

UNCOOPERATIVE ENGAGEMENT:
AN ACTIVE RESPONSE TO HATE SPEECH

By

Meredith Verrochi

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ABSTRACT

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In the following I take up and elaborate on the claim that we do things with words. That is, as speakers in a culture bound by convention and ritual, words are not merely an expressive tool but a form of action. More importantly still, words can – and often do – wound in the very uttering of them. As to the question of how words wound, J.L. Austin provides us with the working theory – speech act theory. Like the illocutionary force of warning or marrying or christening, there is an illocutionary force of subordinating. Drawing together Austin's speech act theory with the theory of meaning and conversation provided by H.P. Grice, we have a formula for actively addressing the peculiar harm that is done in hate speech. If harm is well enough established then *prima facie* something ought to be done about that harm. What remains is the question: what does intervention look like? To that end, the main objective of this project is to show that there are avenues for interrupting the illocutionary force of subordination beyond either enlisting the coercive power of the state or leaving recourse to the “open marketplace of ideas.” Somewhere between the Dworkin-MacKinnon anti-pornography ordinance and Judith Butler’s “resignification” is an alternate path. In the following I develop a concept that I call “uncooperative engagement” as a means of redress that is both tenable and ethical.

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INTRODUCTION

In the following I take up and elaborate on the claim that we do things with words. That is, as speakers in a culture bound by convention and ritual, words are not merely an expressive tool but a form of action. More importantly still, words can – and often do – wound in the very uttering of them.

As to the question of *how* words wound, J.L. Austin provides us with the working theory – speech act theory. Like the illocutionary force of warning or marrying or christening, there is an illocutionary force of subordinating. Drawing together Austin's speech act theory with the theory of meaning and conversation provided by H.P. Grice, we have a formula for actively addressing the peculiar harm that is done in hate speech. If harm is well enough established then *prima facie* something ought to be done about that harm. What remains is the question: what does *intervention* look like? To that end, the main objective of this project is to show that there are avenues for interrupting the illocutionary force of subordination beyond either enlisting the coercive power of the state or leaving recourse to the “open marketplace of ideas.” Somewhere between the Dworkin-MacKinnon anti-pornography ordinance and Judith Butler’s “resignification” is an alternate path.

I begin with introducing Austin into the work of Mari Matsuda, Richard Delgado, and Charles Lawrence and their proposals for enlisting state power as an active response to racist speech. These theorists take it as *prima facie* true that we do things with words and that words can, and often do, “wound” in the very uttering of

them. Interests on both sides of this dialogue – to either *regulate* or *protect* hate speech – rely on this very conceptualization of speech; that is, we do not just describe or report on the world with speech, we act. More specifically, our utterances have *illocutionary force*, and sometimes that force is quite harmful in significant ways. As a collective, the authors of *Words That Wound* propose extending one or more exceptions to the first amendment to include hate speech. Or, as Matsuda suggests, we could uphold our commitment to equality by criminalizing hate speech as international law has already done.

In my first chapter I intend to show that none of the proposals offered up by the authors of *Words That Wound* are appropriately characterized as prior restraint. The use of the term ‘censorship’ as a rhetorical tool is misleading at best and uncharitable at worst. That being said, I ultimately reject the use of coercive state power as an ethically tenable and politically viable form of recourse while I support their arguments for why some form of recourse is warranted. In the first section of the chapter I provide an account of speech act theory, elucidated through the use of examples. The second section is dedicated to the authors of *Words That Wound* and their various proposals for enlisting state power as a viable, ethical form of recourse. And, lastly, in the final section of the chapter I address the problems I see with enlisting the authoritative power of the state to address the harm in hate speech, before turning to Butler’s critique in the following chapter.

Throughout my project I attempt to bring some clarity to the discussion by identifying two overlapping issues that recur and are often conflated: There is a

conceptual problem and a *political problem* at hand. The conceptual problem is that legislative proposals attempt to restrict *words* or *phrases* or the *utterances themselves* and this *mislocates* the harm in hate speech. The political problem arises from our unparalleled commitment in this country to “free speech,” which makes tackling the first amendment an untenable strategy. (Not to mention that restricting speech often coincides with burdening the least well off with even more infringement on their civil rights, and on that count alone it should be considered cautiously.) Regardless of whether or not proposals for enlisting the coercive power of the state are properly characterized as censorship (I, for one, think there are more precise and charitable ways of describing their proposals), enlisting state power to regulate or restrict speech is problematic on both a conceptual and political level.

Given our collective history, the international movement toward regulating hate speech, and the inexorable link between speech and equality, the call to enlist judicial authority to restrict certain speech acts is reasonable, at the very least. The suggested remedies are reasonable, that is, but not satisfying – they are not “unrisky” *enough*, not politically workable enough of the time and with enough assurance that their implementation will not be misused.

The same goes for the Dworkin-MacKinnon anti-pornography ordinance, which I attend to in my second chapter. This chapter is divided into two sections: The first attends to the claim that pornography harms women. This is an important claim to engage since the argument for it is also the argument for the harm in hate speech. The last part of this chapter is dedicated to the anti-pornography ordinance itself. I argue

that the ordinance is *not* a form of prior restraint and to characterize it as such misleads the discussion. The ordinance gives legal standing to the group of victims harmed by pornography – it makes harmful behavior involved in the production and/or use of pornography an actionable offense.

Central to my project is a close analysis of prohibitive policies against speech. However, to claim that MacKinnon and Dworkin have proposed a *prohibitive* policy is just wrong. To make the argument that underneath it all they are suggesting something “ultimately” prohibitive is a tricky argument to make, and one that stretches the term *censorship* into oblivion. A policy that dictates what can and cannot be said is a prohibitive policy. The anti-pornography ordinance provides redress for harm as a result of speech; it does not prohibit the speech from being uttered. If a ladder manufacturer makes a defective ladder and as a result people are hurt, those people have the opportunity (if they choose to take it) to sue the ladder manufacturer for damages. Such a policy does not prohibit ladder making. It can be argued, in a roundabout way, that the policy prohibits bad ladder making in that being open to suit would keep the ladder-maker from making certain kinds of ladders. But to call such a policy prohibitive is a stretch.

I then turn to Butler’s opposition of MacKinnon and Matsuda in the third chapter of this project. Butler rejects intervention through legislation. She calls for *resignification* – a type of reclaiming that is possible at the site of infelicity. I read Butler as challenging both what I have called the *conceptual problem* at hand and the *political problem* at hand. Enlisting state authority is ethically questionable and politically untenable (the political

problem). Furthermore, according to Butler, MacKinnon *et al* posit a sovereign authority to the speech act that is false and that forecloses the very avenues of recourse they wish to enact (the conceptual problem). If the act is sovereign (as Butler accuses MacKinnon *et al* of suggesting) then there is no intervention – it's not possible to interrupt the sovereign act. In response I argue that Butler fails to recognize that the *possibility of infelicity does not foreclose the possibility of felicity*. Sometimes the illocutionary act comes off without a hitch, and sometimes it doesn't. As Austin says, the illocutionary act is a conventional act; its success is determined by a host of interacting conditions.

Thankfully there is a possibility of infelicity and, thereby, an opportunity for the hearer to intervene. I argue that the very same conceptual problem can be leveled at Butler:

She questions the very idea of illocutionary force (she favors the perlocutionary dimension of speech acts) when she says, "The saying is not itself the doing, but it can lead to the doing of harm that must be countered. Maintaining the gap between saying and doing, no matter how difficult, means that there is always a story to tell about how and why speech does the harm that it does."¹ If there is no such thing as illocutionary force [what the saying *does*] then there is no such thing as resignification. Butler forecloses the very avenue of recourse she desires. In the first section of this chapter I address Butler's critique of those calling for legislative intervention. In the second section I focus on Butler's claim that MacKinnon *et al* imbue the illocutionary act with sovereign authority – a point on which I believe she is mistaken. In the final section I bring these two points together in an analysis of the Anita Hill case.

¹ Butler, Judith. 1997. *Excitable speech: A politics of the performative*. New York: Routledge. Pg. 102

In chapter four I introduce Grice's theory of speaker meaning and conversational implicature in the interest of establishing alternate modes of social intervention. Once again, *intervention* is the operate concept here. An analysis of the Gricean model of meaning affords an alternate view of the hearer/audience – one in which that role is quite powerful. In Grice we see that humans are beings that interpret constantly. We are intensely social and we are intensely socialized to read each total speech situation “correctly,” in accordance with the current cultural norms and conventions; in Grice's terms, to *engage cooperatively*. Someone hails me and I'm there, responding. I argue for a co-opting of Grice's Cooperative Principle – one in which we reimagine engagement with the speaker as potentially uncooperative, but engagement nonetheless. Herein lies the possibility of generating infelicity *by the audience*. It is the audience that has the power to thwart the subordinating intentions of the hate speaker. In Section I of the chapter I unpack Grice's theory of speaker meaning. In Section II I address the connection between Austin's notion of felicity and Grice's nonnatural meaning. In the final section of the chapter I pull these concepts together to address hate speech with a series of cases in which an Austinian/Gricean analysis illuminates the power held by the audience.

