

Book Review

*Affirmative Action, Hate Speech, and Tenure:
Narratives about Race, Law and the Academy*

Benjamin Baez

(Routledge Falmer, 2002, \$24.95)

Reviewed by Denise C. Morgan†

The thesis of Benjamin Baez's *AFFIRMATIVE ACTION, HATE SPEECH, AND TENURE*, that legal arguments and judicial opinions "recirculate old race narratives,"¹ is both simple and true. However, Baez's unconventional approach to proving that thesis, analyzing those arguments and opinions as "discursive practices,"² is frustrating.

Baez's greatest strength is his range. His book draws upon the work of a myriad of theorists from different disciplines, including Louis Althusser, Mikhail Bakhtin, Wendy Brown, Judith Butler, Robert Cover, Jacques Derrida, Michel Foucault, Sigmund Freud, Friederich Nietzsche, Charles Taylor, and James Boyd White. The book also incorporates insights from many of the most influential writers in the fields of Critical Race Theory, Critical Feminist Theory, and Critical Legal Studies.³ Unfortunately, Baez manages to translate the work of those theorists into *less* accessible, rather than *more* accessible, terms. Moreover, his book offers little concrete advice to litigators pressing affirmative action, hate speech, or tenure cases beyond warning that "one should proceed with caution, and, more important, that one should understand the state and its courts as creating and circulating race narratives."⁴ Baez's book is smart and challenging—in the manner of a literary theory seminar. However, a legal audience will probably find more satisfaction in reading the original works of critical legal theory upon which Baez relies so heavily. The best

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1. Benjamin Baez, *AFFIRMATIVE ACTION, HATE SPEECH, AND TENURE* 5 (2002).

2. *Id.* at 20.

3. The critical legal scholars Baez cites include Kimberlè Crenshaw, Richard Delgado, Stanley Fish, Barbara Flagg, Alan Freeman, Duncan Kennedy, Charles Lawrence, Catharine MacKinnon, Mari Matsuda, Robin West and Patricia Williams.

4. Baez, *supra* note 1, at 14.

of that genre is both critical and constructive.⁵ Baez's book fails in the second regard.

The three topics that Baez examines in AFFIRMATIVE ACTION, HATE SPEECH, AND TENURE are not usually treated together in traditional doctrinal analysis because they are rooted in divergent areas of constitutional and federal statutory law. Most affirmative action cases are brought under the Equal Protection Clause of the Fourteenth Amendment or Titles VI or VII of the Civil Rights Act of 1964; most hate speech cases are brought under state criminal law and the First Amendment; and most challenges to tenure decisions are brought under Title VII or 42 U.S.C. § 1981. Baez, however, looks beyond the black letter doctrinal analysis that might inhibit more conventional legal scholars. Instead, he treats the case law and legal arguments in those different areas as "texts," and contends that they are "the primary authority for defining and policing race conventions and norms, [which] forecloses other possibilities for conceptualizing and resisting those conventions and norms."⁶ His argument, in other words, is that the language that law professors, lawyers, and judges use to justify their positions in race cases significantly affects how race is understood in non-legal and non-academic contexts. Baez goes one step further, however, and concludes that "[w]hat is important in a legal text is not necessarily the main idea (the ruling or the rule of law), but how that idea is given meaning by the text."⁷ His point is well taken, but overstated. No one who has used or felt the coercive power of the law could mistake the language of a legal decision for the power of the court behind it.

Baez first employs the method of narrative analysis in his chapter on hate speech. In that chapter, he identifies four "claims" that he contends are present in those legal cases: "(1) words have a social context, (2) words can injure, (3) words are ideas in the marketplace, and (4) words are not the same as conduct."⁸ Examining the opposing arguments in *R.A.V. v. City of St. Paul*⁹—the 1992 Supreme Court case striking down the city's cross burning ordinance on the grounds that the government cannot selectively

5. See, e.g., Catharine A. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (developing a new legal approach to sexual harassment claims); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987) (critiquing the Supreme Court's discriminatory intent doctrine and offering an alternate legal test that is rooted in current understandings of human motivation); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 *STAN. L. REV.* 1 (1991) (arguing that the modern Supreme Court's color-blind constitutionalism fosters White racial domination and offering an alternative legal approach to race cases modeled on Establishment Clause and Free Exercise Clause jurisprudence).

6. Baez, *supra* note 1, at 4.

7. *Id.* at 21.

8. Baez, *supra* note 1, at 37.

9. 505 U.S. 377 (1992).

restrict fighting words on the basis of their content—Baez critiques each of those claims in turn. Many of his critiques ring true, such as his assertions that “[f]ree speech . . . is not an independent value but a political prize that can be seized by anyone,”¹⁰ and that “[t]he notion of context in hate-speech discourse may be as abstract as freedom of speech. It fails to account for the instability of all contexts, especially those regarding language.”¹¹ However, Baez’s textual analysis does not advance the discussion of hate speech beyond the impasse that divides the opposing theorists he cites for those two propositions (Stanley Fish and Henry Louis Gates, Jr.).¹² As a result, one cannot even begin to guess how Baez would respond to the remarks that Justice Clarence Thomas made during the Supreme Court’s oral argument in *Virginia v. Black*,¹³ the latest cross burning case to reach that court.¹⁴ Would Baez see the Justice’s comments as a raw political move to privilege the speech of those who would be silenced by burning crosses over the speech of those who would burn those crosses? Or would he see the comments as a futile attempt to fix the meaning of the burning cross as it existed in the particular historical moment of the post-Civil War/pre-Civil Rights era United States? Baez’s arguments in *AFFIRMATIVE ACTION, HATE SPEECH, AND TENURE* leave the reader much room to wonder.

