ALABAMALAW
THE UNIVERSITY OF ALABAMA®

Alabama Law Scholarly Commons

Essays, Reviews, and Shorter Works | Faculty Scholarship

1996

Apologize and Move On: Finding a Remedy for Pornography, Insult, and Hate Speech Review Essay

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

Jean Stefancic
University of Alabama - School of Law, jstefancic@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_essays

Recommended Citation

Richard Delgado & Jean Stefancic, *Apologize and Move On: Finding a Remedy for Pornography, Insult, and Hate Speech Review Essay*, 67 U. Colo. L. Rev. 93 (1996).
Available at: https://scholarship.law.ua.edu/fac_essays/139

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Essays, Reviews, and Shorter Works by an authorized administrator of Alabama Law Scholarly Commons.

APOLOGIZE AND MOVE ON?: FINDING A REMEDY FOR PORNOGRAPHY, INSULT, AND HATE SPEECH

SPEECH & RESPECT. By Richard Abel.
Stevens & Sons/Sweet & Maxwell, London, 1994. 200 pp. + xii.

Reviewed by RICHARD DELGADO* & JEAN STEFANCIC**

INTRODUCTION

Recently, the president of a major public university made a serious accusation of genetic inferiority on the part of students of color at his campus.[1] The remark, which occurred at a closed meeting of campus officials, was detailed, seemingly well thought out, and embedded in a larger discussion of academic standards.[2] Months later, when his statement came to light, the president at first attempted to justify and defend his actions, then apologized.[3] In defense, the president and his supporters emphasized how he had staunchly supported minority rights up until then.[4] Though he apologized repeatedly, this did little good, serving only to fan the flames of controversy.[5] As has happened with other public figures who have attempted to recant toward the ends of their lives, the president's critics were not content to let matters lie.[6]

---

* Charles Inglis Thomson Professor of Law, University of Colorado.

** Research Associate, University of Colorado.

1. *See* Annette John-Hall, *The Man Behind the War of Words at Rutgers*, PHILA. INQUIRER, Feb. 12, 1995, at C1; Denise K. Magner, *President of Rutgers U. Struggles to Control Damage After Comment on Blacks and Standardized Tests*, CHRON. HIGHER EDUC., Feb. 10, 1995 at A16.

2. *See* John-Hall, *supra* note 1; Magner, *supra* note 1.

3. Robin Wilson, *Flash Point at Rutgers U.: Despite President's Apologies, Outrage over Racial Comment May Force Him Out*, CHRON. HIGHER EDUC., Feb. 24, 1995, at A21.

4. *Id.*; *see also* Doreen Carvajal, *A Career in the Balance: Rutgers's President Starts a Firestorm with Three Words*, N.Y. TIMES, Feb. 6, 1995, at B1 (noting that the president's record belies charge of racism).

5. *E.g.*, Bill Maxwell, *There's Wisdom in Forgiveness*, ROCKY MTN. NEWS, Mar. 1, 1995, at 32A.

6. *See, e.g.*, Gary Hart, *McNamara's Mea Culpa Offers Invaluable Lessons*, DENV. POST, Apr. 23, 1995, at 10E; Richard Reeves, *McNamara Waited Far Too Long to Speak Out*, DAILY CAMERA (Boulder, Colo.), Apr. 21, 1995, at D3. *See also infra* part IV (explaining why this often happens).

When should an apology suffice to close a public or private dispute? A new book by Richard Abel addresses one aspect of this question—namely, when the dispute centers around an incident of hate speech or insult.[7] A detailed and textured book, *Speech & Respect* is a welcome addition to the literature on speech-based harms, including pornography, racial insult, and religious invective.[8] In it, Professor Abel joins the growing number of scholars—still a minority—who believe that redress should be taken seriously and that marketplace rhetoric should not automatically trump all claims by women, minorities, and others injured by vicious speech.[9] This book continues the line of impressive scholarship Abel has contributed over the years dealing with American lawyers,[10] deformalized justice,[11] and the structure of legal aid,[12] all written from the perspective of a thoughtful, leftist scholar.

Speech & Respect grew out of an invitation by the Hamlyn Trust to give a series of lectures at the University of Wales, Cardiff, in late 1992 (p. 1). The author was invited to address any subject having to do with the common-law countries and their legal problems (pp. 1-2). One of only two Americans invited to give the lectures in the forty-four years of their existence, Abel chose as his topic the relation of speech and status inequality (pp. 1-2).

Believing that struggles for respect are intensifying throughout the world (pp. 2, 23-28), Abel opens with three stories that show how speech can exacerbate that struggle. The first story details the way that Catharine MacKinnon and Andrea Dworkin

---

7. RICHARD ABEL, SPEECH & RESPECT (1994).

8. For a sampling of work concerning speech-based harms, see, e.g., HENRY L. GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX (1994); NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (1992); CATHARINE A. MACKINNON, ONLY WORDS (1993); MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993); ARYEH NEIER, DEFENDING MY ENEMY (1979); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994).