In conclusion, we need not be stuck with just these two alternatives for hate speech intervention: Either we support government backed legislation (even the relatively weak intervention that is the Dworkin-MacKinnon anti-pornography ordinance) or deny any form of organized intervention. We certainly need not deny the possibility of formulating concrete, manageable interventions – something that can be

described, taught, and employed. Of course such a formulation is necessarily incomplete and open to failure, but that need not mean that the formulation is indecipherable or unmanageable. Sometimes the illocutionary act isn't accomplished...but sometimes it is! We can imagine a set of "rules" without clear and distinct boundaries (more like family resemblances) that can be taught and employed. I suggest we take another page from Austin's book and look to what we actually do (when we are our best, most clever selves in the face of hate speech) in response to instances of hate speech. Here is where we will find interventions that are describable and manageable but are not dependent upon the coercive power of the state.²

There is no escaping power relations in the social world (likewise, there will always be the "diss" even if we intervene on hate speech) – the question is, given that power relations are capable of being manipulated, how do we manipulate them to intervene on hate speech? What is often ignored is the *significant role of the hearer* in any given conversational exchange. I invoke Grice's account of conversational implicature – which gives a significant place to the audience's cooperation – to work out creative uncooperative engagements with hate speech acts. It's got to be more than counterspeech – "just" counterspeech is too much like the liberal response (the "marketplace of ideas" approach). Both Butler and MacKinnon will appreciate a formulation that is more than counterspeech and it is somewhere in between their opposing views that we find the solution. In the final chapter I develop *uncooperative*

² These responses may be conceptually supported by judicial authority but are not maintained or enacted by the coercive power of the state.

engagement as a means of responding that is both more purposeful than counterspeech and less coercive than state legislation.

All else being equal, the “hate speech legislation” debate was abandoned too quickly and, more importantly, unnecessarily. The points on which the two camps agree are strong. Most importantly, the harm in hate speech is significant enough that pursuing a describable intervention is warranted – even morally obligatory. In the following I heed just such a call.

Chapter 1: Speech Act Theory and *Words That Wound*

*Racism achieves its purpose through the construction of meaning.*³

There is a breadth of important work that has been done to argue for enlisting the authority of the state to address the harm in hate speech. This project takes the claim that certain utterances should be actionable under the law as a serious proposal worth philosophical enquiry. I specifically engage the arguments put forth by the authors of *Words That Wound* and the anti-pornography ordinance crafted by Catharine MacKinnon and Andrea Dworkin. All of these theorists (henceforth named *Enlisters*) identify hate speech as an integral function of institutionalized oppression and therein all propose the enlistment of state power to address institutionalized oppression, albeit in notably distinct forms. In a world in which people are placed in groups of varying social and political import and aligned hierarchically within and among those groups, subordination is something that happens, and sometimes it is done through speech – “doing” hate is sometimes done simply by speaking hate and, in this way, hate speech not only perpetuates oppression but is itself an act of subordination.

Interests to regulate speech rely on a particular conceptualization of what we do with words; namely, we do not just describe or report on the world around us, we act. Sometimes we use language to relay our thoughts but also, more often than not, we use language to perform certain actions. There are, in fact, some acts that are *most clearly and*

³ Delgado, Richard, Charles R. Lawrence III, Mari J. Matsuda, and Kimberlé Williams Crenshaw, eds. 1993. *Words that wound: Critical race theory, assaultive speech, and the First Amendment*. Boulder: Westview Press. Pg. 9.

explicitly done through no other way than speech (e.g. promising, christening, inaugurating, to name but a few) – when the conditions are just right, the utterance *is* the act. It is most notably J.L. Austin who attended to this way in which we use language – the *performative* dimension of speech. Austin was less concerned with how words describe the world and more with how language-users employ words to accomplish actions. In the following section I look at the theories of Charles Lawrence, Richard Delgado, and Mari Matsuda and their various proposals for how and why we ought to enlist state power to regulate racist speech. As I read these authors, they each analyze various iterations of racist speech as performing a kind of act. In other words, I read them as talking about *speech acts*. There is a certain robustness lent to *Words That Wound* when read through an Austinian lens, especially when analyzing the claim that significant social and political harm *is done* in racist speech. When Matsuda says that *racist speech is racism*, she suggests that racist speech has a certain illocutionary force (an Austinian concept) that does some work to construct reality. So, first, a bit about Austin's theory of speech acts.

Section I: Speech Act Theory

Consider the following utterances:

- A. "Pass the salt." When said around the dinner table.
- B. "Time to practice piano." Said by a parent to their charge.
- C. "No girls allowed in the tree house." A sign posted on the door of a child's fort.

D. "You're hired." Said by a hiring agent to a potential employee.

E. "I pick Pilot" (for my team). When said by the leader of a team.

All of the above are speech acts in that, when uttered in the appropriate context by the appropriate speaker, they are not *observations*; the uttering *is the performance* of a particular action.

Let us look closer at the last example above, example E: "I pick Pilot" (for my team). Imagine that Captain Orange stands before a group of participants – all of them there willingly, in a not-so-serious context – and begins to pick out the people she wants for Team Apple. Given that, among other things, Captain Orange is in fact the person authorized to pick members of the team and (as we've already established) all the potential team members are there to be picked, when Captain Orange utters, "I pick Pilot" then Pilot is thereby picked for the team. Orange is not describing the situation; she is, as Austin put it, *indulging* in the act of choosing members for the team.⁴ She picks Pilot *in the very uttering of the words*.

Austin considers the "indulging" in an act (*in the uttering*) as first the saying of something as a "full unit of speech," which includes the act of uttering certain noises (the phonetic act), the uttering of certain vocables or words (the phatic act), and the uttering of those vocables with a more-or-less definite sense and reference (the rhetic act).⁵ All together, when one utters something that is meaningful in a given language, conforming to a certain grammar and semantics, we have a *locutionary* act. Captain

⁴ J.L. Austin, 1962. *How to do things with words*, 2nd ed. Cambridge, Massachusetts: Harvard University Press. "When I say before the registrar or alter, etc., 'I do', I am not *reporting* on a marriage: I am *indulging* in it" (6).

⁵ Ibid. Pg. 95.

Orange could, of course, use various *locutions* to perform the *illocutionary act* of choosing members of the team; she could simply say “Pilot” or point and say “Team Apple” and so on. Just as we can congratulate someone (an illocutionary act) by uttering, “Congratulations,” or, less formally, “Congrats,” or “Well done!” If we were interested in being particularly formal or explicit, congratulations can be done in uttering, “I congratulate you,” though a bit awkward to say. So long as the context is just right for congratulating, any of these utterances have the force of congratulations.

The *illocutionary act* is the term Austin introduced to identify the doing of something in the very uttering of the words.⁶ Picking out which, if any, illocutionary act requires an analysis of the context of the utterance. There is no exhaustive list of illocutionary acts – they are as numerous and varied as there are imaginable contexts of speech. Thus, we speak rather of the illocutionary *force* of a given utterance in a particular context. Whether or not a particular utterance has a certain illocutionary force depends on the context of the utterance. An actor on a stage does not really congratulate anyone when she says, “Congratulations” within the context of the play. Captain Orange does not appoint anyone to Team Apple when she says, “I pick Pilot,” if she is merely a bystander or witness to the event.

Language is most essentially a practice that takes place among people. We use language to promise, to break up, to resign from a position, or to conclude an argument (all illocutionary acts). But we also use language in order to bring about certain effects in others. We use language to persuade, to convince, to get someone to trust us, to hurt,

⁶ Another example: Given the context is just right for promising, the deed is done in the uttering of “I promise.” Contrast with running, which is *not* done in the uttering of “I run.”

to assuage. Austin called this dimension of speech the *perlocutionary act*. The doing of something in saying something often (if not always) will result in a series of consequences (as is the case with acts in general). The uttering of “I pick Pilot” will bring about various feelings, thoughts, or actions of the audience, or of the speaker, or of other persons.

I see the locutionary/illocutionary/perlocutionary distinction as providing various descriptors for a given utterance in a relatively specifiable context. So consider: “I pick Pilot” uttered by Captain Orange in the context of choosing the members of her team. The locutionary act is one description of what has been done [uttered the sentence “I pick Pilot”], the illocutionary force is another [made Pilot a member of the team], and the perlocutionary act is yet another [e.g. surprised Pilot’s mom].

Locutionary Act: The structure of her utterance is meaningful in a language – it fits the grammar and semantics of the English language.

Illocutionary Act: In this context, in uttering, “I pick Pilot,” she picks Pilot in the uttering of “I pick Pilot.”⁷ Pilot is picked. Pilot is made a member of the team.

Perlocutionary Act: We can imagine a range of consequences that this utterance brings about in others and even himself. Since we have determined that Pilot is there willingly and is interested in being picked for a team then Pilot is likely happy as a result of the utterance. If Team Pear was preferred, then being picked for Team Apple likely disappoints Pilot.

⁷ Austin imagines a context in which Pilot is not picked: Suppose Pilot isn’t playing and simply walks away from the scene, or was just a bystander witnessing the event. Or, similarly, Captain Orange isn’t actually the one with the authority to pick members of Team Apple. These examples are all forms of *infelicity*, which we’ll attend to later in greater detail.

We do lots of things with language – add figures in our head, perform soliloquies, tell jokes, give promises, and so on – and *one* thing that we do with language is not merely describe or report on the world but perform some act in the very uttering of words. A large part of what the Enlisters provide, once their work is given the Austinian treatment, is an argument for the *illocutionary force* of hate speech to harm with such significance that some form of restraint or redress is warranted, if not obligatory.

The perlocutionary effects of hate speech

The Enlisters argue that our ideological commitment to the protection of hate speech (under the first amendment) is in direct conflict with our ideological commitment to equality. Their arguments call us to account for the “unconscious” racism (sexism/heterosexism/classism) suggested by our continual commitment to protect the speech of racists, bigots, pornographers, and hate mongers. Given the empirical correlation between hate speech and violence (to physical person and personhood), our apparently impenetrable national commitment to protect hate speech seems especially dubious. Something else is called for.

The call to intervene (legally) on speech first calls for evidence that injury has been sustained: To call for the regulation of speech because it harms requires some means of establishing (with some specificity) how and to whom harm has occurred, and presupposes that such a determination is possible. Enlisters take on this task. They argue that the harm in hate speech is just as damaging, just as serious, and just as dangerous as bodily injury. Words that wound “hit the gut” and, since we are talking

precisely about speech that is directed toward members of historically subordinated groups, causes the perpetuation of structural and institutionalized racism.

