for racial insults, epithets, and name calling.[9]

Their work is very important in reminding us that the problem of racist and other injurious speech is nothing new in the public domain. Delgado recalled that many people in the village of Skokie, Illinois, found the demonstration by the National Socialist Party of America in 1977 with its Nazi uniforms and swastikas inflicted significant psychological trauma, especially because of the large number of Holocaust survivors who lived in that community.[10] Like Lawrence, Delgado tried to use conventional legal tools to obtain remedies for that kind of trauma or enjoin it from occurring in the first place. In 1978, the American Civil Liberties Union (ACLU) defended the right of the white nationalists to engage in hate speech as part of their First Amendment rights.

A lot has happened since that book was published in 1993, although much has remained the same regarding the presence of what this book calls public insults in the political domain. Echoing Skokie, white nationalists held a rally in Emancipation Park in Charlottesville, Virginia, on August 12, 2017, and the ACLU defended their right to march. Counterprotesters also exercised their right to free speech by protesting the white nationalists' racist message. The situation turned deadly when a protester on the side of the white nationalists accelerated his car into the crowd of counterprotesters, killing thirty-two-year-old Heather Heyer and injuring nineteen other people.

But unlike its response to criticism of its First Amendment position in 1978, the ACLU of 2017 did some soul-searching after the Charlottesville protest.[11] It invited Jameel Jaffer, Charles Lawrence, and Mary Frances Berry, prominent scholars on the First Amendment, to its biennial meeting on September 16, 2017, to discuss the ACLU's proper role in representing proponents of hate speech. The work of Lawrence, Delgado, Crenshaw, and Matsuda, along with others, made it possible for Lawrence's ideas to be considered important enough to be part of the ACLU's consideration of how to defend the First Amendment *and* racial equality. Following the 2017 discussion of its role in Charlottesville, the ACLU revised its case selection guidelines to help local affiliates resolve conflicts between competing values or priorities. While not changing its fundamental position that it should defend hateful speech, it also emphasized two important factors that might cause a local affiliate to choose not to defend a particular

speaker: "whether the speaker seeks to engage in or promote violence" and "whether the speakers seek to carry weapons."[12] With hindsight, it is possible to argue that the Charlottesville protesters were in the category of those whom the ACLU affiliate could have chosen not to represent even if it had the resources to engage in that representation. The issuance of these selection guidelines caused free speech advocates, such as Wendy Kaminer, to publish an op-ed in the *Wall Street Journal* arguing that the ACLU had retreated from its protection of free speech.[13]

While benefiting enormously from this lively debate about the proper role of the First Amendment in the face of hateful speech, I seek to reframe the consideration of such speech. I accept the reality that hate speech will continue to be a part of the American political landscape and that the First Amendment will preclude us from enjoining such speech or creating strong remedies for the emotional harm that it may cause. Instead, I ask how we can be better prepared to deal with the reality of hate speech, or what I more broadly call "public insults," by anticipating their use by the power bullies.

I seek to take the discussion of public insults in a new direction. I argue that the phenomenon of public insults is undertheorized. The power of public insults goes much further than suggested by Lawrence and his colleagues. Public insults have the ability to systematically deflect civil rights advances in many areas of the law. We need to understand public insults as a *tool* or *weapon* of the power bullies, which is very effective in undermining statutory and civil rights advances. I argue that this tool has the power to act as a headwind to deflect or impede attempts to attain structural reform and then act as a dead weight to frustrate efforts to effectively implement whatever reform is attained. In this book, I use five case studies from different areas of the law—disability, immigration, marriage equality, abortion, and sexual harassment—to concretely examine the power of public insults in practice.

I write this book in the context of my lifelong work seeking to construct tools to advance structural reform rather than to advance reform through one-person-at-a-time remedies. The latter remedy is part of the neoliberal approach to reform, which privileges private, market-based solutions over systemic governmental answers. This book provides a comprehensive critique of this approach. For example, while it is important for an individual