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Abstract

Australia has seen wide ranging debates about the High Court's implied rights jurisprudence during the 1990s. The Constitution has been found to limit the legal control of political discussion. The doctrine survives, although apparently with less energy, after changes in the Court's composition during 1995 and decisions such as *McGinty v Western Australia*. Most commentators suggest the Court has stepped back from its previous activism. Two forthcoming decisions may even remove political discussion as an issue of constitutional doctrine, at least in relation to the law of civil defamation. Following the High Court cases, however, political discussion exists as a central concept for Australian jurisprudential, constitutional and media related legal theory about the control of expression.

Speech and Respect

RICHARD ABEL

Andrew Kenyon

Australia has seen wide ranging debates about the High Court's implied rights jurisprudence during the 1990s. The Constitution has been found to limit the legal control of political discussion. The doctrine survives, although apparently with less energy, after changes in the Court's composition during 1995 and decisions such as *McGinty v Western Australia*¹. Most commentators suggest the Court has stepped back from its previous activism. Two forthcoming decisions may even remove political discussion as an issue of constitutional doctrine, at least in relation to the law of civil defamation². Following the High Court cases, however, political discussion exists as a central concept for Australian jurisprudential, constitutional and media related legal theory about the control of expression.

The developments mean a wider range of international material is being drawn on in these areas of Australian legal analysis: it should include Richard Abel's *Speech and Respect*. As a resource and reference it would have wide interest, although as a thesis it might not be accepted and it is curious in light of some of Abel's earlier work. Most simply, the book is a valuable resource about three notable incidents of disputed speech: pornography, racially hating speech and the novel, *The Satanic Verses*. It clearly recounts deficiencies in either a simple civil libertarian approach to speech or in the recourse to state regulation. The detail and extensive referencing to news media is particularly useful and anyone with interests in one of Abel's three examples probably will find new information relevant to their own work. As a polemic, the book is weaker: Abel's use of great detail can obscure his reasoning, leaving a reader wishing for far fewer examples and for a more reflective consideration of the consequences of each argument.

This is a book about speech and its impact upon the status of groups. A

common liberalist need is to find consequences in speech to take the act of speaking beyond the status of being 'only words'. Abel investigates this focus upon consequences external to the words spoken and is far from alone in his concern with the argument. Abel asks what challenges to law are posed by speech aimed at affecting a group's collective sense of status and concludes with arguments for informal, community based responses to speech disputes. His conclusion, perhaps surprisingly, could be taken to repeat elements of the common liberalist view about words and place speech in a diminished role within society. This is possible although he clearly intends to avoid any marginalisation of speech. Abel's arguments have some merit, as does Abel's disquiet about the operation of law, but seem too near to the libertarian position he is at pains to discount. He returns too closely to the position he is at pains to distinguish: speech as 'only words', but the informal justice he advocates cannot allow for less powerful groups to obtain anything like redress as the law conceives of it. As just one point, how will informal resolution interact with the market? Abel may respond with basic questions about the use and operation of law, particularly in relation to speech, but overall, any boundary between formal and informal arenas which the law shapes is left too little investigated and the operation of an informal approach seems idealised in perhaps similar ways to the law's belief in formal adjudication and rights.

These 'missed opportunities' are the more surprising given Abel's very extensive scholarship in law and society (for example Abel 1982a, 1982b, 1982c). While *Speech and Respect* serves as a valuable prompt to further endeavours, it must be said that even if law's conception is partial and more than occasionally blind, to ask groups affected by status denigrating speech to negotiate a solution with their denigrators (one is almost compelled to say accept a compromise) seems a similarly partial response to the problems of speech.