9. *See, e.g.*, MATSUDA ET AL., *supra* note 8; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence, *If He Hollers Let Him Go*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

10. RICHARD L. ABEL, AMERICAN LAWYERS (1989).

11. Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 267 (Richard L. Abel ed., 1982).

12. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985).

attempted to enact civil rights ordinances that would have enabled women injured by pornography to bring a private action for redress (pp. 4-8). The second deals with hate speech. Focusing on *Beauharnais v. Illinois*[13] and *City of Chicago v. Lambert*[14] (early group libel cases), and the Nazis-in-Skokie[15] case, Abel describes the controversies that erupted when hate groups leafleted, marched, and demonstrated in the neighborhoods of the very groups vilified (pp. 8-11). His third illustration, "The Satanic Verses," recounts the furor that broke out when Salman Rushdie wrote a novel that many Muslims found shameful and blasphemous (pp. 11-22).

Having reminded his readers of the disruptive potential of racist, antiwoman, and blasphemous remarks, Abel turns to the question of remedies. Chapter 2 (pp. 33-80) deals with the civil-libertarian position, which holds that little, if anything, can or should be done to redress the harms of scathing speech. Abel rejects this position; the costs of such speech are too high to ignore (pp. 34-38). Moreover, the state can never be truly neutral among speakers and messages—it sets up and encourages markets and property rights in speech by virtually everything it does (pp. 44-47). Nor are speakers as free and unconstrained as the civil-libertarian model presupposes. Every speaker finds that certain ideas are valorized in advance (pp. 47-57). Some are off limits because of licensing and trademark laws (p. 48). Some speech (for example, the televised variety) is expensive—only the wealthy or well-connected can play (pp. 50-51)—and styles and trends dictate what editors and publishers will consider (p. 52). Regulation thus occurs whether we like it or not.

Chapter 3 (pp. 81-122), however, argues that the standard leftist (and Critical Race Theory) response, namely, regulation, is equally troublesome. One reason is that there is a poor fit between the thing to be regulated—speech—and law or regulation. This is so because all symbols are irreducibly complicated and ambiguous, their meaning a product of a complex of factors: the identity of the speaker, his or her motive, the relationship between the speaker and the listener, the setting in which the speech-act occurs, and the audience that witnesses it (pp. 25-26,

13. 343 U.S. 250 (1952).

14. 197 N.E.2d 448 (Ill. App. Ct. 1964).

15. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Village of Skokie v. National Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

81, 86, 137-41). Law is cumbersome and dichotomous, relying on rigid categories (e.g., specification; public/private) that are necessarily over- and underinclusive and that cannot easily take account of the multifarious quality of speech (pp. 86, 97-103). Moreover, heavy-handed regulation only makes martyrs out of bigots, giving them an audience, allowing them to think of themselves as victims (pp. 102-04), and doubling the harm to the victim by repeating what was said at the trial or hearing (p. 103-04). In many cases, the harm that supposedly justifies a pornography ordinance or hate-speech law will be difficult to prove: there is no straight-line correlation between consumption of pornography and commission of rape or other harms to women, for example (pp. 93-94). And, if we draft regulations narrowly aimed at clear-cut cases of harmful speech, like "You Nigger, go back to Africa, you don't belong on this campus," we allow less easily defined harms or more sophisticated versions of the same messages ("Leon, are you sure you are not in over your head at this school?") to slip through (pp. 97-103).

In his final chapter, Abel offers a surprising solution to the Scylla and Charybdis of laissez-faire and heavy-handed regulation: the apology (pp. 136-52). This would not be a formal requirement but rather one enforced by community pressure (p. 144-49). The person who spoke the wounding message would be required to render an explanation and apologize to the victim (p. 145-46). No prosecutor or other public authority would play a part (p. 144-47). Instead, the victim would control the commencement of the proceedings (p. 142-43). The resulting hearing would not be neutral, as in court, but partial and partisan: the purpose would be to get the offender to see the error of his or her ways and make amends to the victim (p. 143). The status injury of the speech, in which the victim is degraded while the speaker elevates himself or herself at the victim's expense, would thereby be set right. This process would sensitize speakers to the harm they cause, make the victims feel better, and establish and strengthen community norms against this type of behavior in the future (p. 145). The process, in effect, is the punishment (p. 145).

In this essay, we focus on Abel's remedy—the apology. Although we admire Abel's scholarship and welcome much of what he says, we believe that his solution falls short. In Part I, we provide a brief overview of the hate-speech controversy. In Part II, we turn to Abel's remedy, arguing that it is too mild—that it trivializes the harm of racist and sexist speech. We

suggest in Part III that it ignores an implicit power dimension lurking in much invective. Finally, in Part IV, we urge that apology proceedings suffer from a number of practical and theoretical difficulties, some of which seem insurmountable. These difficulties stem from the same source: thinking of racial and other insults in terms of status offenses when they are, in fact, much more than that.[16] We close with a few thoughts of our own on what a proper remedy for the harms of hate speech might be.

