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Comments on Mary Becker Ira C. Rothgerber Jr. Conference on Constitutional Law - Freedom of Speech in a World of Private Power

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COMMENTS ON MARY BECKER

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Professor Becker was kind enough to invite me to address what minority scholars are doing and writing with respect to hate speech and the First Amendment. I am happy to take her up on her offer. Many of the themes and currents she mentioned in feminist literature have parallels in the work of scholars of color.

Just as feminist scholars have been doing, we have been evaluating the range of stories and narratives that everyone takes for granted, that form what we might call the cultural canon, stories such as: without discrimination, no intent; affirmative action displaces and is unfair to innocent whites; free speech is a great boon for dissident groups; and so on.[1] These and many similar stories encode a kind of cultural preference or point of view that renders reform slow and makes it difficult for one to get one's message heard.[2] A new form of scholarship, called narrative jurisprudence, examines these comforting stories and myths, showing how they work together to create a system of White-over-Black (and White-over-Brown-and-Yellow) hegemony.[3] Some of us use "counterstories" to challenge, displace, and discomfit the dominant accounts or tales.[4]

A second focus looks at the role of free speech and communication in enforcing, not general, but highly personalized subordination. An early article, *Words that Wound*,[5] considers whether racial and other types of insults ought to be redressable in tort. Later work by Mari Matsuda,[6] Charles Lawrence,[7] and myself addresses whether hate speech ought to be regulated on university

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1. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1979); Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

2. *See* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

3. *See* Delgado, *supra* note 1.

4. *Id.* at 2416-35.

5. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

6. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

7. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431.

campuses and other places. Much of this writing urges that we give greater attention to the issue of harm in free speech jurisprudence, and that First Amendment doctrine in this area must come to reflect equality concerns as much as those that are liberty-based.[8]

Recent work by Jean Stefancic and myself focuses more specifically on the marketplace of ideas rationale underlying much First Amendment thought.[9] In a recent piece in *Cornell Law Review*, we show that the free market of ideas may provide an effective means of correcting error and reaching consensuses in connection with disputes that are small and narrowly bounded. For example, does a heavy object fall faster than a light object in a vacuum; should we operate public schools according to a voucher system; and so on.[10] However, free expression is much less effective in remedying systemic social ills, such as racism or sexism. Speech is paradigm-dependent; it relies on a common set of conventions, meanings, interpretations, and preconceptions.[11] But racism is part of that paradigm, part of the group of received wisdoms and stories by which we understand and construct reality. One cannot speak up against the racism of one's age, one's time, without seeming political, incoherent, or strange. We reviewed two centuries of ethnic depiction of four main groups of color in the U.S.—Blacks, Mexicans, Indians, and Asians—to show that the dominant images and stereotypes of these persons at any time in history were demeaning—but not recognized as such at the time.[12] That recognition only comes much later, as consciousness changes and society adopts a new paradigm. The vaunted marketplace of ideas, then, cannot correct racial images and stereotypes because they seem to everyone to be more or less true; the critics seem to be calling for censorship, seem to lack a sense of humor. All literary, or theatrical works, we tell ourselves, rely on stock characters. What is so wrong with the ones we use?[13]

We coined the term "empathic fallacy"[14] to designate the error of believing that we can endlessly and perfectly reform ourselves and each other by linguistic means—by reading or writing

8. *See, e.g.*, Matsuda, *supra* note 6, at 2356-61.

9. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

10. *Id.* at 1259.

11. *Id.* at 1260-61, 1277-79.

12. *Id.* at 1262-79.

13. *Id.* at 1278.

14. *Id.* at 1261, 1281 (coining term "empathic fallacy").

ennobling texts, arguing, writing briefs, delivering lectures and sermons, and so on. History shows speech has much less efficacy than we like to think. Linguistic theory supplies the reason why: we hear, receive, and interpret new stories in terms of the old, the ones we have already internalized and now use to judge the new.[15] Ones that deviate too radically from the ones we have heard before, we quickly pronounce wrong or extreme.

Charles Lawrence[16] and others look at the history of U.S. race relations in order to assess the claim, made by the First Amendment's defenders, that the First Amendment has been of great value to minorities and reformers. These scholars point out that, contrary to the usual view, free speech has not proven of great benefit to the cause of civil rights. In the 1960s for example, protesters picketed, were arrested, and convicted. They sat in, were arrested, and convicted. They leafletted, were arrested, and convicted. They tried to parade, were arrested, and convicted. Many years later, after the expenditure of thousands of dollars and much gallant lawyering, the conviction would sometimes be overturned. But generally, to make advances, we have had to act in DEFIANCE of the First Amendment as it was then understood and interpreted.[17] The First Amendment has not been of great value to social reformers.

A number of us have extended this analysis to the present, examining the landscape of First Amendment doctrines, tests, and so-called exceptions.[18] Our system of free speech is not really a system at all, but rather a patchwork of tests, standards, and exceptions. Probably more speech is subject to some form of punishment or regulation than speech which is completely free, that is, beyond regulation. Furthermore, these exceptions have a certain thematic unity.[19] For example, if you say disrespectful words to a judge or other authority figure, you will quickly discover that your words were not free, after all.[20] The same is true of words that disparage a wealthy and well-regarded individual.[21] This person can sue you for damages; your words really were not free.

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15. *Id.* at 1277-82.

16. Lawrence, *supra* note 7.

17. *Id.* at 466.

18. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 375-83 (1991).

19. Namely, they reflect cultural power. *See* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).

20. *Images*, *supra* note 9, at 1286.

21. *Id.* at 1285.

And the same is true for words that violate a copyright, words that plagiarize,[22] words of conspiracy,[23] false advertising,[24] words of threat,[25] and so on for at least twenty exceptions, all of which track and protect the interests of the powerful. Of course, when someone proposes a narrow exception, such as a campus hate speech code, aimed at protecting the interests of some of the most vulnerable members of society—young Black undergraduates at White institutions—free speech absolutists cry foul: our system of free speech must be a seamless web.[26] Showing that the web is far from seamless, and what the pattern of those seams is, has been one of the projects of recent outsider scholarship.

Another focus examines the psychology of judging.[27] Applying some of the insights associated with empathic-fallacy literature, some scholars of color have been looking at the way judges rarely seem able to avoid what later appears to be serious moral error. Examining cases such as *Plessy v. Ferguson*,[28] *Dred Scott v. Sandford*,[29] and *Korematsu v. United States*,[30] we identify ways in which culture permeates and determines judicial decisionmaking, often in ways that a later time sees as incomprehensible.

As you can see, many of the interests and focuses of minority scholars mirror ones that Professor Becker identifies in connection with feminist jurisprudence and its treatment of speech and depiction issues. Running across both areas of scholarship is the notion that the First Amendment, as currently constituted and interpreted, is a much more valuable tool for the majority than the minority. In fact, disempowered groups often find that free speech is used to deepen, not relieve, their predicament. That which many are accustomed to holding dear, others regard warily, not as a friend but as a potential enemy. A poor situation, certainly—and one at odds with the dominant conception of the First Amendment as a friend and ally of the dispossessed.

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22. *Id.*
23. *Id.* at 1286.
24. Delgado, *supra* note 18, at 377.
25. *Id.*
26. Delgado & Stefancic, *supra* note 9, at 1286.
27. *See, e.g.*, Richard Delgado & Jean Stefancic, *Hateful Speech: Loving Communities*, 82 CAL. L. REV. (forthcoming 1994).
28. 163 U.S. 537 (1896).
29. 60 U.S. (19 How.) 393 (1857).
30. 323 U.S. 214 (1944).