Review Essay

Difference through a New Lens: First Amendment Legal Realism and the Regulation of Hate Speech

Jon B. Gould

Richard Abel, *Speaking Respect, Respecting Speech.* Chicago: Univ. of Chicago Press, 1998. x + 380 pages. $30 cloth, $21 paper.

Richard Delgado and Jean Stefancic, *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment.* New York: Basic Books, 1997. xii + 224 pages. $45 cloth, $29 paper.

Move over critical legal studies and critical race studies, the First Amendment legal realists are here. In two recent books, Richard Abel's *Speaking Respect* and Richard Delgado and Jean Stefancic's *Must We Defend Nazis?* the authors take the mantle from such colleagues as Stanley Fish and Mari Matsuda in critiquing a First Amendment jurisprudence that they believe is intellectually dishonest in its foundations and aims. Arguing that the First Amendment is not only subjective but also supports racial and gender inequality, these authors seek to explain the basis of conflicts over hate speech and other controversial expression while offering at times differing measures to deal with racist and sexist verbal attacks.

The heart of their work seeks to decipher the basis for conflicts over hate speech, describing a status competition that moves social or political disputes to the legal sphere. In offering up proposals to handle such conflagrations, however, they describe a system of free speech regulation that has been poorly—if not wrongly—understood. Although these books are admittedly light on theory, they seem to accept the hegemonic view of law offered earlier by critical legal studies but go farther in offering proposals to mediate disputes over hateful expression. Both books deserve consideration. Abel's work is detailed and care-

Address correspondence to Jon B. Gould, Department of Public and International Affairs, George Mason University, Fairfax, VA 22030-4444 (e-mail: <jbgould@gmu.edu>).

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fully argued, but in the end, Delgado and Stefancic's proposal is the more politically deft.

The books start from a similar basis, seeing conflicts over hate speech as reflecting social competition for status or respect. Abel connects hate speech to the "centrality and pervasiveness of conflict over respect" (Abel 1998:5) using fights about pornography, Nazi marches, and religious blasphemy to claim that debates over hate speech are often grounded in identity politics and the desire of the subordinated to seek respect, honor, and dignity from society at large. For example, in describing the fight for antipornography measures, Abel portrays feminist activists as attacking the kind of sexual hate speech that devalues their social standing. Similarly, he says the banning of Salman Rushdie's *The Satanic Verses* reflected the book's threat to "authentic" Muslim society. Under Abel's approach, the charge of "hate speech" becomes a defensive shield for those threatened by social customs or events. Louis Farrakhan represents hate speech to American Jews, pornographic pinups are hate speech to female workers, and Robert Mapplethorpe reflects hate speech to social conservatives worried about a permissive culture. What turns an otherwise unpleasant comment into hate speech is the notion that its expression threatens the social standing or respect of another. As such, Abel says, hate speech is most often associated with issues of moral reform, where cultural groups act to preserve, defend, or enhance the dominance and prestige of their own style of living within the total society. These fights are emotionally intense, as the "dominated must extirpate internalized feelings of subordination" (ibid., p. 70); they are zero sum; and they often involve public fights over symbols. Indeed, because "state imprimatur constitutes a public, official affirmation of norms and values, seemingly ceremonial or ritual acts take on greater meaning. . . . [T]he wider the audience and the more official the imprimatur the higher the stakes. The principal fault lines for hate speech involve religion, nation, and language; race; gender, sexual orientation and physical difference—the kind of characteristics around which societies assign standing" (ibid., p. 70).

Delgado and Stefancic agree with Abel that the "indisputable element of harm" in hate speech is the "affront to dignity" (Delgado & Stefancic 1997:20). The two, however, see a concerted purpose in such expression, maintaining that whites, men, and others in the majority collectively use hate speech as an offensive weapon to keep the subordinated down. As they argue, with "formal mechanisms that maintained status and caste gone or repealed . . . all that is left is speech and the social construction of reality" to keep certain groups in their places (ibid., p. 160).