The authors of *Words that Wound* provide victim testimonials, along with a historicized and contextualized interpretation of constitutional theory, to show the grave harm that is inflicted by speakers of hate. Utilizing the concepts of speech act theory, the harm is described as one of many *perlocutionary* effects of speech (as opposed to illocutionary). Speech *results* in racism; speech *causes* subordination. As mentioned above, the need to establish a *causal* link between speech and harm is necessary for their particular project – when working within the structure of the law, recourse can only be provided to one injured once it is “shown” that another inflicted injury. For example, for a tort action to hold up it must be determinable that some utterance happened [“Fucking dykes!”] and injury followed [fear of remaining in the vicinity of the speaker]. It is quite important to show that there are severe *perlocutionary* effects of speech but, as we shall see, the harm *caused* by the speaker is not the only kind of harm at play nor is it the most insidious kind.

There are several issues with the Enlisters’ line of reasoning that warrant address. Not least of which being that it appears necessary to establish speaker intent and audience response – both of which are tricky things to pin down. Let me be clear that I do not deny the causal connection between hate speech and serious injury; in fact, I wish to remain open to the possibility that *some* form of authoritative regulating of hate speech ought to be part of our larger dialogue, because it is predictably a proximate cause of serious harm (as is drunk driving). That being said, I share Judith

Butler's concern that enlisting judicial authority to combat the harm in hate speech is conceptually problematic and strategically untenable. First amendment exceptions (such as the *fighting words* or *obscenity* doctrines) tend to be characterized as a type of *prior restraint* on speech, in that certain utterances are not protected (under the first amendment) before they are ever uttered. MacKinnon's proposal is quite different, and often gets mistakenly aligned with first amendment exceptions, but is a form of enlisting state power nonetheless. I believe there is another way, and hope to show what that may look like in the following project. In this section, I begin by addressing the proposals for broadening the category of "fighting words" to include racist speech. I then move to Matsuda's argument for the criminalization of racist speech. Matsuda provides an easy transition from making racist speech actionable (under criminal law) to the claims made by MacKinnon and Dworkin in support of making pornographic speech actionable (under civil law), which I address in depth in the following chapter.

A bit more needs to be said about the relationship between prohibiting speech (prior restraint), unprotected speech, and making certain utterances actionable. We can imagine hate speech as falling into and out of three separate categories of legal action: widening the scope of unprotected speech; making certain utterances criminally and/or civilly actionable; and prohibiting certain utterances (prior restraint). The First Amendment says that states cannot limit speech; state authority cannot dictate what can and cannot be expressed by its citizens. Exceptions to the first amendment identify speech that is *unprotected* by the first amendment. ***Unprotected*** speech is not logically equivalent to ***prohibited*** speech, but there is a connection: if particular speech is

unprotected, a state *can* prohibit it without violating the constitution. The charge of *prior restraint* is leveled at the move to prohibit speech. None of these theorists propose banning speech outright; thus, the characterization of their proposals as a form of prior restraint is sloppy at best, uncharitable at worst. Making certain utterances (in certain contexts) *actionable* is *not* the same as prohibiting speech or as prior restraint. Although related, these various forms of intervening on speech are not logically equivalent.

(There may not be much to say on the topic of combating oppression through enlisting state power if they were.) Those who argue for an enlistment of state power to redress the harm of hate speech often get lumped together and characterized as proposing a form of censorship (this is done most notably in the literature by Butler, 1997).

Censorship is problematic on both a conceptual and practical level. As far as censorship entails a kind of *prior restraint* (and it need not, though is often characterized as such), the conceptual problem is that prior restraint restricts words or phrases or the utterances themselves and this mislocates the harm in hate speech. The practical problem arises from our unparalleled commitment in this country to “free speech,” which makes tackling the first amendment an untenable strategy. In the following I engage the arguments put forth by the authors of *Words That Wound* and, while I support their reasons for *why* hate speech should be actionable, I ultimately challenge their call to enlist the power of the state. There is another way, I believe, to respond to hate speech that supports both a commitment to freedom of expression and a commitment to interrupting oppression.

The use of the term ‘censorship’ in this dialogue is largely a rhetorical tool. The critical race theorists are mostly concerned with the arguments of first amendment absolutists. And, yet, the idea that some speech is harmful enough to warrant regulation is not wholly unfamiliar. Community conduct codes on many college campuses, along with the international movement to see hate speech as a civil rights violation, provide the basic ideas that motivate our national dialogue between “freedom of expression” on the one hand and “commitment to equality of all persons” on the other. ‘Hate speech’ is a term used to identify speech that disparages, harasses, or denigrates another based on their membership in an “accidental” social group – such as race, sex, class, sexuality, and so on. For the purposes of this project I’ll refrain from providing a definition that presumes to exhaust the criteria for what constitutes hate speech. (In fact, part of what I hope to show in this project is that there are utterances that ought to count as hate speech that the contemporary definition would not allow – such as, “That’s so gay.”) Although it is important to lay out some clear examples of words that wound, and equally important to work within a zone in which there are clear examples of hate speech, it is also imperative that we not try to draw the outline/boundary to what *is* (definitively) hate speech and what is not. Campus hate speech regulations provide the central threads in these definitions. The authors of *Words That Wound* collectively characterize hate speech as a type of *assaultive* speech – speech that is used “to ambush, terrorize, wound, humiliate, and degrade” – directed at historically subordinated groups.⁸ Currently, in the hate speech codes enforced on

⁸ *Words That Wound* (1993), pg. 1.

many college campuses, and in the debate surrounding legal restrictions on speech, hate speech is defined as “discriminatory harassment” (oral, written, graphic, or physical) directed at an individual or group based on their membership in a protected class. The impetus for such regulation is to promote a productive and safe educational environment. Hate speech, it is argued, has the effect of intimidating its intended recipients and of re-establishing a damaging social hierarchy; i.e. it is more than mere offense. Those who oppose such regulations call upon the first amendment. The free expression of ideas is a fundamental right and, furthermore, nurturing open discussion is the principle objective of any institution of higher learning.

The legitimacy of arguments for the regulation of hate speech (including university hate speech codes) turns on whether or not speech is appropriately characterized in certain circumstances as accomplishing [effecting] what it signifies. In other words, what, if any, *force* does the utterance have to do harm? Critical race theorists, such as Delgado, Matsuda, et al., have argued, rather persuasively, that judges and legislators ought to adopt a perspective that views certain types of hate speech as inexorably linked with subordination and violence; and, thus, to look to history and context when enacting state-supported regulations on speech.⁹ Although an attractive view, it is also a view that relies on a particular conceptualization of speech that ultimately does not meet the end of disrupting oppression. Efforts to limit hate speech often are forced to rely on the idea that such speech is harmful because it offends or insults members of the group or groups that it targets. It is true that hate speech is

⁹ Ibid.

offensive and insulting; however, as I argue, reliance on that fact in order to say what is wrong with hate speech is inherently problematic. Offense and insult are not the only, and not the most serious, harm that occur. Equally problematic is the tendency in an analysis of hate speech as speech act to locate the harm in the intention of the speaker. What is needed and warranted is a system that locates the harm of hate speech not in the feelings, emotions, or thoughts of the audience, nor in the heart, intention, or thoughts of the speaker, but in the force of certain speech acts -- when uttered in the “right” context by people with the “right” authority -- to do as much as they say.

Legal restrictions on hate speech may be warranted given a hierarchically structured society and an explicit, Constitutional commitment to equality. The best arguments for the legal restriction of hate speech rely first and foremost on a conceptualization of law as providing a type of legitimatization of the actions of its citizens. The “claim” that a certain act is illegal has the *force* of condemning the person who commits the act. Conversely, if racist speech – and, thereby, the subordination of denigrated groups – is given state protection, the force of that protection is to legitimate racist behavior. Likewise, the result of legitimizing anti-racist behavior seems intuitively clear: Growing up in a country that “believes” that the racial segregation of schools is unconstitutional is growing up in a place where *the law* delegitimizes behavior that subjugates one race to another. The law circumscribes appropriate behavior and in so doing legitimates some actions and casts doubt on the legitimacy of others.

Proposals for the regulation of hate speech put forth by Mari Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw are founded on the

tenets of critical race theory. Their arguments are grounded in a commitment to recognizing that the experiences and histories of people of color have epistemological value and ought to be considered when evaluating the law and proposing new legal theory. They argue that current evaluations of the law are ahistorical and acontextual and that ahistorical and acontextual evaluations support racism. Ultimately, they claim that an interdisciplinary approach and cross-cultural translation is central to anti-racist methodology and an end to racial oppression includes challenging hierarchy generally, including oppression writ large.¹⁰

Our work is a pragmatic response to the urgent needs of students of color and other victims of hate speech who are daily silenced, intimidated, and subjected to severe psychological and physical trauma by racist assailants who employ words and symbols as part of an integrated arsenal of weapons of oppression and subordination. ...

Each of us knew that we were inclined to be more cautious, less outspoken and visible, after a rash of hate tracts had appeared in our mail or been stuffed under our doors. We knew that we walked more quickly to our cars after late nights at the office and glanced more often over our shoulders as we jogged trails around our campuses. We needed theory and analysis to articulate and explain our reality, to deconstruct the theories that did not take our experience into account, to let us know that we were not crazy, to make space for our voices in the debate.¹¹

Their project pits them against first amendment absolutists who argue that *any* regulation of the first amendment is too much. (Additionally, their project pits them against theorists who reject first amendment absolutism but still argue that enlisting state power is a weak – and quite risky – political strategy. We’ll see more of this when we turn to Butler. For now, these authors focus on “free speech” objections to regulating hate speech.) The disparate proposals compiled in *Words that Wound* are arguments for

¹⁰ Ibid. Pg 6.