FOUR LECTURES

Professor Abel delivered four lectures for the Hamlyn Trust late in 1992 at University of Wales College, Cardiff. In *Speech and Respect*, they were reproduced some two years later with extensive endnotes, but otherwise largely are unaltered from their verbal form. The book's origin within the annual lecture series may explain the, at times, hyperbolic style, the detail and repetition in the use of examples, and the lack of great engagement with other writers investigating legal issues about speech. The topics considered provide rich veins for law and literature and other critical legal

scholarship. Abel, however, does not focus primarily on the legal characterisation of speech, the legal construction of stories in disputes about speech, or the literary theory which may be brought to bear on legal analysis. The book, rather, is strongly sociological and follows from his large body of prior scholarship on areas such as research into the legal professions in common and civil law countries—an overview is provided by Kritzer (1991)—and into forms of legal adjudication (for example Abel 1982a and 1982b). In that and in the informalism which is argued for, the book is in contrast with others, such as MacKinnon's earlier and contemporaneous work arguing for concepts of substantive equality to be used in redefining freedom of speech (MacKinnon 1989, 1994), and Richard Delgado's writings on hate speech which support the development of a tortious remedy (Matsuda et al 1993).

The relational aspects of speech and the harm which can be inflicted on groups is the focus for Abel; that is, speech used as a primary weapon in collective status competition. The problem is familiar and fundamental for formal law. 'Speech is essential to self-realisation, social life, politics, economic activity, art, and knowledge. But speech can also inflict serious harm. In particular, it can reproduce and exaggerate status inequalities. How should we deal with this tension?' (28-29)

ONE: EXAMPLES OF STRUGGLE

Abel begins in chapter one (4-32) by recounting three contemporary disputes about expression: the control of pornography, responses to racially hateful speech and neo-Nazi demonstrations, and the saga of the *Satanic Verses*. The first two examples are focussed particularly on the United States, but the chapter provides a very useful overview of events and positions in much of the common law world within these three debates.

In addressing pornography (4-8), Abel recounts legislative struggles in the United States from the late 1970s, and particularly the statutory measures against the sexually explicit subordination of women proposed by MacKinnon and Andrea Dworkin in Minnesota and, through links with conservative Christian groups, in Indianapolis. Dworkin's assessment of the US First Amendment being an instrument to promote the ruling class's interests are noted (6), but not returned to later when Abel considers the informal resolution of speech conflicts. This is despite Abel giving further examples about the way rights discourse was used, or abused depending upon one's view of the language of rights, in the three disputes: 'In each

story, some actors portrayed ultimate values as mere instruments of status conflict' (25). The continuing question of the effect of information or power disparities in informal conflict resolution is not examined later in the book, despite what one might expect.

As to racial hatred (9-11), Abel focuses on several examples in Chicago during this century, including the infamous march by the National Socialist Party of America in the 1970s. The march was planned for the suburb of Skokie, by which name the incident is often known, but eventually held in central Chicago (10). Again, great detail about the events and some of the litigation is included, and the example strongly illustrates how traditional First Amendment theory can serve the paramount interests of groups in obtaining publicity for their ideas: the way the law allows unpopular expression to be configured as an act of rebellion. This point is expanded upon later in relation to the state regulation of speech generally:

Even when legal regulation does not court evasion or aggravate harm it constructs and encourages deviance. ... Regulation confers moral salience. True ideologues welcome punishment as martyrdom, which can only enlarge their entourage... (103).

The standard citations are present in the recounting of the *Satanic Verses* dispute (or the SV affair as it is known almost affectionately by campaigners supporting the writer, Salman Rushdie). Book burning, violence, deaths, and an author in hiding are all detailed, as are Rushdie's early comment after the Indian Prime Minister banned the work: 'You own the present, Mr Gandhi; but the centuries belong to art' (12) and Shabbir Akhtar's 'much quoted warning: 'the next time there are gas chambers in Europe, there is no doubt concerning who'll be inside.' (13). Such quotations allude to the contest for authority over a religious narrative which can be seen in the conflict. Indeed, Rushdie's argument is a parallel to Abel's own thesis in many ways. Rushdie commented that the furore about his work was based on who should control the narratives of Islam and that power over these, in the end, 'must belong equally to everyone' (20). Abel's proffered informalism would suggest similarly that all have a role in resolving status speech conflicts. As Abel notes, however, in relation to the Rushdie dispute: 'Britain was profoundly polarised' (18). Whether, or how, such polarisation can be accommodated within a negotiated solution giving a role to all is not expanded upon by Abel, nor is it yet apparent in this actual speech dispute.