At times it is difficult to determine if Abel means respect or status competition in theorizing the reaction to hate speech. These would appear to be different influences in the sense that

status motives can reflect insecurity or a sense of affirmation. For example, when Jesse Helms and other conservatives decry homoerotic art as hateful expression, one of their fears must be that they are on the downside of the cultural curve and that their values are being supplanted in popular culture. By contrast, when Delgado and Stefancic and other critical race theorists push for protection against racist epithets, their intent seems to affirm the membership rights they have achieved since the 1960s. Admittedly, both groups may be concerned about their relative status at a given time, but it is worth exploring the differing motives of those on the rising and falling ends of the status curve. A good example here is gay rights, a topic that often lends itself to cases of hate speech. Presuming that gay rights remains on the upswing and that homosexuals are being increasingly accepted by heterosexual society, what would we say of those on opposite sides of the Defense of Marriage Act? Do opponents of gay rights seek respect as much as they fear that "any concession to the subordinate [endangers] their own superiority" (Abel 1998:124)? By contrast, gay activists seem less concerned with "status anxiety" than in affirming their own place. We might thus tease apart status motives into two groups, those inspired by respect and those motivated by anxiety. Groups on their way up the status curve seek respect, whereas those fearful of losing their dominant position necessarily reflect status anxiety.

This clarification aside, there is much to like in the works of Abel and of Delgado and Stefancic. Their link of hate speech to status competition rings true, allowing us to explain a number of social conflicts that intuitively bring to mind issues of social standing. Abel discusses several recent cultural debates, including the Smithsonian's proposed exhibit of the *Enola Gay*, local fights over school curricula, and the "white hand" television advertisement of Jesse Helms. At the heart of each fight loomed status competition: veterans opposed the Smithsonian to maintain their heroic standing, conservatives pushed creation science to gain the state's imprimatur of cultural values, and Helms sought to arouse the fear of lower-class whites that they were losing standing to blacks.

With the exception of Helm's ad, none of these examples involves hate speech per se, but Abel's point—and that of Delgado and Stefancic—is that the labeling of speech as acceptable or impermissibly dangerous rests on sociopolitical needs and judgments. Hate speech is not some dry academic or legal exercise in which scholars or magisterial courts seek to determine the appropriate boundaries of free expression. Rather, hate speech is a social, cultural, and political issue, requiring us to decide which attacks so threaten our social or political stability that we might rein them in. Why is it, for example, that sexual harassment rules pass judicial scrutiny but a municipality may not ban a burning

cross?[1] Might the different social standing of women and blacks have something to do with the decision? I leave that question for later, but the exercise recalls Gerald Rosenberg's claim that the "First Amendment is not a substantive force in itself, but instead a forum for substantive arguments about the cultural definitions of liberty" and its relation to equality (Rosenberg 1988).

It is hardly a coincidence that Rosenberg arises at this point, for Abel and Delgado and Stefancic use Rosenberg merely as a stopping point in attacking the very legitimacy of First Amendment jurisprudence. Their arguments generally fall into two camps: one, that the lines drawn between accepted and prohibited speech are subjective to the point of being arbitrary; and two, that the marketplace of ideas is slanted in favor of the privileged. We have seen much of these arguments before, including, especially, the work of Stanley Fish, whose praise for Abel appears on the book jacket. Yet the amount of detail Abel provides is astounding. Although at times he serves up straw man arguments,[2] the book makes a convincing case that free speech absolutists are either disingenuous or have their heads in the sand. Abel's goal is to "challenge the laissez-faire position" on speech, to "adduce instances of state interference that principled libertarians accept" as proof that the pure civil libertarian view is flawed (Abel 1998:127). His point eventually will be that speech values should be balanced "against others through discrete contextualized prudential judgments" (ibid., p. 125).

The vast detail in Abel's book is welcome news to those who believe that First Amendment jurisprudence is culturally driven. For example, Abel chronicles the several legislative rules that prohibit "derogatory, demeaning, or insulting" (ibid., p. 146) references to public officials, while also noting the number of courts that have struck down collegiate hate speech codes as content restrictions. One of his best examples is the California Assembly, which forced a new member to apologize for speaking of contractors "Jewing down" subcontractors. Were a California university to require the same of a student in the post-*R.A.V.* era, the administrators would be subject to suit, but in the legislative arena, such restrictions prevail.

Abel is less persuasive in arguing why government regulation of harmful expression is unhelpful, but he makes a good argu-

[1] In the case of *R.A.V. v. City of St. Paul* (1992), the U.S. Supreme Court invalidated an ordinance from St. Paul, Minnesota, prohibiting the display of a symbol "which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (*R.A.V.* 1992:377). At the same time, in upholding sexual harassment law the Court permitted "special prohibitions on those speakers who express views on the disfavored subject . . . of . . . gender" (ibid.).