¹¹ Ibid. Pgs 7-8.

various forms of regulation; they include a tort action that recognizes racial epithets as sufficiently analogous to “garden-variety” fighting words, a criminalization of racial epithets, and the extension of the fighting words exception to include racial epithets. Delgado, Lawrence, and Matsuda all propose amendments to contemporary legal theory that would limit the scope of free expression to varying degrees. The one exception is Crenshaw’s piece, in which she focuses on the intersectionality of race and gender as it plays out in the obscenity trial of the rap group 2 Live Crew. She takes a case presented to the courts as a case about “free speech” and shows us that there is much more going on than merely the question of obscenity. Her analysis provides an illustrative example of the acontextual and ahistorical interpretation of the first amendment, which is precisely THE argument made by the collective authors of *Words That Wound*. Current interpretation fails at acknowledging the intersectionality of racism and sexism (at a minimum) and thus fails at protecting the interests of women of color. Something *else* is required. Although Crenshaw refrains from proposing some specific form of regulation on speech, she stands with the group in her call to contextualize and historicize first amendment theory.¹² As one voice, the authors of *Words that Wound* prescribe revising legal theory with a backward-looking strategy.¹³ They call for judges and law-makers to consciously and purposefully allow history and context to influence current law making.

¹² Ibid. Pgs. 10, 111-132.

¹³ Ibid. Pg. 134.

Section II: Enlisting state power to regulate racist speech

Charles Lawrence and the call to extend fighting words

In his piece, “If He Hollers Let Him Go,” Charles Lawrence makes the case for allowing history and context to explicitly influence legal decisions by recounting one of his own experiences, what later became known at Stanford as the Ujamaa incident.¹⁴ The origin of the incident was an argument between two white freshmen and a Black student over the ethnicity of Beethoven. The next night the two white students defaced a poster of the artist – coloring the drawing brown, giving it wild curly hair, big lips, and red eyes – and pinned it to the door of the Black student who had asserted that Beethoven was of African descent. It was also discovered (also in Ujamaa, Stanford’s Black theme house) that another poster (this one advertising a Black fraternity dance) had been defaced on the dorm bulletin board. The word “niggers” had been written in large letters across the face of the poster. The overwhelming reaction by (white) students and faculty to the Ujamaa incident was to treat it as “an unfortunate boyish prank by misguided undergraduates” and as unrepresentative of the racial climate at Stanford. They called for tolerance of this “isolated” case given the danger to free speech and intellectual debate that would result from punishing the white students. As a token Black faculty member at Stanford, Lawrence’s reaction to the incident was quite different.

The message said, “This is you. This is you and all of your African-American brothers and sisters. You are all Sambos. It’s a joke to think that you could ever be a Beethoven. It’s ridiculous to believe that you could ever be anything other than a caricature of real genius.”¹⁵

¹⁴ Ibid. Pgs. 53-88.

¹⁵ Ibid. Pg. 8.

Lawrence's experience of the poster's message highlights the very public injury of such an act – the injury is to a group, not to an individual. It matters that the dorm was the Black theme house on campus, the intended audience is clear. Most important of all, when the administration privatizes the injury they ignore the most harmful part – the force of the message to perpetuate racism. But to see that, one must contextualize and historicize such incidents, which the administration decidedly fails to do when they treat the incident as “isolated” and as a “boyish prank.”

The perpetrators were not punished. According to the administration, the offending students' conduct was protected under the university's free speech doctrine. For Lawrence, the act of “defacing” an image by “making it” non-white (and the historical link such “defacing” has to minstrel shows and blackface), within the context of entrenched arguments about intellectual capacity and “empirical” claims of inferiority, all contribute to the message affected by pinning the image to a Black student's door.

The power of the poster's message was derived from its historical and cultural context, from the background of minstrel shows, of racist theories about brain size and gene pools and biblical ancestors that has shaped our conscious and unconscious beliefs about the intellectual capacity of Blacks. Without the context the defacement had no meaning.¹⁶

The meaning of the defaced poster's message cannot be grasped outside of the historical context of the oppression of Blacks; thereby, we see what Lawrence means by an *ahistorical* reading of first amendment theory. Thus, the administration makes a mistake in not considering this context in its interpretation of its own regulatory practices.

¹⁶ Ibid. Pg. 8.

Lawrence calls for a reevaluation of Stanford's code of conduct, a code that can be (and was) called upon to protect racist hate messages. [Note that the call to reevaluate a university code of conduct is much like the global calls to consider the value of equality when interpreting regulations of speech.] He argues that college campuses should uphold carefully crafted hate speech regulations and that doing so is *not* a serious threat to first amendment ideals. Racist, bigoted, hateful utterances are a type of "fighting words," according to Lawrence; they hit the gut, their injury is immediate, like a "slap in the face."¹⁷ In *Chaplinsky v New Hampshire* (1942), the Court held that there is a category of face-to-face epithets, or "fighting words," that was wholly outside the protection of the First Amendment, which "by their very utterance inflict injury" and which "are no essential part of any exposition of ideals."¹⁸ Thus, the "fighting words" exception to first amendment protection subsumes racist speech acts. In this chapter of *Words that Wound*, Lawrence also argues that the distinction between face-to-face, direct racial insults and fighting words is a false distinction. Thus, the scope of unprotected speech ought to include less direct encounters, such as the Ujamaa incident, even though the incident is not constituted by a face-to-face assault. He understands the concept of "fighting words" to include instances where the target of racist speech (be it an individual or a *group*) cannot escape the utterance.

Courts have held that offensive speech may not be regulated in public forums such as streets and parks where listeners may avoid the speech by moving on or averting their eyes, but the regulation of otherwise protected speech has been permitted when the speech invades the privacy

¹⁷ Ibid. Pg. 68.

¹⁸ *Chaplinsky v New Hampshire* (1942).

of unwilling listeners' homes or when unwilling listeners cannot avoid the speech. Racist posters, flyers, and graffiti in dorms, classrooms, bathrooms, and other common living spaces would fall within the reasoning of these cases. Minority students should not be required to remain in their rooms to avoid racial assault.¹⁹

The poster of Beethoven, defaced to look like a demeaning representation of African ethnicity, pinned to the door of a Black student, is a message of hate that all Black students on Stanford's campus cannot escape. As Lawrence suggests, the poster has a "captive audience" in the victim who cannot escape being addressed by the degrading caricature.²⁰ The poster's message is not meaningful outside the context and history of racial oppression.

Overall, Lawrence's goal is to show that most arguments for protecting racist speech are founded on a bogus distinction between "fighting words" and "offensive" or "insulting" speech. The claim is that racist speech merely offends or insults when, in actuality, whether or not the message results in any one person feeling insulted or offended is of the least concern. The concern ought to be (given our national commitment to equality for all persons) whether or not the message is one of denigration of a group. Furthermore, the fact that racist speech is often met with flight rather than fight illustrates the real threat that racist speech is taken to indicate rather than supporting the claim that racist insults are not "fighting words." As Lawrence suggests, "The harm to be avoided is both clear and present."²¹

¹⁹ Ibid Delgado et al. Pgs. 70-71.

²⁰ Ibid. Pg. 57.

²¹ Ibid. Pg. 68.

Along with his co-contributors, Lawrence argues that civil equality is not fully actualized without speech. And, likewise, speech can interfere with civil equality. And in just this way we see first amendment absolutism unjustifiably interfering with equality for all under the law. Speech that can be shown to interfere with civil equality should be *unprotected*.

Richard Delgado and the call for a tort remedy

A decade before the compilation *Words That Wound*, Richard Delgado published his path-breaking article of the same main title, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling.”²² When critical race theory was in its infancy, Delgado was looking to social scientific research on the effects of racism to support the call for an independent tort action for racial insults. A tort action is “permissible and necessary,” he argues, given the severity and pervasiveness of *dignitary* harm caused by racism. Racial insults are *nothing but* the vehicle of *intentional harm and discriminatory practices*. They have no other purpose and no political merit.

The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages also color our society’s institutions and are transmitted to succeeding generations.²³

In the above passage we see the same compelling historicizing and contextualization found in Lawrence’s personal response to the Stanford Ujamaa incident. When the

²² Ibid. Pgs. 89-110.

²³ Ibid. Pg. 90.

insult reaches a whole group of citizens as its audience (intentional or otherwise), singled out by membership in an “accidental” category, it no longer holds to argue that the harm is mere offense. The message, as Lawrence echoed, is that “distinctions of race are distinctions of merit, dignity, status, and personhood.”

Immediate mental or emotional distress is the most obvious direct harm caused by a racial insult. Without question, mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority. Racial insults, relying as they do on the unalterable fact of the victim’s race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults.²⁴

As is the case with the entire line of reasoning that leads one to argue for enlisting state authority, there is an argument from analogy here: Racial insults are *enough like* other forms of actionable speech – such as fighting words, defamation, and even physical abuse – that the regulation of it is “permissible and necessary,” meaning that regulation of racist speech (and hate speech in general, I think) is not mutually exclusive with first amendment ideals.

Clearly, a society whose public law recognizes harm in the stigma of separate but equal schooling and the potential offensiveness of the required display of a state motto on automobile license plates, and whose private law sees actionable conduct in an unwanted kiss or the forcible removal of a person’s hat, should also recognize the dignitary harm inflicted by a racial insult.

I find it impossible to disagree with Delgado that a society that recognizes the “potential offensiveness of the required display of a state motto” is incapable (or – yuck – unwilling) to recognize the significant social and political harm done by racist speech. A tort remedy would provide the “permissible and necessary” legal redress for victims

²⁴ Ibid. Pg. 94.

of racist speech and, more importantly, would “say” that racism is a significant harm that ought not be tolerated. Racial insults do more than just describe a political position; they are intended to denigrate in a way that is historically supported by slavery, Jim Crow, eugenics, and the like. In this way, Delgado challenges the claim that first amendment ideals conflict with the regulation of racist speech. He explains,

The values of individual self-fulfillment to be furthered through free expression are based on the rights of individuals to develop their full potential as members of the human community. But bigotry, and thus the attendant expression of racism, stifles rather than furthers the moral and social growth of the individual who harbors it. In addition, a racial insult is only in small part an expression of self: It is primarily an attempt to injure through the use of words.²⁵

Elsewhere Delgado likewise notes the obviousness of *intentional* harm in the very use of “established” racial insult terms. “No other use remains for such words as ‘nigger’, ‘wop’, ‘spick’, or ‘kike’.”²⁶ It is important to note here that Delgado has already established the context in which these terms are uttered, and it is only in that context that “no other use remains” then the intention to harm, otherwise we may fall victim to what Butler calls a “paradoxical redoubling” – her somewhat imprecise expression for the mention of the locution in the attempt to regulate the uttering of that very expression.