These three stories are articulated in terms of differing values held by the

various players within them, but for Abel they illustrate a common subtext, namely a fight for respect and status (22-23). Status has obvious connections to work done in relation to gender and race. Abel's main points, however, are that status is communal, competition for it can be only relational, and that status therefore is a 'zero-sum' concept. Abel describes an 'irrepressible nostalgia for community' (23) in collective status claims and notes that this is in opposition to the modernist characterisation of law as having shifted from collective to individual identity and modes of relation. The emphasis on community accords with the difficulties Abel perceives in formal legal avenues for redressing speech disputes. The question is conceived of in quite different terms to, for example, the liberalist position of the High Court in its implied rights jurisprudence. The communal understanding of speech disputes, at least as far as status is affected, also links with the approach Abel puts forward for their resolution, namely a flexible, one perhaps could say amorphous, collective negotiation.

TWO: LIBERTARIAN ILLUSIONS

Abel goes on, in chapter two (33-80), to examine and critique a civil libertarian position on speech which seeks a mythical grail of a town square market free for the promulgation and reception of ideas. (The age of the lectures may explain the absence of such current favourites as the internet and its simulation of community discussion.) His main criticism is that the civil libertarian approach cannot exist in practice. This follows from the pervasive, overarching effects of both the private, that is commercial, influence on speech and the necessary reality of government regulation which cannot be achieved with neutrality. Both elements substantially influence speech through issues such as funding, distribution, intellectual property rights, and the enforcement of contractual secrecy provisions. These effects are recounted through numerous examples, in support of Abel's conclusion that a 'civil libertarian utopia without state regulation would be a world of constraint, not freedom. Each instance of private power must be evaluated by criteria that are substantive, not formal' (58). The arguments are put well and the detail useful.

THREE: REGULATORY EXCESSES

The common dualism of freedom or regulation leads Abel in turn to the alternative of state regulation, which is criticised in chapter three (81-122). Regulation is used as a term to encompass statutory and common law con-

trols. For Abel, it has the tendency to distort the reception of contentious speech, to encourage evasion through focussing on form rather than substance, and to amplify the message it tries to suppress. The severity and crudeness of its sanctions leads to both dubious assertions about the consequences of speech in action and to a focus on extreme instances. The law is all too often at pains to make clear that it is not concerned with 'only words', but it is such ordinary, systemic and pervasive words which are central to much status competition. Although these tendencies are illustrated well, Abel could examine further the ways in which the form and substance of speech is approached by the courts. The usual Australian test for whether a publication amounts to a sub judice contempt, for example, is articulated in terms of substance, namely whether there is a real and definite tendency to prejudice the administration of justice in a pending proceeding. Protection for some publications such as fair reports of judicial proceedings, on the other hand, would appear to involve stated doctrinal issues of form as well; that is, the way a media report reflects the hearing, as a matter of substance, and the way it is presented as a report, as a matter of form. The examples are commonplace, but such investigations could lead to the questionable dualism of practice and theory being examined *in toto*, and add strength to Abel's thesis. It is not that such context is absent entirely; for example the media's role in amplifying the effects of seeking legal redress is noted. Abel gives the example of an alleged defamation being repeated through the judicial process and the media reporting of it to a perhaps far wider audience than it originally reached (103). Such points, however, could be taken further.

FOUR: INFORMAL DREAMS?