[2] For example, Abel criticizes "free speech absolutists" while at the same time acknowledging that few scholars accept the oversimplification that "the state should never constrain speech and must observe strict neutrality as a speaker" (Abel 1998:125).

ment that much regulation misses the speaker's motive or context. As he explains:

> the growing enthusiasm for state regulation of [speech, including] pornography, hate speech, blasphemy, media violence, and advertising of harmful products . . . is often misguided: always costly, usually ineffective, and sometimes counterproductive. Law inescapably dichotomizes reality, rupturing subtleties of meaning with arbitrary boundaries that are always over- and under-inclusive. . . . Far from silencing harmful speech, law encourages, valorizes and publicizes it, transforming offender into victim and offender into romantic defiance of fundamental right. (Ibid., p. 244)

Again, Abel provides a litany of examples for his point: the development of the television rating system that comes hand in hand with rising violence in children's programming, the censoring of great literature as pornographic or racist, Internet decency software that screens out important medical information, the tendency of officials to employ symbolic restrictions to avoid the real causes of deleterious effects, and entrepreneurs who welcome repression as an opportunity to disguise promotional activities as civil libertarianism. If Abel's research is voluminous, however, it is difficult to tell whether he is attacking the act of restriction or merely claiming that mistakes are made in distinguishing between harmful and acceptable speech. Surely, he does not mean the former, for Abel recognizes the dangers inherent in such speech as extortion, threats, conspiracy, and even racist attacks. Yet to argue that speech restrictions miss the context of expression is not to turn the system of free speech on its head. Although claiming that the shibboleth of free speech is hardly so steadfast, Abel seeks a different forum for speech regulation that will take motive and context into account.

If Abel's opening salvo is more temperate, Delgado and Stefancic attack the unequal social and political power that they believe supports free speech law. As they suggest repeatedly throughout their book, "the marketplace of ideas is not level but slanted against people of color" (Delgado & Stefancic 1997:111). To Delgado and Stefancic, First Amendment jurisprudence is anything but viewpoint neutral, repeatedly reinforcing the status and views of the governing white, male elite. The authors focus specifically on what they call the neoconservative, "toughlove crowd," commentators and jurists who do not recognize the power of speech to reinforce racial or class divisions and who do not "want to confront the intuition that slurs against people of color are simply more serious than ones directed against whites, nor the idea that the playing field is not level" (ibid., p. 111). To Delgado and Stefancic, a jurisprudence that refuses to consider these influences is illegitimate.

Abel agrees that free speech is slanted in favor of the established, saying that "'neutral' passivity is a decision to reproduce the status quo" (Abel 1998:247). But rather than focusing primarily on racial and gender differences (as do Delgado and Stefancic), Abel's is more of an economic critique. In challenging the false dichotomy between public life as the realm of constraint and the private world as the domain of liberty, Abel aims at power differentials inherent in a capitalist society, arguing that greater speech restrictions will come from private industry. Once again he provides copious examples, most of which focus on the ability to distort truth. As he says, "the commodification [of speech] not only devalues speech but also shapes and rations it, allowing those with superior material resources to drown out or silence opponents" (ibid., p. 174).

Whether the management of public relations equates with the state's prohibition of particular messages is, of course, open for debate, but what makes it difficult to weigh Abel's argument—and to some extent Delgado and Stefancic's—is their paucity of theory over the ultimate purpose of free speech. As even Abel says of his book, "My style is narrative. . . . I adapt William Carlos Williams—no social theories but in events. To paraphrase the Yellow Pages, I let my stories do the talking" (ibid., p. ix). Delgado and Stefancic claim that First Amendment legal realism reflects the failure of the First Amendment to ameliorate racism or sexism, but they too fail to explain why free speech jurisprudence should take on this goal. Moreover, their collective view that speech regulation misses context fails to define whose judgment of context should rule. For example, Delgado and Stefancic would permit blacks to call each other nigger, which, within racial groups, can be "spoken affectionately . . . as a greeting," but they claim that whites should be punished for such "badges of degradation" (Delgado & Stefancic 1997:26). Yet how would they handle the case of *Dambrot v. Central Michigan University* (1993), in which a white coach used nigger in the same manner as his black players, "to connote someone who is 'fearless, mentally strong and tough'" (ibid., p. 479)? Do Delgado and Stefancic mean to say that First Amendment jurisprudence is necessarily subjective and that the solution is simply to replace prevailing standards with ones they consider more acceptable? If so, they seem to fall squarely into the hands of free speech absolutists, who undoubtedly would claim their system superior because it prohibits any one group's viewpoints or subjective judgments from dominating. A uniform, objective U.S. Constitution, they would say, is eminently superior to a subjective system without clear standards.

