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PROFESSOR DELGADO REPLIES

*Richard Delgado**

Ms. Heins' response to my article contains three distinct attacks. She asserts that: (1) as a *descriptive* matter, Supreme Court decisions preclude a tort action for racial epithets; (2) as a *prescriptive* matter, courts should not recognize the tort even if they are not precluded from doing so; (3) it is inappropriate to advocate such a tort. This last assertion is a disguised claim by Ms. Heins to politico-moral *standing*.

1. *The descriptive claim.* Of her three claims, Ms. Heins' descriptive claim is the least interesting. We both recognize that the Supreme Court has not ruled on the constitutionality of the tort action. And we both point to analogous case law and the policy rationales of the first amendment to predict the Court's outcome. Racial epithets uttered in face-to-face, one-on-one situations marked with an inequality of power and authority[1] are both similar and dissimilar to libel,[2] fighting words,[3] obscenity and pornography.[4] Ms. Heins highlights the differences; I emphasize the continuities. We come to differing conclusions.

Fair enough.[5]

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[1] Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 179–81 (1982)(elements of proposed cause of action).

[2] *Id.* at 175 n.250 (group libel analogy); Heins, *Banning Words: A Comment on "Words That Wound"*, 18 Harv. C.R.-C.L. L. Rev. 585, 589 (1983)(rejecting group libel analogy).

[3] Delgado, *supra* note 1, at 173–74 (fighting words analogy).

[4] Heins, *supra* note 2, at 587 (rejecting fighting words analagy).

[5] Less fair are her accusation, *id.*, at 585–86, that I "misstate[ ] the applicable constitutional law" by recognizing only that "a balancing test is all that is required," and her arch suggestion that I "must be aware that the Supreme Court's balancing test...weighs heavily against infringement."

I am not only aware of this, but expressly said so: "Under first amendment doctrine, regulation of expressive activities is scrutinized more closely when directed at content of speech.... [A] tort for racial speech will almost surely...be subject

However, analysis of Supreme Court cases decided in other settings is insufficient in an area as context-sensitive and value-laden as the first amendment. First amendment rationales and case law decided on nonconstitutional grounds supply vital clues for predicting a future decision on the tort's constitutionality,[6] but Ms. Heins offers scant analysis of either.

Her discussion of first amendment rationales is, understandably, brief. How can such speech advance political dialogue, further the search for truth, or help society strike a balance between stability and orderly change?[7] Ms. Heins does assert, with commendable forthrightness, that epithets used in one-on-one situations are "not wholly unrelated to 'individual self-fulfillment.'"[8] However, Ms. Heins nowhere explains how a bigot gains self-fulfillment from spewing racial invective. Perhaps she means that some persons derive pleasure from browbeating blacks and other minorities. But it seems unlikely that this is self-fulfillment envisioned by Emerson and other first amendment theoreticians.[9]

Nor does Ms. Heins consider the body of tort decisions that have bent the rules to afford relief for victims of racial slurs. These cases are legion.[10] They indicate an attitude of judicial sympathy for the victims; as such, they signal that higher courts may take similar positions. Ms. Heins should have discussed them, if only to explain how and why they are, in her view, wrong.

Without a valid first amendment rationale for protecting slurs or an explanation of why the tort cases that protect the interest I espouse are wrong, Ms. Heins is left with disconnected

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to the more exacting scrutiny afforded in such cases." Delgado, *supra* note 1, at 172-73.

[6] First amendment cases presenting novel facts are often decided by reference to certain basic first amendment values, *e.g.*, L. Tribe, American Constitutional Law § 12-1, at 576-79 (1978).

[7] Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 878-88 (1963)(discussed in Delgado, *supra* note 1, at 175-79).

[8] Heins, *supra* note 2, at 590.

[9] Heins also asserts that racially charged speech may have artistic or dramatic value, Heins, *supra* note 2, at 590. But she cannot be thinking of racial epithets uttered in one-on-one situations, and directed by a person in a position of power and authority over the victim.

[10] Delgado, *supra* note 1, at 175-78.

dicta from disparate first amendment cases and decisions decided on other grounds.