That regulation arguably is both imperative and bound to be counter-productive for the reception of speech by communities, leads Abel to suggest informal community based resolution of disputes as being preferable to formal law, in his final lecture (123-172). A dialogue between groups would be used to redress offence and hurt. Each 'self-regulating community', large and diverse enough to reflect wider society, would deal with speech disputes itself (143). Abel suggests groups such as universities and workplaces could fulfil this role. The process, however, would be commenced by the aggrieved party and aim to see a perpetrator admit their transgression of a social or group norm, explain the incident, and sincerely apologise for their words (145). Abel has previously noted an ambiguous tendency of informal justice to expand the reach of state regulation. Informal proceedings which offer less 'due process' can be applied to a far

greater number of people and incidents than formal law would be applied to (Abel 1982b: 267). In that work, Abel cited Lewis Carroll to suggest that the process would be a case of: 'Sentence first—verdict afterward' (Carroll, 1946: 132). The proposal in *Speech and Respect* could be seen to go even a little further than that. The informal resolution would be consciously partisan, with the value asserted to lie in the process not in any legal outcome in a usual sense (145). It will be obvious this raises many issues for the legal responses to speech, some of which will be returned to.

Encouraging such an educative dialogue, however, would not replace entirely the legal sanctions which already exist; Abel supports formal laws where speech is the 'worst':

The case for suppressing speech strengthens with its danger: where the harm to subordinated groups is greatest, the audience receptive and growing, the message least ambiguous, and the motive clearly evil (149).

The interaction of such sanctions with community approaches is not explored and the continuation of existing sanctions begs the questions of informalism somewhat, although no-one is claiming to shape any grand narrative about speech. Providing for sanctions, however, again raises unexamined issues of boundaries and returns the argument to his points on the shortcomings of regulation and particularly the indeterminacy of speech. Allowing that Abel's thesis is addressed particularly at speech and status, his conclusion still seems unpalatable in the practical operation it could be expected to have. Abel suggests the ambiguity of speech, and the importance which context, motivation and reception play in its meaning could all assist in the informal resolution of disputes. Such qualities clearly do raise difficulties for the law's normal approaches to speech—the consequentialism, for example, which appears within much doctrine but is open to empirical question, as Abel notes (25-26). Can these qualities of speech, however, be expected to facilitate helpful group discussion? Perhaps, but other aspects of the disputes would suggest their assistance must be limited; namely the very relational status issues which Abel focuses upon. If the disputes are about status, in the sense in which neo-Nazi demonstrations, for example, commonly are perceived to be, are they surely not about power? Is dialogue either the intention of participants or a likely outcome of the suggested informal approach? Abel argues that the goal is 'status equality not conflict resolution' (145) but that does not seem to circumvent these issues of power and motivation.

A CRITICAL COMMUNITY RESPONDS

Abel's conclusion is the strangest aspect of the work; others have expressed disbelief at its effect (Clarke 1994: 525), or at least queried its practicality (Delgado and Stefancic 1996: 108). There have been two main criticisms. First, that the informalism argued for would repeat the flaws of state regulation (Moon 1994: 384, 391, Clarke 1994: 525), extending its reach enormously and inappropriately as the state is supplanted by self-regulating communities. Secondly, that the informal resolution of speech disputes would be compromised fatally by the private resources of the differing speakers involved (Moon 1994: 392, Delgado and Stefancic 1996: 97). The framework would resemble, in its operation, the libertarian position of a private, market oriented, forum. Abel clearly does not intend either of these results for his proposal, although he acknowledges at length the difficulties of any response to a speech dispute and the partial role any one solution would play.

Abel's proposal does rely on a 'more speech' approach in that it seeks an explanation and apology from a transgressive speaker. In this, there may lie the thought that a lack of information is at the base of speech disputes. As Delgado and Stefancic (1996: 104) have pointed out, this could hardly be the case with much disputed speech: it is an exercise in power, ridicule and denigration, not something that resembles a misstatement about the weather. Can the effects of this speech be redressed by an explanation and apology? Is it helpful, if apparently necessary, to phrase the question in terms of effects? The believed consequences of speech are decisive in formulating responses to its harms. Abel does not analyse overtly the harms of speech; rather he attempts to bypass a consequentialist argument by formulating the harm within the very act of speaking, stating that 'consequentialist arguments run the risk of empirical falsification and distract attention from the real harm—the reproduction of status inequalities by the very act of speaking' (26). This seems to assert merely that a particular harm flows necessarily from, for example, hateful speech.