I. THE HATE-SPEECH DEBATE

Beginning around 1979, many campuses and universities began experiencing an upsurge in the number and virulence of racist incidents aimed at students of color, women, and sexual minorities.[17] Some of the incidents included outright violence, such as attacks and beatings, or arson directed at buildings housing minority groups.[18] Others took the form of face-to-face insults, graffiti, or leaflets disparaging minority students and questioning their right to attend the university.[19] According to the *Chronicle of Higher Education*, at least 175 campuses have experienced racial unrest serious enough to receive news coverage;[20] according to the National Institute Against Prejudice and Violence, twenty to twenty-five percent of students of color are the target of hate speech during each college year.[21] Experts are divided on the cause of the increase. Some believe it is the result of better reporting or heightened sensitivity on the part of groups that formerly accepted their victimization in silence.[22] Others

---

16. *See infra* parts II, III.

17. Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 872 (1994).

18. Delgado, *supra* note 9, at 343, 349, 351, 353, 357.

19. Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1810 (1994). *See also* Delgado, *supra* note 9, at 349-50, 352-53, 357.

20. Denise K. Magner, *Blacks and Whites on the Campuses: Behind Ugly Racist Incidents, Student Isolation and Insensitivity*, CHRON. HIGHER EDUC., Apr. 26, 1989, at A1, A28.

21. Howard Ehrlich et al., *The Traumatic Impact of Ethnoviolence*, *in* THE PRICE WE PAY: THE CASE AGAINST HATE SPEECH AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995).

22. Delgado & Yun, *supra* note 17, at 873.

believe that the increase is real, pointing out that it mirrors an upsurge in anti-woman slurs, hassling, and hard-core pornography, as well as attacks on foreigners and immigrants taking place throughout the Western world.[23]

Whatever its cause, the increase in hate speech has sparked concern on the part of campus authorities, a number of whom have responded by enacting student conduct codes that penalize different types of face-to-face epithets and invectives.[24] These codes were immediately challenged in court, where many were struck down.[25] Then, the tide began to turn. Courts began upholding sexual-harassment prohibitions in the workplace.[26] Shortly after deciding the "cross burning case,"[27] the Supreme Court approved sentencing enhancement for bias-motivated crimes.[28] And, across the border, the Canadian Supreme Court upheld national legislation penalizing hate speech[29] and hard-core pornography.[30]

On the scholarly front, academics began calling for a "First Amendment legal realism" that would replace the formalistic set of mechanical "tests" and special doctrines that have held sway since the early years of the century.[31] Under this new approach, free-speech doctrine would be informed by a host of factors, including the setting of a particular message, its consequences, its victims, and the speaker who uttered it.[32] First Amendment doctrine would join other areas of law, such as torts, contracts, and search-and-seizure doctrine, that are shaped by experience, not science, and policy, not logic.[33] Prompted, perhaps, by the

---

23. *Id.*

24. Delgado & Yun, *supra* note 19, at 1810.

25. *Id.* at 1811.

26. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

27. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (declaring invalid under the First Amendment a city ordinance that prohibited bias-motivated disorderly conduct).

28. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

29. Regina v. Keegstra, [1990] 3 S.C.R. 697.

30. Regina v. Butler, 89 D.L.R. 4th 449 (1992).

31. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

32. Delgado, *supra* note 31, at 170-71.

33. On the notion, embraced by many of the early realists, that the life of the law is experience, not logic or science, see Felix S. Cohen, *Transcendental Nonsense*

sense that free-speech law must evolve to serve the needs of a changing society, and propelled by the insistent critique of feminists and anti-hate-speech scholars, the movement from First Amendment formalism to realism is now well under way.[34] It is against this background that Richard Abel's book, *Speech & Respect*, appears with its startling suggestion that "status harms" be remedied by means of an apology. We now turn to this aspect of Abel's book in greater detail.

II. THE TRIVIALIZATION CRITIQUE: WHY AN APOLOGY CANNOT REDRESS THE HARM OF RACIST OR MISOGYNIST SPEECH

Our principal reservation about Abel's remedy is that it is too mild, and thus it trivializes the injury of hate speech. An apology is surely much milder than the criminal prosecution that led to the *Beauharnais v. Illinois*[35] case or the measures contemplated by various international conventions dealing with racial incitement.[36] And we have no doubt that most persons charged with hate offenses would consider an apology less onerous than the remedies provided for in typical campus hate-speech codes, such as an official reprimand or suspension.[37] Indeed, we shall argue in the next two sections that the mild nature of an apology renders it almost wholly inadequate to redress and deter hate crimes and hate speech. It atomizes the harm, fails to consider its power dimension, and leaves the perpetrator intact and the victim unredressed. It cuts off consideration of broader issues and encourages all concerned to go on with their lives as if

---

and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605 (1914).