2. *The prescriptive claim.* Here her reasoning becomes more interesting and the differences between us clearer. Racial epithets should not be subject to tort sanctions even if the law permitted it, Ms. Heins argues, because racial epithets are speech, and speech should not be penalized without a very good reason.[11]

She finds no very good reason. But she does not look very hard, either. In contrast, the first half of my article does offer a series of reasons for deterring racist speech in one-on-one situations.[12] Ms. Heins' treatment of this part of the article is revealing. The interests that the tort action would serve by deterring the harms I delineate—injury to the ideal of equality, to happiness, to psychological and physical well-being, as well as the establishment of a caste system and harm to the perpetrator—are lumped together by Ms. Heins under the summary label of "ending racism."[13] This she grudgingly concedes to be a compelling state interest. Even so, she writes, I have overlooked the Supreme Court test requiring that the tort action must advance this interest and do so in the least onerous way possible.[14]

Her assertion that I have not shown that the tort will advance the end of controlling racism is incorrect. I expressly address the manner in which a tort for racist speech will discourage such speech, establish a new public conscience, and ultimately change attitudes.[15] Furthermore, what lesser means does Ms. Heins have in mind—an administrative remedy? public school programs? She does not tell us, remaining content with the simple assertion that there may be an equally effective, but milder, remedy somewhere, but that I have not found it.

A parting comment on the prescriptive claim. Normative statements should be grounded, one would think, on a factual understanding of the thing or action that is praised or con-

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[11] Heins, *supra* note 2, at 586, 592.

[12] Delgado, *supra* note 1, at 135-49 ("Psychological, Sociological, and Political Effects of Racial Insults").

[13] Heins, *supra* note 2, at 586.

[14] *Id.*

[15] Delgado, *supra* note 1, at 148-49.

demned.[16] Ms. Heins does not ground her normative rejection of my argument on *any* factual grounds. Racism is not so bad, she says, at least not bad enough to impose on freedom of expression.[17] Why not? Her response gives no indication. It makes no reference to the social science literature on the effects of verbal racism, neither that which I canvassed nor any other. We are left with the distinct impression that she *cares* a great deal about free speech but cares less about eliminating racism in society. That of course is her right. But it does not constitute a reason for others to join with her in that belief.

3. *Politico-moral standing.* A claim that does deserve to be taken seriously is Ms. Heins' veiled claim to politico-moral standing. This claim is a vital one, because a court could read Ms. Heins' statement of the relative unimportance of racial insults, observe that she represents a respected liberal organization,[18] and conclude that she speaks for the victims of racial abuse when she rejects a cause of action on their behalf.

Here I wish to speak clearly. The organization Ms. Heins represents is composed mostly of white, male, middle-class lawyers who care a great deal about free speech. They rank speech over the right of women to be free from pornographic exploitation[19] and the right of elderly Jewish survivors to be free from painful reminders of the Holocaust.[20] That is, of course, their right.

[16] *See* Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 Yale L.J. 986, 996–1004 (1966)(moral assertions must be supported by reasons, otherwise are indistinguishable from prejudices of the lawgiver and are unacceptable bases for restricting liberty).

[17] Heins, *supra* note 2, at 592 (likening racist taunts to safety valves, by which "[h]otheads blow off and release destructive energy," citing Beauharnais v. Illinois, 343 U.S. 250, 286–87 (1952)(Douglas, J., dissenting)).

[18] Ms. Heins is a staff attorney for the Civil Liberties Union of Massachusetts.

[19] *See Violent Pornography: Degradation of Women versus Right of Free Speech*, 8 N.Y.U. Rev. L. & Soc. Change 179 (1978)(ACLU position that pornography is protected expression).

[20] The ACLU represented Nazi marchers in Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978).

But this does not mean that Ms. Heins or the ACLU speaks for minority victims of racial epithets in making this ranking. *Her language makes clear she thinks she does.* Combatting racial abuse of this type is to "squander resources"[21] (whose resources?); moreover, "too much work (whose work?) remains in the battle (whose battle?) against. . .racism"[22] to waste time fighting its verbal manifestations. In her agenda, "loudmouths"[23] should be free to vent abusive language at the expense of persons of minority race. It is her right to advocate this. But to say that this is in the best interest of the slur's victim, or that the victim should sit still and take it because the ACLU has other things on its mind are, to be charitable, highly debatable positions.[24]

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[21] Heins, *supra* note 2, at 592.

[22] *Id.*

[23] *Id.*

[24] At one point, Ms. Heins argues that my article is not only tactically unwise, but should not have been published, at least without some form of warning label, *Id.* (thesis so "hostile to free expression [its hostility] ought to be made explicit, *if it is to be advocated at all*" (emphasis added)). The unintentional irony of her suggestion should be obvious. *Cf.* L.A. Times, March 9, 1983, § 4, at 1, col. 2 (ACLU expected to challenge Department of Justice ruling that three Canadian films must wear labels identifying them as propaganda).