On this point, Abel and Delgado and Stefancic presumably would respond that pure civil libertarians have their heads in the sand, refusing to recognize the social and political base on which

free speech law rests. Yet these three authors—all First Amendment legal realists—appear reluctant at times to take the final step and label free speech jurisprudence primarily a political process. They want the seeming impartiality and careful balancing that First Amendment absolutists usually assign to the judicial process, but they also want that unbiased judiciary to craft legal rules more akin to their ideology. It is a difficult niche to carve out. If, as they say, law is socially constructed, then the lines we draw between accepted and prohibited speech may be no more legitimate than the social and political processes that generate the decisionmakers. We can set up systems to filter out as many outside, express influences as possible, but in the end, constitutional law becomes primarily a political process.

The concept that courts are political institutions is, of course, hardly new, for many of the legal philosophies of the twentieth century accept the truism that "treating courts and judges as either philosophers on high or as existing solely within a self-contained legal community ignores what they do" (Rosenberg 1991:342). Courts "must be treated as [the] political institutions [they are] and studied as such" (ibid.). Indeed, most students and practitioners of American law have now grown up with at least the tantamount recognition that the law they invoke is influenced by (or suffers from) the social context in which it is used. For example, we know that business fraud is enforced but sexual fraud is not because we as a society are hesitant to allow the judicial system into our bedrooms although we accept it in the workplace.[3] Similarly, the development of rape shield laws reflects a legal system that has adjusted to the rising social power of women.[4]

But when we talk about constitutional law, and more particularly the First Amendment and freedom of expression, a strange set of intellectual blinders seems to take hold. At times, it seems as if scholars and practitioners want to believe that the doctrine is not only sacrosanct but unwavering in meaning and application. Whether or not the First Amendment is initially humanmade law, some advocates seem to suggest that it must continue to mean the same thing. Justice Black was perhaps the most famous of these champions, claiming that the First Amendment has a fixed meaning: Congress shall make *no* law abridging expression. Others have been more delicate in their argument, claiming that the values behind the First Amendment—including self-expres-

[3] The term *sexual fraud* is best described by Jane Larson, a law professor. According to Larson (1993), sexual fraud involves such cases as breach of the promise to marry and the reckless transmission of sexually transmitted diseases. Larson also claims that gender bias explains the courts' reluctance to enforce sexual fraud.

[4] It is possible that male lawmakers and jurists would have come to see the need for these protections on their own, but politically empowered women pushed courts and legislatures to remove a victim's sexual history from the consideration of rape cases.

sion, truth seeking and self-government—require that its doctrine be permanent and unwavering (Redish 1984).

Yet this very argument shows the First Amendment's meaning to be open to social construction. That we present cultural and political rationales for the norm of free speech means that we determine its importance through social interactions. Free speech is not an immutable, God-given norm; it exists to serve social needs or socially constructed values. We use constitutional law to advance certain social values; in turn. the meaning of these norms may change as our social, cultural, or legal needs change.

This realization can be a scary proposition. As Stanley Fish has said,

> People cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is *politics,* the realization that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want silenced. (Fish 1994:110)

Yet this is exactly what courts do when they consider free speech cases. Regardless of the legal rule they claim to be following, judges implicitly must balance the value of the speech at issue against the potential harm it presents. Justice Stevens acknowledges as much when, in *R.A.V.* (1992:426–27), he says:

> Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of "categories" fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. . . . Moreover, the categorical approach does not take seriously the importance of context. The meaning of any expression and the legitimacy of its regulation can only be determined in context. Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience.

We see these kinds of judgments most clearly when the courts approach symbolic acts. Cases like flag burning (*Texas v. Johnson* 1994), the destruction of draft cards (*Bond v. Floyd* 1966), and written epigraphs like "fuck the draft" (*Cohen v. California* 1971) reach the Supreme Court and have lasting importance because we recognize that they are not simply value-neutral actions being measured against immutable norms but instead represent symbolic ideas being interpreted and weighed by potentially fallible,

and even biased, judges.[5] The Court takes on these cases, and we watch in rapt attention, because we understand that the Court is operating on the very heart of socially constructed behavior. Symbols are a way of socially constructing meanings. As one scholar explains, law "affects us primarily through communication of symbols—by providing threats, promises, models, persuasion, legitimacy, stigma, and so on" (Haiman 1993:9).