Other writers often see different harms flowing from such speech. The two criticisms noted above, those of repeating the flaws of regulation and abandoning the arena to market forces, can be seen to follow from beliefs about the harms of speech different to Abel's own. Delgado and Stefancic (1996) are a good illustration. They believe that Abel's approach trivialises the harms of hate speech, and refer to various sociological findings about the significant personal harms which can result from such speech. If these harms exist, an apology does seem to be manifestly inadequate, and support would follow for Delgado's work (Matsuda et al 1993) advocating the

creation of a tortious remedy for hate speech, ignoring any questions about the process and operation of such a remedy.

Placing his informalism in context, theorising about its operation, or researching similar attempts to deal with speech all would have assisted Abel's thesis greatly. It would have made more clear the possible harms and forced Abel to consider these criticisms. It may have been possible to show the way in which informalism might operate, various limits to its suitability, and the way in which it might deal with the problems of both private power and regulation which face formal law.

An operational context also would have led to a greater investigation of 'community'. This is another concept which is used but not explored enough by Abel. His earlier work raises issues which could have been addressed here. As Abel has emphasised previously, community is a problematic and morally ambiguous term and, necessarily, a site of conflict:

The political significance of informal institutions turns not only on who uses them but also on the total social environment in which they operate. If it is true that informal institutions express and can help to build community, then it is critically important to investigate the qualities of the community they foster (Abel 1982a: 12).

The role of a community in relation to its members and others within a society is far from being a necessary good. Abel also has made the point that community groups such as churches may have passed their time for resolving disputes because they no longer hold the same authority as they once did:

The ideology of informalism expresses a nostalgia inspired by the demise of traditional sources of authority... Although such institutions [such as churches, schools and families] are presented as forums for dispute settlement, they performed that role only because they were, preeminently, loci of authority (Abel 1982b: 275).

An expansion of the meaning and operation of community within his proposal may also have clarified the ways in which this informal resolution would differ from informal justice as it is commonly seen. As already suggested, the proposal most clearly differs in removing significantly the idea of due process from the resolution of speech disputes. Although Abel states

his proposal is qualitatively different to the informal justice he has previously written about (145), it is not clear that a self regulating community would not face similar criticisms.

Abel is an eminent sociologist and lawyer. He has carried out extensive work on law and its practice, and as these quotations show, he has raised previously many issues important to his thesis here. Central to much of his work has been the influence of different players' power upon the operation of law, formal or informal. One major previous work about informal justice illustrates the point, which is unanswered by *Speech and Respect*. In this earlier work, Abel introduced a collection of essays on informalism in American law and noted the need to be alert 'to the fact that every procedure, no matter how trivial it may appear, has some impact on the relative power of adversaries' (Abel 1982a: 11). His own conclusion then, in an essay on the contradictions within informalism, was that 'informal institutions can cool out grievances only temporarily, at most. Complainants who invoke them quickly perceive their inutility' (Abel 1982b:309). That does not mean, however, that they should be dismissed, although the conclusion surely affects their context: informalism 'expresses values that deservedly elicit broad allegiance' (Abel 1982b: 310) such as harmony, access, speed and participation.

Lest it be thought unreasonable to raise such matters, it can be repeated that Abel has emphasised the need for informal approaches to be investigated in context—their ambiguous qualities necessitate it:

Formalism and informalism, both as modes of state power and as forms of resistance to it, possess fundamental, inherent political ambiguities. It is not possible to determine, in the abstract, which is preferable. Each must be situated historically in a concrete social context (Abel 1982a: 9-10).