34. Delgado, *supra* note 31.

35. 343 U.S. 250 (1952). The petitioner in *Beauharnais* distributed flyers that were degrading to African Americans; he subsequently was fined $200 under a provision in the Illinois Criminal Code outlawing the publication or exhibition of any lithograph that exposed the citizens of any race to contempt or derision. *Id.*

36. For a discussion of the various conventions and covenants that require nations to control hate crimes, hate speech, and hard-core pornography, see Richard Delgado & Jean Stefancic, *Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice*, 27 CONN. L. REV. 773 (1995); Delgado, *supra* note 9, at 361-71.

37. For a general discussion of campus hate-speech codes, including their enforcement, see Delgado, *supra* note 9; Lawrence, *supra* note 9; Matsuda, *supra* note 9.

nothing very serious has happened. An apology can thus make matters even worse.[38]

Why such a light remedy? Perhaps part of the reason may be simply disciplinary. Abel is a social scientist as well as a lawyer, and much of social science (particularly sociology) is greatly concerned with status and status harms.[39] These harms can easily be seen as not particularly serious; we consider excessive preoccupation with status unseemly and petty. But hate speech and pornography are more than status harms. The feminists who attempted to enact the Minneapolis antipornography ordinance believe that pornography does not merely cause a dignitary harm to women, but increases the very real incidence of sexual objectification, harassment, and rape.[40] Students and scholars of color who wish to curb racist hate speech do not want merely to feel better about themselves. They want to improve the campus climate for minority students, change the current ignominious image of persons of color to a more neutral one, and prevent the type of physical violence for which a racial epithet is often a precursor.[41] But seeing these harms in status terms can easily lead one to think that a mild remedy such as an apology is all that is called for. Abel may have fallen prey to his own disciplinary bias.

Two additional considerations can also account for the way in which otherwise supportive scholars such as Abel shy away from effective remedies.[42] The first has to do with the perceived extent of the problem of race and racism. As we have pointed out, it is easy for a person of majoritarian hue to underestimate the amount of racism (and homophobia and sexism) in the world.[43]

---

38. *See infra* part IV.

39. *See e.g.*, JOHN K. GALBRAITH, THE AFFLUENT SOCIETY (4th ed. 1984); R.M. MACIVER & CHARLES H. PAGE, SOCIETY: AN INTRODUCTORY ANALYSIS 348-83 (1967); ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 380-84 (rev. ed. 1957); VANCE PACKARD, THE STATUS SEEKERS (1959). *See also* ABEL, *supra* note 7, at 24-28 (discussing status competition in contemporary life).

40. *See* ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988).

41. *E.g.*, MATSUDA, *supra* note 8; Delgado, *supra* note 9; Lawrence, *supra* note 9; Matsuda, *supra* note 9.

42. For other progressive scholars who express concern over the consequences of hate speech or pornography but nevertheless conclude that very little can (or should) be done, see GATES ET AL., *supra* note 8; NEIER, *supra* note 8; WALKER, *supra* note 8; Nadine Strossen, *Regulating Free Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484.

43. Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the*

Few of the relevant vignettes play out in front of him or her. A shopkeeper who routinely hassles well-behaved black teenagers is unlikely to do so if another person is watching.[44] A police officer is not likely to treat a black motorist in a discriminatory fashion if there are several onlookers, and so on.[45] Yet, these and similar incidents befall minorities of color all the time.[46] We believe this mechanism—the differential frequency with which both groups see and experience racism—may explain why a person like Abel who deplores racism, but believes it relatively rare, might be satisfied with a remedy that does little to deter offenders or change the status quo.

A second mechanism that might explain why Abel and others who believe that redress ought to be taken seriously nevertheless shrink from effective remedies we have termed the *empathic fallacy*.[47] This mechanism consists of our believing that we can talk back against racism and other social evils, that we can change our own and others' consciousness through verbal means—exhortation, appeals, storytelling, brief-writing, and so on—aimed at demonstrating the error of the offender's ways.[48] This is a mistake. One can often persuade another person that he or she is in error with respect to a small, bounded point or a matter of fact.[49] But deeply inscribed social evils, like racism and sexism, that are woven into our very patterns of thought and discourse are not so easily dispelled. They form part of our mindset, the collection of stories and narratives by which we organize experience, including acceptance or rejection of new stories such as those offered by a race reformer.[50] History shows that the dominant stereotypes of a particular era—for example, that of lazy, hypersexual, or animalistic blacks—are rarely seen as especially offensive at the time.[51] It is only years later, when consciousness and conditions shift, that we look back and ask,

---

Fundamental Contradiction Have a Corollary?, 23 HARV. C.R.-C.L. L. REV. 407, 407-09 (1988); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* 77 CORNELL L. REV. 1258, 1282-83 (1992).