If this depiction of First Amendment jurisprudence is correct, we quickly come to a conundrum pointed out by critical legal studies scholars, among others. If legal norms are set through social processes and if social processes are controlled by a dominant culture, how do the marginalized change legal norms? Critical legal studies has urged outsiders to storm the palace gates,[6] but to use a battlefield analogy, it is hard to overcome superior firepower especially when, as Delgado and Stefancic point out, the dominant culture is likely to see any alterations to the status quo as a threat. As they say, "the point of canonical ideas [like free speech absolutism] is to resist attack. If one places at the center of one's belief system the notion that all speech should be free and that equality must accommodate itself to that regime, then all equality arguments but the most moderate will appear extreme and unjust" (Delgado & Stefancic 1997:144).

Part of this reason, they say, is because "the dominant group" in society depends on discriminatory expression such as pornography and hate speech to maintain its position. With "formal mechanisms that maintained status and caste gone or repealed . . . all that is left is speech and the social construction of reality" to keep certain groups in their places (ibid., p. 160). Whereas before, women and blacks understood that they were not the equals of white men (because, among other things, the Constitution excluded them), today anxious whites and men who fear the ascendancy of women and the "crime and vengeful behavior of blacks" use hate speech as a cultural weapon "to maintain their position in the face of formerly subjugated groups clamoring for change. . . . [I]t is, in short, an instrument of majoritarian identity politics. Nothing in the Constitution (at least in the emerging realist view) requires that hate speech receive protection. But ruling elites are unlikely to relinquish it easily, since it is an effective means of postponing social change" (ibid., pp. 160–61).

So, what can an outsider to do if she wishes to change legal norms and with them social inequalities? Abel advocates a system of extrajudicial confrontations in which "communities" create

[5] Indeed, it "often has been argued that the most defining characteristic of what it means to be human is the symbol-creating and symbol-transmitting capability" (Haiman 1993:9).

[6] In fact, I recall my contracts professor in law school, Duncan Kennedy, suggesting (perhaps tongue in cheek) that summer associates at law firms sabotage the corporate copying machines.

"structured conversations" between victims of hate speech and their offenders to "secure apologies from those whose words reproduce status inequalities" (Abel 1998:263–65, 273). Abel wants society to take the side of outsiders in matters of hate speech, but he believes that resolution is best handled outside of formal judicial processes.

To the critical reader, Abel's proposal may seem to stray close to state censorship, which Abel excoriates so strenuously, but as Abel responds, his "skepticism about state regulation here is strategic, not principled" (ibid., p. 275). His goal is not to champion the freedom of hate speech but to limit the tendency of "criminal and civil penalties [to] publicize, valorize, and confer martyrdom on offenders" (ibid.). As such, his proposal operates outside the purview of strict state control, creating informal processes throughout civil society to confer respect upon victims, evaluate speech in context, and make offenders render an apology that is acceptable to both victim and community. Describing the process in more detail, Abel says:

> Once the victim has voiced the grievance, the accused must be allowed to offer an account—an alternative interpretation of ambiguous words and obscure motives. The victim's acceptance may expunge the injury. But because few accounts are entirely credible, an apology may also be necessary. An apology is a ceremonial exchange of respect. . . . Offenders owe, offer, or give apologies, thereby acknowledging moral inferiority. Victims readmit offenders to the moral community by accepting apologies or preserve the moral imbalance by rejecting them. (Ibid., p. 265)

Abel deserves credit for a proposal that seeks to avoid costly legal battles by resolving status disputes at their source, and he is right to seek a method that weighs context and motive more precisely. But in taking sides, we need to ask *who* is siding with whom and for *what* reasons. If Abel's goal is that dominant decisionmakers side with the dispossessed, he fails to explain why such "insiders"—those who may have benefited at the expense of outsiders—would later conclude that the outsider perspective is superior. Conversely, if the goal of Abel's proposal is to empower the dispossessed by allowing them to air their status complaints, it is unclear why the dominant would participate in such sessions absent the state's compulsion. I take Abel's point of limiting the externalities of state censorship, but it is difficult to understand why the perpetrators of status offenses would choose to participate in this ritual public apology without some sort of coercion besides guilt or conscience. General community pressure would be woefully inadequate, for if we stick with the dichotomy between the dominant and the dispossessed, the former likely look to their own for peer pressure. The dispossessed's clamoring may get some attention, but it alone is unlikely to bring the dominant

to the public square in sackcloth if, as Delgado and Stefancic posit, the dominant use hate speech to keep the dispossessed in place.