He has also noted the importance of such a placing into context when commenting on other writers in the socio-legal field; for example, strongly criticising Alan Watson's *Society and Legal Change* (1977) for not approaching law through the social context of its operation (Abel 1982a: 808).

The difficulties which the law may have in dealing with, for example, form and content in speech do not obviously suggest informality is preferable. Abel's thesis could be expanded to explain the type of legal regulation which might encourage informal resolution of disputes. His thesis would be strengthened if other possible formal legal approaches were analysed.

Of course, Abel is questioning formality *per se* in relation to speech which attacks status, but this would be served by a greater dismantling of formal law's methodology and delineation of the role he sees for it. As Abel notes (24), collective status competition can be seen in the public debates surrounding legislative reform: reformers can feel vindicated once given the approving seal of formal law. In that way, formal law may be a key element of the status conflicts which Abel details. Previously, Abel has acknowledged the tactical uses of formal law in substantive equality claims, and the power of state regulation to achieve reforms of substance; for example in relation to the United States' civil rights reforms (Abel 1990: 686) and regulation protecting less powerful members of society in areas such as employment (Abel 1990: 696). The points remain to be explored.

FURTHER THEMES: ART, JURISPRUDENCE AND MODALITY

In his recounting of the three examples of status speech disputes and overview of common theory about law and expression, Abel draws on other themes worth noting, three being artistic expression, the interplay of legal rules and exceptions, and the law's response to modal behaviour.

The *Satanic Verses* not surprisingly raises issues of artistic expression, such as the assertion by the author of rights to investigate any controversial topic—'There are no subjects which are off limits and that includes God, includes prophets' (11)—and the linking of freedom of expression generally to a special value which may exist in a writer's contribution to society—Rushdie, again, has argued 'Free speech is the whole thing, the whole ball game. Free speech is life itself... You must decide what you think a writer is worth, what value you place on a maker of stories, and an arguer with the world' (21). As with his references to the so-called culture wars in the United States since the late 1980s (46-47), Abel perhaps underestimates the localised qualities of the art speech debates, and the origin of the various quotes referred to; for example, the second quotation from Rushdie, above, is taken from a celebration of the First Amendment at Columbia University, New York. It is not that art, public funding politics do not raise similar issues elsewhere in the world, but the particular history of the United States, its founding as a nation, and the public role religion still appears to have within it, set it apart decisively from Australia certainly, and England most probably. His use of art is an instance of examples provided by the book which may not translate across the Pacific, if they may have done across the Atlantic for his audience in Wales.

The boundaries constructed by law are raised, if not always investigated, throughout this book and art is an example of the ever present problems at the boundary. Abel notes the tendency for actual or theorised controls on speech to admit exceptions and suggests this can tend to engulf any rule (86-88). Art is a good illustration of speech which commonly is treated differently in this way by theorists: an exception is made in doctrines limiting speech for speech which is also 'art'. Abel suggests that allowing such an exception, however, 'merely shifts debate from an arbitrary boundary to an ineffable essence' (89). Abel appears to subscribe to the essence's reality in art. He, therefore, does not evaluate more favourably theorists who may treat art in the same way as other speech, such as MacKinnon and her work which has highlighted and questioned the use of arguments in the pornography debate about art being different in quality to other speech (MacKinnon 1995, 1994). Abel, however, does provide many examples of interest to readers concerned with areas such as music, film and visual arts, and the wide ranging consideration of artistic legal issues is a notable quality of the book.

Modal behaviour is central to status speech disputes, as Abel notes (22). If formal law has limited dexterity in responding to speech, the facility it does have is focussed on atypical and individual behaviour:

Preoccupation with the extremes—which alone provoke sufficient outrage to mobilise the political support necessary for prohibition—diverts attention from the quotidian—which inflicts far greater harm.... But legislators and judges openly refuse to confront modal behaviour (106).