44. Delgado & Stefancic, *supra* note 43, at 1282.
45. *See id.* (effect of observers).
46. Delgado, *supra* note 43, at 408-09.
47. Delgado & Stefancic, *supra* note 43, at 1281.
48. *Id.*
49. *Id.* at 1277.
50. *Id.* at 1278-79, 1280.
51. *Id.* at 1275-76, 1277 n.151.

how could we have believed *that*?[52] This inability to perceive the dominant racism of our time bodes ill for language-based remedies, such as the apology that Abel touts, that contain a "more speech" aspect (pp. 144-51). It also should raise doubts about mild remedies, such as a word and a handshake, as deterrents for future misbehavior. The person who utters hate speech is unlikely to see what he or she has done as very serious.[53] When approached by a spokesperson for Abel's community group bent on bringing the perpetrator and victim together for a struggle session, the former is apt to respond with laughter or disbelief: "Why are you taking this so seriously? Lighten up."

Abel's book contains many passages that lead us to believe he has failed to come to grips with the damaging nature of hate speech. For example, he continually refers to the harm of racist speech as an affront to dignity, status, honor, sensibility, or respect (e.g., pp. 4, 14, 23, 24, 28, 37, 123, 134, 145, 147, 149, 151). His main discussion of the effects of racist speech does not include suicide, depression, drug-taking, damaged self-image, poor school achievement or dropout, or high blood pressure, consequences social scientists and minority scholars have noted.[54] He does not concern himself with the frequency of racist hate speech, such as reports by the National Institute Against Prejudice and Violence that the average black undergraduate is victimized several times during the course of his four years on campus.[55] Indeed, Abel's lengthiest discussion of the harms associated with speech concerns cigarette and alcohol advertising (pp. 37-38). The harms of censorship, by contrast, are spelled out in considerably greater detail (pp. 5, 38-58, 149-52). Could this be because professional-class whites see relatively few acts of out-and-out racism, but do see, hear, and discuss many cases of "political correctness" gone awry,[56] of student groups who carry redress for slights and insults to excess?

---

52. *Id.* at 1278-79, 1281.

53. *Id.* at 1282-83, 1288.

54. For a discussion of these and other consequences of racism and racist speech, see, e.g., Matsuda, *supra* note 9, at 2336-38; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-49 (1982).

55. Ehrlich et al., *supra* note 21.

56. One can imagine stories of vengeful and humorless thought police of the left, supposedly bent on enforcing some idealized, sanitized code of proper speech and behavior.

Abel's book is full of examples that bear out our trivialization thesis. For example, pornography's critics point out that models and actresses in the pornography industry may suffer very real harm;[57] Abel observes that ballet dancers suffer injuries too (p. 94). And in the concluding passages of the book, after outlining his apology solution, Abel points out that an apology's weaknesses ought to be accepted. One of those weaknesses is that certain communities may refuse to redress racist insults and decide not to require an apology (p. 148). What then of the black man or woman who stumbles into such a community unaware? This may happen, Abel concedes, "[y]et this fear may be exaggerated. The liberal consensus against discrimination has been growing . . . . Successful community efforts to redress the harms of speech will broaden and deepen that consensus, allowing the state to extend the expectation of equality, as it has been doing since the Enlightenment." (p.148) This passage is at odds with reports of increasing racism, anti-Semitism, and anti-immigrant sentiment taking place everywhere in the Western world,[58] as well as with survey results indicating that black parents believe conditions today are the worst they have been for twenty years, that their children will lose job and educational opportunities because of racial discrimination, and that their sons are at serious risk of death or assault by the police.[59] Abel writes:

> Let me conclude . . . by stressing how far we have come . . . . Racist . . . slurs that pervaded polite discourse have been banished . . . . Crude media stereotypes now startle and shock . . . . Public homophobia is in retreat. Communal regulation of harmful speech builds on these small victories in the unending struggle for a more humane society.

(p. 152) If, as many commentators believe, racism and homophobia are instead on the rise, a mild remedy such as an apology will likely prove inadequate.

---

57. DWORKIN & MACKINNON, *supra* note 40, at 42-44.

58. *E.g.*, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992).

59. Richard Whitmire, *"Major Crisis" for Black Children*, DENV. POST, May 27, 1994, at A2; *see also* ELLIS COSE, THE RISE OF A PRIVILEGED CLASS (1993) (reporting similar polls and interview material showing high rates of black frustration and pessimism).