For that matter, free speech is no less at risk when the private sector or civil society seeks to set the boundaries of appropriate dialogue rather than the state. Earlier in the book, Abel derides Catharine MacKinnon and antipornography activists for seeking to graft an overbroad notion of pornography's harms onto First Amendment law, but his call to take sides seems to carry the same risks. He says that we need to attack speech that reinforces status inequalities, but whose judgment wins out here, and might it simply be wrong?

In this respect, Abel adopts the very argument of MacKinnon's he derides in implying that some women have internalized male norms from a culture of constrained sexual hierarchies. If one's goal is to raise the social standing of the dispossessed, Abel faces the paternalistic problem of what to do when the dispossessed do not see themselves as such. To move ahead anyway is to participate in the status differences that credit some groups' views over others. Doing nothing, however, may ensure that the dispossessed continue to internalize the cultural norms that keep them down. To be sure, this dilemma is hardly specific to Abel's proposal, but it is a bit surprising that he does not address the problem in greater detail.

Abel will undoubtedly claim that as long as the proposed process seeks reconciliation and not punishment or censorship, his proposal escapes the problems of MacKinnon's scheme in that one group's tastes cannot establish which speech will be punished or banned for society as a whole. If the process works as envisioned, however, it will necessarily "chill" some speech as undesirable. By the very fact of labeling some speakers the perpetrators and others the victims, Abel's proposal inherently weighs certain expression as more desirable than other speech. By then seeking apologies from the perpetrators (with the inherent shame and "moral inferiority" that follows), Abel's proposal is likely to discourage, if not ban, some speech. His advantage is that context and motive will be weighed so that only the most wrongful speech will be chastised. Again, though, we are left with the question of whose judgment prevails in defining harmful speech. Abel's objection to trial courts is that they miss the context of much expression, but can his community-based confrontations better prevent a vocal group's tastes from dominating the division between acceptable and harmful speech?

Delgado and Stefancic take up this argument, seeing Abel's approach (or one like it) as paternalistic and unrealistic. Although they undoubtedly would applaud Abel's goal of seeking apologies from perpetrators of racist speech, they strongly oppose the idea that "talking back to the aggressor . . . is the

solution to racist speech" (Delgado & Stefancic 1997:104). This approach, they say, is often put forward by those "in a position of power" who "therefore believe themselves able to make things so merely by asserting them" (ibid.). Yet, "racist speech is rarely a mistake, rarely something that could be corrected or countered" by the kind of dialogue Abel envisions (ibid.). They make their point with a humorous example, painting a potential encounter session between perpetrator and target. Responding to a person who says, "Nigger, go back to Africa. You don't belong at the University," Delgado and Stefancic (ibid.) have the target respond:

> Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have informed you of this, I am sure you will modify your remarks in the future.

Although obviously exaggerated, Delgado and Stefancic are right that "talking back" may "not correspond with reality. It ignores the power dimension to racist remarks" and fails to provide an effective requital (ibid.). Confrontation may discourage future remarks, and dialogue can be important where a perpetrator's motive is unclear, but an exchange between perpetrator and victim is likely to fail for want of enforcement powers. Either the perpetrator feels guilt or remorse and voluntarily shows up for the session—in which case he was not that serious an offender—or he flouts the encounter and continues his attacks unchecked by the community. Abel's system may work in relatively closed circles—colleges or universities, small towns, or church groups—where peer pressure is more concentrated and influential, but in larger, heterogenous arenas, a state power seems necessary to compel the perpetrator's attention and require amends.

Even recognizing Abel's point that state enforcement can be overly broad, it seems that the trade-off is failing to reach the most serious offenders. If, as the First Amendment legal realists say, racist verbal attacks are on par with physical assaults, it is important that they be addressed and not simply overlooked if a perpetrator fails to recognize his or her responsibility. Indeed, to treat verbal attacks differently from physical offenses—to relegate them to encounter sessions instead of legal processes—is to say that they are not as significant as physical hatred and do not have to be taken as seriously. Certainly, many civil libertarians and neoconservatives would agree with this view (if not think that verbal assaults should be left unregulated), but one of the points of the First Amendment legal realists seems to be that the speech-act distinction is illegitimate. For that matter, how would the encounter model handle such cases as *Wisconsin v. Mitchell*

(1993), where physical acts are motivated by hateful beliefs?[7] Do we prosecute the offenders for their acts and then send them to encounter sessions to discuss their views? If not, how do we defend Abel's bifurcated model?