While it is surely unfair to expect any scholar to *resolve* the conflicts between liberty and equality that have long been present in the debate over the legality of hate speech, Baez’s narrative analysis further muddies those waters. What is one to make, for example, of his assertion that “fire appears to be an important metaphor in First Amendment jurisprudence. The use of metaphors, however, is not just a question of rhetoric; metaphors do things Taken as a metaphor in First Amendment law, fire is speech.”¹⁵ It is unclear how acknowledging the existence of allusions to fire in First Amendment cases provides any insight into that area of law. Indeed, Baez never explicitly says what he thinks is the appropriate legal response to hate speech. Also, his extralegal alternatives — “the answer to hate speech may not be necessarily punishment,

10. Baez, *supra* note 1, at 43.

11. *Id.* at 45.

12. See Stanley Fish, *There’s No Such Thing As Free Speech and It’s a Good Thing Too*, in *HATE SPEECH AND THE CONSTITUTION* (1996); Henry Louis Gates, *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1994).

13. *Cert. granted*, 122 S.Ct. 2288 (2002).

14. Justice Thomas said that the burning cross is “unlike any symbol in our society.” He also asserted that “[t]here’s no other purpose to the cross, no communication, no particular message. It was intended to cause fear and to terrorize a population.” Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

15. Baez, *supra* note 1, at 38-39 (emphasis in the original).

restriction, or censorship, but a disruption in the conditions and conventions that allow (hateful) speakers to speak conventionally and with authority”¹⁶—are simply beyond the powers of our legal system to bring about.

Baez’s chapters on tenure and affirmative action also pose challenges for a legal audience. In those chapters, Baez’s use of narrative analysis leads him to conclusions that standard quantitative analysis would likely reject. For example, in the chapter *Tenure and “Intentions”*, Baez compiles a database of fifty-two tenure cases decided since the 1970s that were “(a) . . . initiated by tenure-track faculty members who were denied tenure or reappointment; and (b) . . . alleged racial or national origin discrimination under federal or state law”¹⁷—and that were listed on Lexis. Baez’s sample is incomplete, because it does not take into account unpublished judicial decisions or decisions of administrative agencies like the Equal Employment Opportunity Commission. In addition, because he sorts the cases into “wins” and “losses” irrespective of whether the cases were decided on the merits or on procedural grounds, his sample compares apples and oranges. As a result, Baez’s sample of tenure cases—which are decided under a variety of state and federal laws, are in an array of procedural postures, and about which the author tells us little beyond the races of the parties involved—might support anecdotal conclusions, but it does not offer a sufficiently firm basis from which to draw the quantitative assessments that he reaches.¹⁸ While I do not doubt the existence of race discrimination and prejudice in tenure cases (or elsewhere), Baez overreaches when he states that:

the courts seem to privilege the rule of law in cases brought against historically White institutions, allocating blame to the faculty members suing those institutions; but they emphasized case-specific standards in cases brought by White plaintiffs against predominantly Black institutions, thus rewarding those faculty members.¹⁹

Moreover, Baez’s assertion that the bias he identifies in his sample may be attributable to the fact that “Black institutions often have inadequate legal representation which would advise against illegal behavior, thus making their decisions appear intentionally discriminatory,”²⁰ is both unsupported

16. *Id.* at 58.

17. *Id.* at 60.

18. Empirical analyses of the type attempted by Baez have been more effectively undertaken. See, e.g., Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992).

19. Baez, *supra* note 1, at 68.

20. *Id.* at 86.

and undermines his conclusion that the outcomes of those cases are racially manipulated.

Baez is on firmer footing in critiquing the persistent narrative in tenure and affirmative action cases that asserts that race discrimination is a product of “the isolated acts of individuals acting outside of society’s rules or conventions, [and that] [t]he objective of anti-discrimination law under that perspective [is] to eliminate the ‘act,’ or to punish the intentional ‘actor.’”²¹ This complaint—that it is assumed that race discrimination is an anomaly and, therefore, that it is appropriate for plaintiffs to be required to prove conscious, intentional discrimination in order to prevail on their claims under the Equal Protection Clause—is a common one in the work of critical legal theorists.²² In my own scholarship, I have argued that race discrimination simply cannot be reduced to a form of intentional tort because “[w]hile . . . discrimination cases may *also* redress personal injuries—they are more fundamentally about ensuring full and equal membership in political community.”²³ Indeed, only a distributive approach that seeks the fair allocation of essential community resources—like access to public spaces, employment opportunities, and education—irrespective of evidence of intentional misconduct, can achieve racial justice in this country. Baez agrees that “[t]he story of the intentional discriminator, and its manipulation to further the ideology of individualism [in affirmative action cases] will ensure that racial justice is never reached.”²⁴ However, once again he is unable to find a legal solution to the problems he identifies.

Baez’s book concludes with an acknowledgment that “legal politics require that issues be spoken of in certain ways.”²⁵ Simply put, lawyers do not have free reign to make and remake race narratives; lawyers are constrained by precedent, by their clients’ interests, and by the society in which they live. We should take seriously Baez’s call to “engage in critical projects of emancipation.”²⁶ However, AFFIRMATIVE ACTION, HATE

21. *Id.* at 89.

22. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (“[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works.”). See also Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990) (“Central to the victim perspective is an insistence on concrete historical experience rather than timeless abstract norms.”); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

23. Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 157 (2001).

24. Baez, *supra* note 1, at 116.

25. *Id.* at 156.

26. *Id.*

SPEECH, AND TENURE does not give us much of a guide towards that end.