III. THE POWER CRITIQUE: HOW TO COIN AN INADEQUATE REMEDY BY FAILING TO UNDERSTAND HOW RACIST AND OTHER FORMS OF DEGRADING SPEECH ARE NOT MERE LAPSES OR MISTAKES, BUT INTENTIONAL AFFRONTS

In our opinion, Abel's apology solution not only is too mild for the harm it aims to redress, but it also mistakes the very nature of that harm. Most racist insults are not mere oversights or slips of the tongue.[60] (Imagine, for example, someone saying, "Gosh, I had no idea people like you did not like being referred to as 'Nigger.'") The racist insult does not attempt to convey new information; nor is it the kind of communication that could readily be improved by further communication. "Nigger, go back to Africa, you don't belong on this campus" conveys little information because the hearer already knows that (1) he is an African American; (2) his ancestors come from that continent; and (3) many persons like this one on the campus dislike him and wish he were not there.[61]

Rather, the racial insult is more like a performative. An instrument of oppression, it relocates the speaker and listener on a continuum of power and social authority.[62] According to many feminists, pornography does the same with women—it sexualizes violence and reinforces patriarchal attitudes and behaviors, such as leering, pressured sex, and objectification.[63] Demeaning remarks, then, are not primarily informational, but instrumental means of keeping others down. They are power moves, concerted and orchestrated by the speaker and others like him or her in a semiconscious design, drawing on a history of similar remarks and treatment.[64] Their purpose is to remind the victim what his or her position is in relation to the speaker and, by speaking this reminder, to make it so.

Abel urges minority victims of hate speech to talk back (pp. 135, 143). But how can one talk back to a power move? Would one say, "Excuse me, sir. I, an African American, have an equal

---

60. Delgado, *supra* note 9, at 372-74; Delgado & Yun, *supra* note 17, at 871, 884.

61. Delgado & Yun, *supra* note 17, at 885.

62. On the power dimension of social slurs and epithets, see Delgado, *supra* note 9, at 383-86.

63. *E.g.*, DWORKIN & MACKINNON, *supra* note 40, at 72-75 (describing pornography's role in constructing male-female relationships).

64. For a discussion on the concerted quality of racial mistreatment, which operates through compounding, see Delgado, *supra* note 9, at 383-86.

right, under prevailing standards of morality and constitutional law, to attend this university?" The speaker already knows this. Or would the response be, "Sir, did you realize that I, an African American citizen, find your use of the term 'Nigger' offensive?" Again, the speaker already knows this. Calling the speaker a bigot or ignoramus is an invitation to a fight and scarcely cures the harm inflicted by the first message.[65]

Abel might reply that the peer pressure inherent in his small-group sessions will compensate for any power imbalance between the hate speaker and his or her victim. This requires a closer look at these sessions. Abel describes the goal of the sessions as an "informal conversation between victim and offender. First the offender must be allowed to offer an account, an alternative interpretation of ambiguous words and impenetrable motives. To the extent that the victim honors this account the wound may be salved." (p. 146) Then, "any lingering resentment must be mollified and persistent status inequality corrected by an apology." (p. 146)

For Abel, such an apology must not be perfunctory or merely formal.

> [O]ffenders must affirm the norm, acknowledge its violation, and accept responsibility. Such a social exchange of respect can neutralize the insult. The offender owes, offers, or gives an apology, thereby acknowledging moral inferiority; the offended accepts it, thereby restoring the offender to a plane of moral equality, or rejects it, preserving the moral imbalance.

(p. 146) Such an informal conversation is to take place not as the last step in a judicial proceeding but rather as the outcome of a meeting initiated by the victim (p. 145-46). The local collectivity will bring the two together for a conversation leading to the apology that ends the dispute (p. 146-48).

There are a number of difficulties with this procedure. First, the initiator is the grievant himself or herself. This is necessarily so, for the process Abel contemplates is entirely informal—there is no third party such as a prosecutor or university dean who could hear of the event, file charges, and hold a hearing (p.145).

---

65. Delgado & Yun, *supra* note 17, at 884 (pointing out that many racial beatings or killings began just this way: a group badgered a black or Asian; the latter spoke back and paid with his life).

This means that the victim must alert the relevant community to what has happened, convene a panel or group (Abel is nonspecific on who this will be), and initiate the discussion. The grievant, however, will often be ill-equipped to do all these things. As a recent target of a stinging remark, he or she may have withdrawn into introspection.[66] Moreover, the nature of hate speech ensures that the victim will often be an "outsider"—one who has no community or, at any rate, not one the perpetrator will recognize as his or hers.[67] The victim may not know which whites will be sympathetic. Lacking power and authority, the victim may be unable to summon a group or persuade the offender to take part in his or her own "degradation ritual."[68] The offender may see no reason to apologize. Disliking members of the target group, he or she may refuse to cooperate or do so only in an insincere or supercilious way. The apology, if it comes at all, may come too late, long after the harm is done.[69]

Even if the perpetrator can be made to sit down with the complaining party, the informal setting in which the dispute will be aired is exactly the wrong way to redress a racial harm. One of the most insistent critiques of alternative dispute resolution holds that deformalized justice exacerbates power differentials among disputants.[70] *Formal* proceedings also have their defects, as everyone knows.[71] But in the courtroom a host of rules and expectations reduce both the sway of prejudice as well as the likelihood that that impulse will find expression in the first place.[72] The victim is represented by a lawyer, who has a time to speak and a prescribed way of speaking.[73] The parties address not each other but the judge or jury.[74] The surroundings,

---

66. On the demoralizing or traumatic effect of some racial epithets, see, e.g., Delgado, *supra* note 54, at 137, 146-47.