In keeping with his co-contributors, Delgado provides a proposal with the requisite amount of *specificity*. When the tort action is brought, in order for the plaintiff to prevail, it must be shown that

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff

²⁵ Ibid. Pg. 108.

²⁶ Ibid. Pg. 94.

understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.²⁷

Within such parameters it would be expected that the highly racial epithet “You dumb nigger” would almost always be actionable, while the insult “You incompetent fool” would not be actionable even when it is directed at a Black person by a white person and made in a highly insulting context. Likewise, Delgado thinks, when the term “Boy” is directed at a young Black male, such an utterance might be actionable depending on the speaker’s intent, the hearer’s understanding, and whether a reasonable person would consider it a racial insult in the particular context. On the other hand, “hey, nigger,” spoken affectionately, in solidarity, and as a greeting between Black persons, would not be actionable. And in the unlikely circumstance where the white plaintiff suffers harm from the insult “you dumb honkey,” the utterance could be actionable.

All in all Delgado challenges the law to acknowledge the substantial, unconscionable harm done not only to individuals within our “equal” society but also to the community at large by “intending to demean through reference to race.” In so many ways we have already begun the process of undermining the legitimacy of racial insults; and, yet, imagine what could be done when the law backs up the sentiment.

In a step beyond Lawrence’s call to extend the fighting words exception and Delgado’s call for a tort remedy, Matsuda argues for the legal and ethical basis for the criminalization of racist speech. As I discuss in the following section, she constructs a policy of evidence that proposes to pick out actionable racist speech from non-

²⁷ Ibid. Pg. 109.

actionable racist speech. Her model provides what it would actually look like to identify – effectively and consistently – the offending speech by a legal system.

Mari Matsuda and the criminalization of racist speech

The driving motivation behind criminal law (including criminalizing acts of speech) is the presumption that such criminalization is a “collective investment” in justice and social order. Public legislation (as opposed to private legislation) is crafted and enforced in an attempt to establish and maintain a just society. In *Public Response to Racist Speech: Considering the Victim’s Story*, Mari Matsuda makes the case for the criminalization of certain narrowly defined racist utterances given that racism (through whatever mechanism, including speech) interferes with justice and social order. Thus, an absolutist commitment to first amendment ideals in the face of racist hate speech has the effect of perpetuating racism. As she says, “Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.”²⁸ So, not only is an absolutist approach to racist speech misguided, criminal sanctions – not merely civil remedies – are an appropriate response to racist speech. Civil remedies are “private” remedies (e.g., tort actions); the criminalization of speech is a “public” response to racist speech (the title of her article). A public remedy is called for, Matsuda explains, in response to racist speech once we acknowledge the interplay between the first and fourteenth amendments and our duties as a polity to both.

²⁸ Ibid. Pg. 36. Note here the attention to, though not explicit reference to, Austinian illocutionary force.

Matsuda's own familial history provides an important part of the context of her analysis: her parents were labor and civil rights activists who paid a price for their unpopular beliefs during the McCarthy period. Her own experience with censorship, intimidation, and blacklisting helps to contextualize her push to criminalize racist speech. She is mindful of her parent's plight and, thus, draws an important distinction between hate speech (that which is directed at the least powerful segments of our society) and other forms of "unpopular" speech (including "reverse" racism). She is mindful of the well-established history in this country of censoring those on the edges of society. A public remedy is called for in response to racist speech only by contextualizing and historicizing the first and fourteenth amendments – a context and a history found by shifting to an outsider jurisprudence.

[I] suggest that outsider jurisprudence – jurisprudence derived from considering stories from the bottom – will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought. I conclude that an absolutist first amendment response to hate speech has the effect of perpetuating racism: Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.²⁹

This outsider jurisprudence includes looking to the victim's stories as evidence of the real consequences of current legal interpretation. Her argument for the criminalization of racist speech is supported by victim testimony – testimony that elucidates the substantial injury that racist speech inflicts on its targets. The victim's story is a story of the effects of racist speech. She calls for an attentiveness to the epistemic authority of

²⁹ Ibid. Pg. 18.

the targets of racist hate messages; it is testimony of the victim of racist hate messages who can most effectively say what constitutes the injury of those messages.

Additionally, Matsuda argues that current interpretations of the first amendment are flawed. As we see throughout *Words That Wound*, an ahistorical and acontextual analysis of first amendment protections contributes to racism, is not in keeping with our national (and international) commitments to equality, and ought to be abandoned for a historical and contextual analysis. Matsuda explains:

The choice of public sanction, enforced by the state, is a significant one. The kinds of injuries historically left to private individuals to absorb and resist through private means are no accident. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live. The absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives. A legal response to racist speech is a statement that victims of racism are valued members of our polity.³⁰

It is Matsuda's commitment to the epistemic authority of the victim's stories that speaks loud and clear: The targets of racist speech (even as peripheral audience members) experience such speech as racism. Laws that protect racist speech legitimate racist conduct. Laws that criminalize racist speech criminalize racist conduct. The message of the latter claim is that racism is seriously not ok.

Target group members know that messages of racial hate are located in a notorious history of racial violence and that they are only meaningful in virtue of that history. As Matsuda notes, the manager who instructs his African-American employee to just ignore the random acts of assaultive (often anonymous) speech by his co-workers

³⁰ Ibid. Pg. 18.

as “harmless jokes” or “just letting off steam” is often unaware of the historical and contextual location of those “jokes.”³¹ Those managers, often people of a certain privilege, are neither tuned to nor operating within outsider jurisprudence. Harassment on the basis of race is related to, but significantly distinct from harassment on the basis of shoe size. Calling a name like “fag” is related to, but significantly distinct from calling a name like “teacher’s pet.” It may hurt to be identified by your colleagues as having some undue favor with the higher-ups but it does not perform dignitary injury to the same degree as getting identified as the “wrong” race or the “wrong” sexuality.

Matsuda, like Lawrence, is well aware of the legitimate risks involved in extending the scope of unprotected speech. On the one hand is continuing the protection of racist speech and bigoted ideas and on the other is limiting the free flow of *productive* ideas. Limiting free speech runs the risk of silencing the already too often under-empowered minority with an extension of the scope of unprotected speech. Thus, Matsuda recognizes and defends a narrow definition of actionable racist speech.

I believe racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.³²

Matsuda proposes this definition while acknowledging that *any* proposal stretches the scope of first amendment protection and that *any* such extension weakens the first amendment. She hopes that a narrow definition of what kind of racist speech is

³¹ Ibid. Pgs. 22-24.

³² Ibid. Pg. 35.

actionable will better protect free speech. On her view, actionable racist speech must meet three identifying characteristics: (1) the message is of racial inferiority; (2) the message is directed against a historically oppressed group; (3) the message is persecutory, hateful, and degrading.³³ Similar to the juridical structure of the various first amendment exceptions, Matsuda provides a clear *category* of speech that can be applied to *identifiable circumstances* with some specificity, while avoiding the criminalization of *all* forms of speech that could be qualified as racist speech.

Under these narrowing elements, arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutory language remains protected. Hateful verbal attack upon dominant-group members by victims is permissible. These kinds of speech are offensive, but they are, in respect of first amendment principles, best subjected to the marketplace of ideas. This is not to suggest that we remain silent in the face of offensive speech of this type. Rather, the range of private remedies – including counterspeech, social approbation, boycott, and persuasion – should apply.³⁴

This definition would have helped the courts of Skokie, IL argue that a public Klu Klux Klan march can (and ought to) be regulated on grounds that the message is one of racial inferiority – “all members of the target group are at once considered alike and inferior.”³⁵

In consideration of the larger dialogue, Matsuda asks how one can argue for censorship of racist hate messages “without encouraging a revival of McCarthyism?”

And she answers,

³³ Ibid. Pg. 36.

³⁴ Ibid. Pgs. 36-37.

³⁵ Ibid. Pg. 36.

We know, from our collective historical knowledge, that slavery was wrong. We know white minority rule in South Africa is wrong. This knowledge is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy. There is no nation left on this planet that submits as its national self-expression the view that Hitler was right. ...At the universities, at the centers of knowledge of the international community, the doctrines of racial supremacy and racial hatred are again uniformly rejected. At the United Nations the same is true. We have fought wars and spilled blood to establish the universal acceptance of this principle. The universality of the principle, in a world bereft of agreement on many things, is a mark of collective human progress. The victim's perspective, one mindful of the lessons of history, thus accepts racist speech as *sui generis* and universally condemned.³⁶

Like Matsuda, and MacKinnon (as we shall see), I too believe that the capacity to distinguish subordination (done through speech) from its counterparts – with some regularity and some consistency – is not out of reach. Even though I do not argue for the criminalization of racist speech, I see no good reason to reject the outsider jurisprudence that Matsuda suggests. Contextualizing and historicizing the application of the law is simply one important piece of living in community rather than against it.

The resounding, compelling assertion is that racism in America is long standing, pervasive, and infectious. The critical race theorists of *Words That Wound* claim that history and context have always and continue to infuse the legal system and that this infection dictates what private citizens can expect as legal remedy for injuries sustained. And, perhaps most importantly, these theorists explain that the injury in racist speech is *performative*, even though we would do better to locate the harm more precisely as *illocutionary force*.

³⁶ Ibid. Pg. 37.

Section III: What's wrong with enlisting state power?