Abel argues the problem is common to formal law but exacerbated by the particular degree of indeterminacy in the meaning of speech. The problem with modal behaviour is seen more sharply through his focus on collective rather than individual identities and status. The media is recognised as having a role in the formation of collective status, and could be seen as part of the 'far greater harm' in his eyes (134). It seems that the media, however, also might be a dominant element in the informal approach Abel suggests. To return to the *Satanic Verses* example, much of the incident has been played out in national and international media. It would not be hard to see that debate in terms of loose, collective identities arguing for their relative status, in a large part through the avenues of the media; that is, the informal approach to resolution may have been occurring before our eyes and ears. As Abel's examples show, the media hardly has avoided stereotypes in treating issues of speech, nor necessarily been aware of its own impact

and role within the debate; for example, the way neo-Nazi demonstrators were able to claim 'victory' in the Skokie dispute due to the media publicity their beliefs gained (9-10). While the media may have kept the issues before people, it can hardly be seen to have supplanted any more formal resolution, nor been much more sensitive than formal law to difficulties of modal behaviour and speech.

CONCLUSION

Speech and Respect's main newsworthy quality to date has been the circumstances surrounding its delayed publication, some two years after the lectures were delivered. The Trustees and publisher aptly modelled an issue central to Abel's arguments, the importance of private controls upon speech. There were disagreements between the publisher, Trustees and Abel about the inclusion of lyrics of the American rap musicians '2 Live Crew', over which the band were unsuccessfully prosecuted for obscenity (36). The lyrics were eventually included in an appendix (175), with an unsensational warning that readers may find them 'extremely offensive' (36). The Trustees, regretting the delay in publication, noted:

[I]t was decided to accede to Professor Abel's request that the additional material should be included ... on the basis that readers will judge for themselves the appropriateness of Professor Abel's decision, and, like the Trustees, become involved in a practical way with an issue which is central to The Lecturer's thesis (xii).

Perhaps of more interest, the episode has been detailed by Abel in a later article (Abel 1994), which goes to some length to examine the private, commercial constraints he encountered as an author. In this, Abel does acknowledge the significant assistance his particular financial, employment and personal situation played in underscoring his stand on a matter of principle in this speech dispute (Abel 1994: 379, 381). Again, this one example of less formal resolution does not suggest a general reliance on the method would benefit many involved in such disputes. The resolution appears to have relied on principles of contract law, in any case—Abel withheld consent for publication if it was to be in an incomplete form (Abel 1994: 378)—and, as a lawyer, he must have had greater awareness of the formal avenues open to him. Informal resolution, rather, could seem to be not far removed from the 'civil libertarian utopia ... of constraint, not freedom' (58). Informal resolution could repeat the weaknesses of libertarian 'more speech' solutions and the problematic effects of regulation. To leave

a resolution to negotiated apologies and the like merely may be to abandon a large part of any solution. One easily could agree with Abel that the nuances of speech are particularly difficult for law to respond to appropriately, and acknowledge the aptness of informal and agreed solutions to speech disputes when they occur, but still question how such an informal approach may operate for the quotidian.

Although the work does not appear to have been commented on in the Australian literature at all, and despite any shortcomings it may have, *Speech and Respect* remains a invaluable review of examples of speech disputes and the common responses to them, and an interesting prompt to further work. If informal approaches are to be mapped out, and to supplement formal legal avenues, which may be both flawed and necessary, they will have to deal with the same problems of private power and less-than-perfect regulation which afflict formal law's response to speech. Law now too often either abandons the field to private interests or 'far from silencing harmful speech, rather encourages, valorises and publicises it, transforming offender into victim and offence into romantic defiance' (107).

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NOTES

1. (1996) 134 ALR 289.

2. The cases are expected to be heard by the High Court early in 1997 and involve David Lange, former Prime Minister of New Zealand, and Laurie Levy, of the Coalition Against Duck Shooting.

3. Coincidentally, MacKinnon (1994) developed this work out of a lecture series at the same time as Abel, although the arguments advanced differ substantially.