67. For survey material on the incidence of racial victimization, see THE PRICE WE PAY: THE CASE AGAINST HATE SPEECH AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995); see also Ehrlich et al., *supra* note 21.

68. The term is Professor Abel's (p. 146).

69. *See* Reeves, *supra* note 6.

70. *See, e.g.*, Abel, *supra* note 11; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359. Earlier, Abel was one of the most noted critics of deformalized solutions to legal problems. *See* Abel, *supra* note 11.

71. For example, judges can be biased, the atmosphere can be intimidating, and the high cost of litigation can deter grievants.

72. Delgado et al., *supra* note 70, at 1370-75.

73. *Id.* at 1372, 1388.

74. *Id.* at 1368-70.

including the flags, robes, raised platform, and other trappings of formality, remind everyone present that this is an occasion in which the values of the American Creed are to preponderate, rather than the less noble ones many of us embrace during moments of intimacy, such as in a private club or bar, or when chatting with friends.[75]

This "fairness and formality" critique bodes ill for Abel's remedy. Unless the convened group identifies strongly with the complainant, all the ingrained expectations, power disparities, and personal histories of the two protagonists are likely to come to the fore and be magnified.[76] The more empowered actor will summon up privilege, expecting the best.[77] He or she will cultivate, and probably obtain, rapport with the jury or audience and will expect, and probably receive, the benefit of the doubt with regard to subtle interpretations of the message.[78] The victim, by contrast, will feel insecure and alone. How likely, from such a setting, is justice to emerge?

The notion of bringing offenders and victims together in hopes of reconciliation is enormously appealing.[79] It can heal wounds and enable both parties to come to understand each other's humanity.[80] But the few experiments that appear successful at this have concerned rehabilitation of persons convicted of crimes of violence or burglary.[81] They are highly structured, with the meetings controlled by an experienced intermediary. There is little doubt about the relevant norm nor about who is expected to give way and admit error.[82] The sessions Abel describes have few of these features, and they cannot easily be built in. Unfortunately, racism is one of those entrenched

---

75. *Id.* at 1383-84, 1387-88.

76. *Id. See also* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

77. For example, the offender is likely to remark to himself or herself, "surely they won't want *me* (an executive, fraternity member, professor) to abase myself too much, especially considering who is making the accusation (a janitor, student, gay, etc.)."

78. Delgado et al., *supra* note 70, at 1391-99.

79. On programs aimed at bringing offenders and their victims together in hopes of reconciliation, see Eileen Dempsey, *Criminals, Victims Can Reconcile Through Program*, COLUMBUS DISPATCH, Mar. 6, 1994, at 3C; Doug Hoagland, *Learning to Forgive*, FRESNO BEE, Feb. 5, 1995, at F1.

80. *See* Grillo, *supra* note 76.

81. *Id.*

82. In these circumstances, the criminal is presumed to be at fault and is thus expected to repent. *Id.*

patterns of behavior that requires a formal structure, such as a courtroom proceeding, to be redressed.[83]

IV. PRACTICABILITY AND THE PROBLEM OF PRESERVING THE PAST: CAN AN APOLOGY EVER UNDO A RACIAL HARM?

As we have been urging, the apology is inadequate to deal with most racial harms. It is too mild,[84] and it cannot easily redress the power dimension of racist slurs and epithets.[85] But not all remedies operate perfectly; sometimes the fit between a measure and the event it is intended to correct is less than one hundred percent—we are satisfied with rough justice.[86] Nevertheless, we believe that Abel's approach is flawed in a third way, one that raises questions about its ability ever to redress the harms of hate speech, pornography, and group insult.

This third set of defects has to do with practicability. As everyone knows, an apology can be grudging or insincere.[87] Many persons, forced to apologize, take the opportunity to justify their actions or even to drive the insult home a second time.[88] The root meaning of apology (*apologia*) is a defense or rationalization of what was done.[89] Many offenders, particularly those of high positions, may be apt to respond in this manner. The victim can find the situation "flipped"—he or she can be depicted as a hypersensitive, vengeful, or petty person who cannot let a small grievance lie, or as one who imagines an offense where none was intended.[90] The perpetrator can proclaim, "I've already apologized, yet you are asking for more."

Other perpetrators, called on the carpet, can use their apology as a means of closing off a more searching examination of their conduct. In the words of our title, they can issue a perfunctory mea culpa and then insist that the balance has been

---

83. *See* Delgado et al., *supra* note 70.