When given an Austinian treatment, we see that the Enlisters provide an argument for the *illocutionary force* of hate speech to harm in the very uttering of the racial slur. Some form of regulation or redress is warranted, if not obligatory. I agree with the Enlisters to wit but conclude that utilizing first amendment exceptions to combat the harm in hate speech is conceptually problematic and strategically untenable. First amendment exceptions (such as the *fighting words* or *obscenity* doctrines, along with Matsuda's proposal to criminalize certain racist utterances) tend to be seen as a form of regulation that verges on prior restraint, in that certain utterances are singled out and *not* protected before they are ever uttered. And this is where these theorists bump up against the accusation of censorship. Regardless of whether or not their proposals are properly characterized as censorship (I, for one, think there are more precise and charitable ways of describing their proposals), enlisting state power to regulate or restrict speech is problematic on both a conceptual and political level. The conceptual problem is that their proposals attempt to restrict *words* or *phrases* or the *utterances themselves* and this *mislocates* the harm in hate speech. The political problem arises from our unparalleled commitment in this country to "free speech," which makes tackling the first amendment an untenable strategy. Not to mention that restricting speech often coincides with burdening the least well off with even more infringement on their civil rights, and on that count alone it should be considered cautiously.

In the search for responsible avenues of recourse to the harm in hate speech, we find little that is viable. This very fact has led many to enlist state power as a means of

providing authoritative support against oppression as it arises in and through speech.

As Delgado notes,

Victims of racial invective have few means of coping with the harms caused by the insults. Physical attacks are of course forbidden. “More speech” frequently is useless because it may provoke only further abuse or because the insulter is in a position of authority over the victim. Complaints to civil rights organizations also are meaningless unless they are followed by action to punish the offender. Adoption of a “they’re well meaning but ignorant” attitude is another impotent response in light of the insidious psychological harms of racial slurs. When victimized by racist language, **victims must be able to threaten and institute legal action**, thereby relieving the sense of helplessness that leads to psychological harm and communicating to the perpetrator and to society that such abuse will not be tolerated either by its victims or by the courts.³⁷

Given our collective history, the international movement toward regulating hate speech, and the inexorable link between speech and equality, the call to enlist judicial authority to restrict certain speech acts is reasonable, at the very least. The suggested remedies are reasonable, that is, but not satisfying – they are not “unrisky” *enough*, not politically workable enough of the time and with enough assurance that their implementation will not be misused. The call to combat the harm in hate speech through legislation is simply not good enough when the larger picture is the upending of subordination through speech.

I have argued that the supporters of hate speech legislation featured here all rely on a conception of speech and meaning that is distinctly Austinian. They argue that racist speech reinstantiates Blacks as inferior to whites in the very uttering of the words – racist speech is racism. Their theories diverge at the point where they believe the

³⁷ Ibid. Pg. 95.

constitution already provides a remedy. Lawrence and Delgado focus on the fact that the scope of protection afforded by the first amendment already does not extend to many areas of speech, most notably “fighting words.” Lawrence provides a revision of the fighting words doctrine to include racist speech that is also supported by Delgado’s earlier analysis of the psychological and political effects of racial insults. Matsuda, also giving voice to the victim’s experience, argues that extending the fighting words doctrine or proposing a tort remedy *is not enough* – racist speech is racism and, thus, our commitment to civil equality dictates its criminalization. In this way, we’ll see an alignment between Matsuda’s argument and MacKinnon’s – both theorists are clear that first amendment legislation must attend to the fourteenth amendment (although it currently does not). MacKinnon argues that pornography is not *best* described as speech – it is not merely the “expression” of ideas – pornography is the subordination of women. All of these theorists offer compelling, deeply personal examples that show the power of speech to construct and constitute human lives.

Perhaps most importantly, all these theorists presuppose that the law can influence and even change the hearts, minds, attitudes, and behavior of its citizens. In fact, *the Supreme Court* said as much when it struck down the Defense of Marriage Act in June 2013. The majority opinion, written by Justice Kennedy, acknowledges the power of the law to “tell” citizens that they are not of equal value (in this case, when their marriages are not recognized). Kennedy wrote, “DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal

recognition.”³⁸ Although the case turned on whether or not DOMA violates the due process clause of the Fifth Amendment and, alas, not on whether DOMA violates the Fourteenth Amendment, it is notable that the majority opinion explicitly acknowledges the illocutionary force of enacted law. “The law” has the right authority to legitimate the behaviors that it allows and denigrate the behaviors that it does not. This claim seems intuitively clear to me. The best arguments for the legal regulation of hate speech understand that the law has the power to legitimate racist, sexist, homophobic, classist, and so on, behavior. It can either protect the status quo or influence real, social change.

As mentioned above, a conceptual challenge to all of the above is that such proposals must locate the harm of the utterance in the *locution* rather than the *illocution*. In other words, the simplest way to legally address hate speech is to tell the citizens what they can and cannot *say*. Delgado’s piece highlights this best when he equates racial insults with the use of racial terms, as he says, “[R]acial insults differ from ordinary, nonactionable insults precisely because they use racial terms for the purpose of demeaning the victim.”³⁹ Further on he distinguishes between the epithet “You damn nigger” and the insult “You damn fool.” The former actionable and the latter not, even when directed at a Black person by a white person in a context that makes the utterance highly insulting. I confess, I stand solidly behind the assertion that there is a significant difference between the epithet and the insult and I believe the distinction is not too difficult to identify and, thus, not impossible to regulate. And, yet, given that the harm in hate speech is *not* located in the locution, the illocutionary force of hate speech (and

³⁸ *United States v Windsor* 570 U.S. 2013. Docket No. 12-307.

³⁹ *Ibid* Delgado et al. Pg. 107.

its insidious form of harm) is not yet satisfactorily addressed by the call for legislative intervention.

Chapter 2: Censorship, Silencing, and the Construction of Social Reality: The Dworkin-MacKinnon Anti-Pornography Ordinance and the Illocutionary Force of Subordinating

MacKinnon's call for state intervention is sufficiently *unlike* the call made by the authors of the previous chapter, and we make a category mistake when we lump all of these various proposals for enlisting state power together – especially when we call them all “censorship.” In the following chapter I wish to show that to call the Dworkin-MacKinnon anti-pornography ordinance *censorship* is a mistake; but, more importantly, that pornography does have the force of subordination and, in light of that fact, the onus is on us to construct some form of politically viable and ethically tenable response to its harms.

In *Only Words*, MacKinnon argues, quite persuasively, that pornography harms women and the harm is significant enough to warrant legal action against pornography. The specifics of her proposed legislation will be addressed further down. The point I wish to make here is: *if* it is shown that pornography is a significant harm to women – and I think that it is – then some form of redress is warranted, whether or not that response is legal in kind. So, first, we must answer the question: What does it mean – precisely – to say that pornography significantly harms women?

It helps to note here that a specific conceptualization of pornography is at hand. (She is not addressing all phenomena that may be considered, in one context or another, to be pornography.) MacKinnon tells us that she will address pornography as:

[T]he graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities, enjoying pain or humiliation or rape, being tied up, cut up, mutilated, bruised, or physically hurt, in postures of sexual

submission or servility or display, reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.⁴⁰

MacKinnon's purpose is to get at the images and acts that contribute to women's oppression. MacKinnon's conception of the harm done in pornography is that pornography subordinates. This deceptively simple claim, when unpacked, is quite complex. The thrust is that pornography not only perpetuates women's subordinated status (a perlocutionary effect), but that it is – in and of itself – a way in which subordination is done (an illocutionary act). Pornography *is* subordination, according to MacKinnon, and it is this claim, when unpacked, that identifies pornography *as a speech act* with a certain illocutionary force.

In "Speech Acts and Unspeakable Acts,"⁴¹ Langton clarifies the claim that pornography subordinates by introducing the concepts of ranking, legitimating, and depriving. As we shall see, pornography subordinates in that it has the illocutionary force of ranking women as inferior, legitimating discriminatory behavior against them, and depriving them of rights and power. *Ranking*, *legitimating*, and *depriving* are illocutionary verbs – all of which identify acts that can also have *the effect* of silencing (a perlocutionary consequence).

Langton argues that the harm in pornography is that it subordinates women in the very uttering of it (an illocutionary act) and it silences women (a perlocutionary act). This is where things get tricky: Langton fails to emphasize the way in which silencing is

⁴⁰ Dworkin, Andrea and MacKinnon, Catharine. 1988. *Pornography and Civil Rights: A New Day for Women's Equality*. Also at:

<http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm>

⁴¹ Langton, Rae. 1993. Speech Acts and Unspeakable Acts. *Philosophy and Public Affairs* 22:4.

done in the illocutionary force of the pornographer's speech – it is not merely an effect of speech. All subordinating acts have a silencing tendency. Being placed in a subordinated social position comes with a lack of authority and a lack of authority means that one is less likely to speak, less likely to get heard, and less likely to get their speech acts to count as the actions they intend to perform. Note the various ways that the speech acts of some can silence the speech of others and this is not *just* a perlocutionary effect – there is an illocutionary dimension at work here as well (as we shall explore in more detail later on). Silencing – in its many forms – *is part of the subordination* of women done in and by pornography. (Both Langton and MacKinnon would agree, though their respective arguments would benefit from making this connection clear.) When we shift our focus from the speaker to the hearer in these cases we see that some speech can actively silence the speech of others. When pornography is protected as speech then those harmed by pornography are kept from effectively saying that they are harmed – at least in any way that matters. Women's civil standing is minimized (if not made non-existent) when the speech of pornographers is protected as free expression. The beauty of the Dworkin-MacKinnon anti-pornography ordinance is that it establishes a more equal civil standing for those harmed by pornography – it gives women a voice.