If First Amendment legal realists are serious about rooting out racist speech and halting its spread, then some sort of enforcement system is necessary. With this in mind, Delgado and Stefancic propose the creation of a new tort claim for racist insults. The tort would have three elements: that the defendant addresses language to the plaintiff "intended to demean by reference to race," that the plaintiff understands the language as intended to demean through reference to race, and that a reasonable person would recognize the language as a racial insult (Delgado & Stefancic 1997:25).

To readers of Delgado's past work, this tort claim should look familiar; for the last decade or so Delgado and his critical race colleagues have urged formal legal redress for racist speech. Yet there seems to be an important difference in Delgado's and Stefancic's present proposal. Rather than reaching racist speech per se, the tort claim is limited to racial insults; political speech, academic assertions, or personal beliefs appear immune to the claim. Announcing one's view that blacks are genetically inferior to whites would not qualify as a racial insult even despite the statement's prejudice. Rather, as the authors illustrate with an example, the tort claim would be limited to such epithets as "Nigger, go back to Africa" (ibid., p. 104).

That Delgado and Stefancic would limit their proposal to racial insults raises the question of whether they are trivializing the response to racism. Neoconservatives would undoubtably ask, Can we root out racist attitudes by banning insults? To see their proposal in this light, however, is to miss its significance. Among other measures, Delgado and Stefancic recommend "empowering outsider speakers" (ibid., p. 37) as well as penalty enhancements for crimes of bias. Yet what one really sees in their proposal is an increasing political savvy within outsider scholarship. Rather than jumping into the fray with an ambitious proposal that is sure to scare off the white majority, they propose incremental steps. One can almost hear them musing that if we can just knock off racist insults, perhaps we can get at larger racist attitudes.

Delgado and Stefancic are right that a new legal norm "creates a public conscience and standard for expected behavior" (ibid., p. 11), and their strategy of addressing the most egregious (and least defended) assaults first makes sense. Even if their proposal ultimately leads to few tort cases—a likely result for such a

[7] In *Mitchell,* the U.S. Supreme Court ruled that an accused's free speech rights are not violated by a state "hate crimes" statute that enhances punishment when the victim is selected because of race.

limited claim—it may well affect attitudes and with that discourage hate speech "through the teaching function of law" (ibid.). Indeed, that their measure will assuredly be labeled symbolic or ineffective illustrates just how productive it can be. With a white majority unconcerned about the proposal as "merely symbolic" or "a sop to minorities," it might be willing to accept a new tort claim that, in the hands of minority litigants, has the potential to affect racial attitudes. The same has been true for collegiate hate speech codes. Although initially derided as symbolic or ineffective, today up to 60% of incoming college students support the prohibition of racist and sexist speech. In addition, press coverage of the speech codes has changed from uniformly negative to moderately accepting (Gould 1999).

Ultimately, then, Delgado and Stefancic answer the conundrum posed earlier in this essay: If outsiders believe they are being shut out by the majority and if real change will require the acquiescence of the majority, how do outsiders effect that change? The answer is to take small steps, to propose incremental measures that are less likely to arouse the majority's ire, and to use the opening to move attitudes and ultimately policy. As Delgado and Stefancic say of feminist attempts to restrict pornography, "We might enact laws prohibiting the worse forms of violent (e.g., 'snuff') films, saving treatment of the more general problem for another time" (Delgado & Stefancic 1997:37).

Regardless of whether one agrees with Delgado and Stefancic's ideology or proposals, one must at least admire their political reckoning that larger change comes step by step. Like Abel, they seek to dislodge the racial "and perhaps sex-based subjugation . . . embedded in our society" (Abel 1998:20–21). But where Abel looks at the situation and says we ought to be able to give minorities their deserved rights, outsiders themselves look at the same picture and mutter, "We can expect baby steps at best." This view is not necessarily the pessimism of Derrick Bell (1992), but more likely the response of realistic liberals and progressives to what they see as an unresponsive social and political culture. If they want the majority's aid or acquiescence in advancing change, their strategy makes sense.

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