84. *See supra* part II.

85. *See supra* part III.

86. For example, tort law rarely compensates victims for their delay and attorney fees, and the Fourth Amendment's main remedy is the exclusionary rule.

87. For example, the offender might reply, "If I hurt your feelings, I apologize."

88. Again, the offender might be heard to say, "I had no idea you people didn't like being called wops; you are Italian, after all."

89. OXFORD ENGLISH DICTIONARY 552 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

90. For example, the offender might retort, "I had no idea you were so sensitive, so I guess I'm sorry."

set right and that it is time to move on. The apology can serve to deflect the need for more searching analysis of the behavior of a person or an institution.[91]

Apologies are rarely accepted evenhandedly. We accept light remedies mainly from persons like ourselves, of our own race and class, those in whose good faith and citizenship we wish to continue to believe but who have merely lapsed on this one occasion—business executives, university presidents, teenagers guilty of pranks.[92] One rarely hears of poor people or African Americans allowed to escape responsibility for offenses that they commit (such as shoplifting) by means of a simple apology. Their offenses, we believe, are real and serious.

Underlying each of these difficulties is a tension over what we call "claiming the past." An apology, once accepted, enables the giver to hold his or her head high. It atomizes the transaction, deflecting inquiry from larger patterns of responsibility that reach to other persons and to this person's previous actions.[93] For example, in the case mentioned at the beginning of this essay, a university president was charged with suggesting that students of color at his campus were genetically inferior.[94] Though he apologized publicly, his critics would not let matters lie, insisting instead that the offensive message cast the president's past in a new light. He had supported minority causes in the past. But perhaps his appointment of a few black assistants was tokenism, his commitment of funds to black student organizations a way of buying off discontent.[95] They saw his apology as a power move—a way of forestalling the more searching introspection required of one likely to have engaged in a pattern of misbehavior and now wanting to get off lightly. Both sides, in other words, challenged each other's interpretation of the relationship between the president's deed and his seemingly impeccable past. For one group, the offense placed his past in doubt, so that a mere apology

---

91. Compare in this regard an *apology* (for one act) with a *confession* (for an entire course of conduct).

92. On the light treatment society often affords offenders like these, see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

93. *See supra* note 88.

94. *See supra* note 1 and accompanying text.

95. Comments from the floor, Address at the Rutgers University School of Law by Richard Delgado & Jean Stefancic, Hate Speech Today (faculty colloquium) (Feb. 13, 1995).

was insufficient. For the other (the president's sympathizers), his previous good deeds rendered the recent lapse minor. People of good will should accept his apology and move on.[96]

CONCLUSION

Abel's book is a welcome addition to the literature on hate speech because it focuses attention on the ubiquity of these offenses, as well as on the need for new approaches. His primary mechanism for resolving these conflicts, however, does not do justice to the nature of hate speech or pornography, nor to the power dimensions they contain. Apologies, if heartfelt, can salve wounded feelings and prompt the offender to reflect on what he or she has done (p. 146). But they are also apt to be insincere—power moves calculated to put the victim himself or herself on the defensive.[97] Their implementation lies in the hands of "the community," an informal and amorphous group likely only to magnify existing power and status differentials between the victim and the perpetrator.[98] They enable perpetrators to preserve their pasts, when their actions may, in fact, call for more searching inquiry.[99]

What, then, would the ideal remedy for hate speech look like? As we have argued, the process must be formal, not informal. Thus, the remedy for campus hate speech must include a disciplinary hearing of some sort, with a judge or hearing officer and a panel, similar to a jury. It is desirable, as Abel quite correctly points out, that the hearing serve an educational function. Consequently, universities should design procedures that are public rather than secret. Students and other members of the campus community should be invited to attend, as should the press. The event can serve to strengthen community norms against racial transgression and insult, while impressing upon the offender the seriousness of what he or she has done. The penalties, however, could be relatively mild—reprimands or short

96. *See supra* notes 3-6 and accompanying text.

97. *See supra* text accompanying notes 38-40, 93-96.

98. *See supra* notes 67-75 and accompanying text; *see also, e.g., supra* notes 63-64 and accompanying text (discussing the role of pornography in preserving power differentials between men and women).

99. *See supra* notes 91-93 and accompanying text.

suspensions—trading a greater certainty of punishment for the seriousness of the penalty.

Such approaches would combine the teachings of the fairness and formality critique *and* the concerns for communal norms and reinforcement that Abel emphasizes. No approach is guaranteed success. With what we know about human nature, human vulnerability, and the limits the Constitution imposes, all we can do is experiment. Racial harms are among the more troubling ones our system of law and politics is required to address. Abel's book continues the serious discussion of these issues. His remedy falls short, but this should not detract from the effort he has made. The Hamlyn Lectures granted Abel an opportunity to explore these vital topics and so contributed to legal discourse, just as their originator intended.