Section I:
The way pornography harms: the intersection of subordination and silencing

Speech acts and subordination

In the previous chapter we saw that Pilot is picked for the team when Captain Orange utters, “I pick Pilot.” The locution – I pick Pilot – is used by the Captain to place Pilot as a willing participant (in this context) into a group. Now imagine a small but significant variation to the context – imagine that Captain Orange is in charge of picking this year’s varsity players from amongst the gathered members of Team Apple. In this new context, when Pilot is picked the *picking* is also a *ranking* along a hierarchy so far as varsity is meant to be the “better” or “higher level” players. Choosing players for varsity when there is a junior varsity is a form of ranking the players – some as superior to the others – the repercussions and social ramifications of which will be different for different cultures, but the hierarchical *ranking* happens nonetheless. The same locution – ‘I pick Pilot’ – is used in both contexts with significantly different results. The results are different because the *illocutionary act* is different.

Subordination is (among other things) the act of placing something in a lower rank or position. *Ranking* is a type of speech act – it is something that can be done through speech and, on occasion, alone in speech. If Captain Orange is choosing members of the varsity team, and Pilot gets picked, then a type of ranking has happened in the very uttering of “I pick Pilot.”

As far as pornography is a speech act, pornography is the subordination of women. MacKinnon argues as much in her understanding of pornography as *telling us* where women belong – namely, what women are meant to do and to be for men – much

in the same way that sexualized utterances, in certain speech contexts (such as the workplace), constitute harassment. Our judicial system finds no inconsistency in the idea that telling your employee there's a sexual price for promotion is understood as more than "only words" even though only words are used to do it. Sexualized utterances are, in certain contexts, harassment. Likewise, MacKinnon et al understand pornography as ranking women as inferior to men. As Rae Langton notes, "The claim that pornography subordinates women, however interpreted, is a claim that pornography determines women's inferior status."⁴² Pornography's subordinating force, MacKinnon argues, is evidenced by (at a minimum) the correlation between the viewing of pornography and the physical and psychological abuse of real women. But this is a causal claim – that viewing pornography leads to the abuse of women (not in every case but epidemiologically, so to speak). And here is where Langton steps in to support the claim that there is more than a *perlocutionary* act associated with pornography. It is shown that pornography is harmful (quite literally) and that harmfulness is constituted, in part, by *the speech act of subordination*. In the following pages I address the claim that pornography "says" *more* than women are sex objects – it does more than *depict* subordination, pornography *is* subordination.

Speech acts and silencing

The claim is that pornography harms women. The exact nature of that harm, it is argued, is twofold: pornography subordinates women in the very "uttering" of it *and* it

⁴² Ibid. Pg. 298.

silences women. The claim that pornography *subordinates* in the very uttering is a claim that pornography *as speech act* has a certain illocutionary force.⁴³

The silencing that is part and parcel of subordination, once unpacked, is easy to see in the context of pornography's harms: The authority of the pornographer's voice overshadows whatever counterspeech women might use to reject or deny the claims made in pornography. In other words, protest is made but nothing comes of it. Likewise, the consistent protection of pornography as speech by our national judicial system legitimizes what pornography has to say as well as lending it even more authority to say what it has to say (note here that we have the legitimization of a select group of behaviors/attitudes toward women with the persistent protection of the perpetrator's speech). This type of silencing is a *result* of the pornographer's speech (a perlocutionary effect). But yet another type of silencing of women happens with the pornographer's speech; a type of silencing that is subtler, less transparent.

When we say that one has been "silenced" the image that comes to mind is one of a speaker that has been kept from speaking – speech was cut off or stopped before it could be fully heard. If I keep you from being heard – I yell over you, or interrupt, or blare music while you're speaking, or tape your mouth shut – then I have *silenced* you, my act is *silencing* yours. The same goes for the silencing of a group or institution. The parameters are different, the "speaker" is metaphorical, but the concept is the same: The speech act is kept from being heard; the group is silenced.

⁴³ The use of the term 'utterance' and its varying iterations is purposeful and in keeping with Austin's development of speech act theory. The term captures both verbal and non-verbal speech acts, with an emphasis on the *act* involved.

But there's another mode of "silencing," another means of keeping someone's speech from being heard that is more insidious, subtler. You speak but your utterance is not taken to be what you intend for it to be. Here we're talking about illocutionary acts, not about linguistic meaning. You don't get to do what you intend to be doing. Or you get taken to have done something other than what you intended to do. So, in other words, you do not mispronounce, you are not inaudible, your speech gets physically *heard* but not understood as what you intend. In Austin's terminology, the problem is a lack of appropriate uptake from the audience; or, from the speaker's perspective, the speech act misfires. Consider an example (from Donald Davidson)⁴⁴: When an actor on a stage recites the lines of the play – "Fire! I mean it, there's a fire!" – if the audience rightfully takes her to be performing a piece of the play, the performance is what it is supposed to be; Austin would say it comes off without a hitch. Now imagine that moments later there really is a fire in the back of the theater that the actor has noticed and now she means to warn the audience with her utterance "Fire! I mean it, there's a fire!" The audience, we imagine, does not take the speaker to be *warning* with this second utterance. Her words are interpretable, audible, she doesn't mumble or jumble them up, and yet she is not understood as doing what she intends for her speech to do. The speech act is done but does not get taken up appropriately – the audience isn't alerted to the fire even though she does everything the context calls for – her speech act misfires.

⁴⁴ Davidson, Donald. 1984. Communication and Convention. In *Inquiries into Truth and Interpretation*. Oxford: Oxford University Press. 269.

Given pornography's pervasive maintenance of a particularly damaging social and sexual climate, it turns out that the context of women's speech acts regarding sex is set up for a particular perversion of uptake: a woman's "no" gets read as "yes." In much the same way that the actor on a stage does not get to warn the audience even when she screams the right words – because the conditions that constitute acting in a play dictate what her words get taken to be from the audience – women too often do not get to say what they want from their sexual encounters. She can scream "fire" and people will laugh.

Catharine MacKinnon, Andrea Dworkin, Rae Langton and others have talked about the force of pornography to silence women. It is this second, Austinian sense of silencing at work against women in a population saturated by pornography to which they refer. MacKinnon argues that pornography contaminates our entire social space with false teaching about women. The pornographer's message is like smog in the air, even if you don't always notice, it's there, infecting every single thing that takes it in.⁴⁵

Rae Langton characterizes this second mode of silencing as "illocutionary disablement" – you speak but are not taken to be doing what you intend to be doing.⁴⁶ The pornography industry (as speaker) silences women by **creating and perpetuating** the conditions of their illocutionary disablement. The illocutionary force of some utterances is to foreclose the possibility of effective responses on the part of the hearer.⁴⁷ Actually, illocutionary disablement on a personal level is quite familiar to us – "The

⁴⁵ This is a variation of Beverly Tatum's example in "Defining Racism: 'Can We Talk?'" (1997).

⁴⁶ Langton, Rae. 1998. Subordination, Silence, and Pornography's Authority. In *Censorship and silencing: Practices of cultural regulation*, ed. Robert Post. Los Angeles, CA: Getty Research Institute.

⁴⁷ We'll see more on *foreclosure* when we turn to Judith Butler.

lady doth protest too much” – she is read as protesting too much and thereby cannot protest at all in the sense that she is unable to secure the appropriate response from the audience. For instance, apologizing is a type of illocutionary act – an important one, in fact, for the sustaining of good relationships. Now imagine a context in which one says (seriously but lovingly) to her partner, “I need you to apologize.” The partner’s response (even when she is genuinely sorry and it is, in fact, an apology) does not have the full *force* of an apology simply because it is in response to a solicitation – all that she gets to do is apologize *at my request*. She may be genuinely sorry, but the full force of the illocutionary act I wanted her to perform (and that she too wanted to perform) is foreclosed by my original utterance.

Silencing and the construction of social reality

Austin pointed at the constructive power of speech acts (and the resulting problem of illocutionary disablement) with his distinction between exercitive and verdictive speech acts.⁴⁸ Exercitives and verdictives are each a sub-class of illocutionary speech acts; these sub-classes identify the force of certain utterances that perform a given action even when that action does not directly match the saying. Remember that illocutionary speech acts do something in the very uttering of the words. Sometimes the illocutionary act is explicit in that the act is itself what the words say, as in “I promise.” Other times the illocutionary act is not explicit, as when a promise is made by saying, “I’ll be there.” In the latter example, we say the illocutionary force of the utterance is to promise,

⁴⁸ Austin, J.L. 1962. *How to do things with words*. Oxford: Oxford University Press, Lecture XII.

despite the fact that the utterance is only understood as a promise within a specific context, it's not explicit. These names are meant to capture the force of certain utterances that perform in the very uttering of the words. More specifically, exercitives and verdictives are two types of *illocutionary force*. Austin describes his distinction in the following, from *How To Do Things With Words*:

The first, verdictives, are typified by the giving of a verdict, as the name implies, by a jury, arbitrator, or umpire. But they need not be final; they may be, for example, an estimate, reckoning, or appraisal. It is essentially giving a finding of something – fact, or value – which is for different reasons hard to be certain about.

The second, exercitives, are the exercising of powers, rights or influence. Examples are appointing, voting, ordering, urging, advising, warning, etc.⁴⁹

When Captain Orange says, “I pick Pilot,” Pilot is thereby picked. But, of course, the picking can also be done in saying “You’re in!” to Pilot, among other iterations. Though the locutions are different – the first is an *explicit performative* – both have the illocutionary force of constituting reality in a certain way. The world moves to fit the word.

The type of constituting that is done with exercitive speech acts is exemplified by the above example and the following: When the boss says to the employee, “You’re fired,” you are thereby fired – the re-alignment of your social status is done by the speaker in the speaking. *This* is what is meant by the claim that social reality is constructed through speech. In the very saying of the words the world becomes such that you are no longer employed. Likewise, when an employer says, “You’re hired,” the

⁴⁹ Ibid. Pg. 151. It is interesting to note that Austin lists both ‘degrade’ and ‘name’ as exercitive speech acts.

world becomes such that you are now employed when before you were not, at least not by this particular employer. Your social placement, your identity, what you are as a social being, is altered. The employer's decision may be misguided or ill-founded, but it is still the case that you are hired in the very uttering of the words. The employer can change her mind, but since you were hired in her previous speech act, when she changes her mind she now has to fire you. She may fire you simply by saying "Oops, I made a mistake, never mind" but now it is a firing nonetheless. The social construction that is done by the illocutionary act can only be undone by an additional illocutionary act.

There are a variety of speech acts that do some work to construct reality in another way – the verdictives – but the construction is not constitutive of the speech act as is the case with exercitives. The referee calls the ball "out" and the direction of the game changes – reality adjusts. Unlike the boss' firing, however, the ball is not out because the referee says it is out. The ball gets *counted* as being out because the referee says it is out; the ball *is* out because it's over the line, and it's over the line not because the referee says so but because the player hit it so. A picture of the play can show that the referee made the wrong call, and the direction of the game can be adjusted in accordance with this new information. It is still the case that the referee's speech act matters in a way that the very same utterance made by a fan in the stands does not.

Leslie Green and Rae Langton, in a debate over pornography's power to subordinate and silence, work through a thought experiment – one that Green

introduces and Langton responds to – about pornography’s authority and jurisdiction.⁵⁰ Green introduces us to Max and Mick, both gay men, one Catholic and the other Jewish, living in a liberal society with a fair amount of religious freedom where Roman Catholics are the minority. Green asks what authority and scope the Catholic Church has when its VIP’s authoritatively say that homosexuality is an “objective disorder” and an “intrinsic moral evil.” Green suggests that these utterances clearly subordinate Mick, a gay Catholic, who takes the teachings of the Church to be his own. For Mick, the Church is an authority on morality and has jurisdiction over him as a Catholic. In this case, authoritatively saying so makes it so. These utterances subordinate Mick not merely because the Church, being a powerful institution, has a certain authority in general, but also because Mick himself takes the Church to have authority in the relevant arena. But is this also the case for Max? Is Max, a gay Jewish man, subordinated by the Church’s utterances? Green suggests no, Max is not subordinated by the Church’s utterances, at least not with the same immediacy as Mick. Max’s situation depends more on the social context, since he does not see the Church as an authority on morality and he does not take the Church’s teachings to apply to him, whether or not Max is subordinated depends upon whether or not other Catholics in his community have some authority over Max. For instance, if Max lived in a community without a liberal constitution or without reasonable religious freedom, and where Roman Catholics were a majority rather than a minority, then we could assume that some who believe homosexuality is an objective disorder would have the power to hire

⁵⁰ Green, Leslie. 1998. Pornographizing, Subordinating, and Silencing. In *Censorship and silencing: Practices of cultural regulation*, ed. Robert Post. Los Angeles, CA: Getty Research Institute.

or fire Max, to control his education, to deny him the chance to marry, and so on. Now, given all this, Max is still not subordinated in the original imagined community. This is not to say, however, that Max does not potentially suffer certain perlocutionary effects of the Church's speech act. He may feel ashamed or anxious or angry because the Church purports to subordinate him, even while living in a community that often endorses speech counter to the Church's utterances. But, unlike Mick, Max is not subordinated in the very uttering of the words, unless the total social context is on the side of the Church.

Green concludes that the power to subordinate in the uttering of some words is not simply a function of the words themselves, or of the perceived authority of the speaker, but also of the social context in which the words are uttered.⁵¹ This claim is not much different from Austin's claim that the "total speech situation" must be analyzed in order to deduce the illocutionary force of a given utterance.

Langton develops what Green introduces to further illuminate the scope of pornography's authority. Langton introduces Austin's categories of illocutionary force – exercitives and verdictives – into the example of Mick and Max to further clarify exactly how the Church's utterances may construct the social reality of both men. There is more than one means and more than one degree to which authoritatively saying it is so can make it so. Consider the context, once again, of pornography's scope: Even if I, myself, see pornography as only verdictive in its force, that does not mean I am thereby not socially constructed by it in an exercitive way. The way that pornography enters my

⁵¹ Ibid. Pg. 294.

conscious life may be minimal – perhaps only in that I see that it says I’m supposed to be a certain way but I don’t agree and I don’t take that on. Alas, my belief doesn’t keep me from being socially constructed in my everyday life by pornography’s exercitive force. (We will return to this example when discussing Butler’s claim that the speech act is thought to be sovereign.) If the force of pornography is pervasive enough then I will suffer the illocutionary disablement that comes along with the smog.

When I say exercitive speech acts are subordinating I’m saying that they are constructive – the world comes to fit the word, not the other way around. To say that the speech acts of pornography subordinate is to say that they have the *exercitive* force of putting a whole group of people “in their place” in the same way that the boss’ speech act *is* the firing or hiring – the world comes to fit the word in the uttering.⁵²

The underlying idea in MacKinnon is that we can figure out how to respond to pornography as harmful without sliding down the proverbial slippery slope to broad censorship of, let’s say, Toni Morrison’s *The Bluest Eye*. The court’s interpretation of first amendment protection of pornography as speech has only considered child pornography (and only child pornography featuring boys, at that) as “being someone’s life” before it was the pornographer’s speech.⁵³ But subordination is subordination, MacKinnon argues, and if subordination is present in pornography with adult women then, via analogy, the harm warrants redress. More importantly, MacKinnon presents the idea for *why* it is important that some sort of legal recourse be made available. The understanding is: The law legitimates certain behaviors and delegitimizes others simply

⁵² The idea that a speech act can have the force of putting one “in her place” is an idea I return to in my final chapter on hate speech acts and ways to actively intervene.

⁵³ *New York v Ferber*. 1982

by “saying” what it says. Unqualified protection of pornography organizes its acts of subordination without exception. It is the perlocutionary harm in virtue of which the act is actionable – proof of coercion, having bruises or broken bones, and so on. What matters *to the law* is the harm that is shown to be the result of pornography – but this is because the law is crude and requires “proof” of harm. The illocutionary act of pornography silences, especially with its unqualified protection by the first amendment – the silencing is the subordination.

If pornography is a type of speech – and first amendment legislation has resolutely determined that it is speech – then pornography is one pervasive and influential example of “words that wound.” According to Austin, all speech is a kind of act – even the recitation of lines in a play is just that, the recitation of lines in a play. In addition to the legal definition of pornography as speech, the U.S. court system has continually acknowledged that pornography is a kind of act that has certain effects. In fact, the legislative support is already there for the (Austinian) claim that pornography is a kind of act with a certain *perlocutionary* outcome.⁵⁴ If pornography is speech and a kind of act, then pornography is a kind of speech act. And once we consider pornographic images and texts as speech acts, as Langton notes, “we are in a position to apply to them Austin’s distinctions between locutionary, illocutionary, and

⁵⁴ In *American Booksellers v Hudnut* (771 F.2d 329, 7th Cir. 1985), Judge Frank Easterbrook concluded that the anti-pornography ordinance was unconstitutional but accepted the premises of the ordinance, saying that pornography depicts the subordination of women and that depictions of subordination “tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.” He concluded that this “simply demonstrates the power of pornography as speech” and, thus, the ordinance was unconstitutional.

perlocutionary acts.”⁵⁵ The argument for how pornography harms women is an argument for the power of words (speech acts) to perpetuate hate and determine the “status” – social and political – of women.

Section II: Pornography as hate speech and hate speech as actionable under the law

Considerations of various proposals for enlisting the power of the state to address the harm in hate speech, such as those of Delgado and Matsuda, lead nicely to a consideration of the Dworkin-MacKinnon anti-pornography ordinance. First and foremost, the model ordinance is a critical (albeit controversial and not yet successful) example of enlisting state power to counteract oppression. It is an important example of an attempt at legislation meant to address subordination done through speech. As I have said previously, the world is such that navigating various social groups (and being “grouped” by others) – along lines of varying social and political import, arranged hierarchically – is a fact of life. In this world, subordination is something that happens and sometimes that subordination is done through speech. MacKinnon’s work, especially in *Only Words*, addresses current first amendment policy in the U.S. and the repercussions of its hegemonic application. The Dworkin-MacKinnon anti-pornography ordinance is an attempt to counter hate speech using means available within U.S. legal doctrine as it is currently structured and interpreted. Allow me to note, briefly, that I believe there is something to be said for working within rather than outside or against what is already the case: I see MacKinnon and Dworkin et al. as working to influence

⁵⁵ Langton, Rae. 1993. Speech Acts and Unspeakable Acts. *Philosophy and Public Affairs* 22:4. 298.

the current trend in first amendment doctrine. Such a program is “practical,” and practicality is at times necessary and important. And, finally, MacKinnon’s work (along with the contributions of others engaged in the philosophical discussion surrounding hate speech legislation) provides an argument for how precisely certain speech acts harm in the very doing of the utterance.

As we have seen, part of MacKinnon’s argument has something to do with the way utterances construct reality rather than merely reporting on it or describing it. It is argued, rather persuasively, that pornography harms women in at least two ways: Pornography subordinates women and it silences women. The bulk of my analysis will engage this claim, the claim that pornography subordinates and silences women in the very “doing” of the utterance.

I will recount how MacKinnon argues for the claim that *pornography is subordination* and what that argument means for an analysis of hate speech, its harms, and what can be done about subordination through speech. The attempt to craft an ordinance that addresses the harm in pornography acknowledges that pornography is speech (under the law) but also that protecting pornography as speech legitimates certain behaviors (e.g., seeing women as sex objects; taking them to “want it” when they say “no”) and denigrates others. We have already seen that it is not impossible for legislators to recognize that the law has such power, as in the Supreme Court’s opinion on DOMA. The attempt to craft an ordinance that addresses the harm in pornography acknowledges the illocutionary force to subordinate and the illocutionary force to silence.

Along with the proposals outlined in the previous chapter, the Dworkin-MacKinnon anti-pornography ordinance also marks a shift in the philosophical analysis of censorship and silencing: There is a move away from aligning state power unequivocally with oppression and toward enlisting state power to counteract oppression. As Robert Post notes in his introduction to *Censorship and Silencing*, proposals such as the anti-pornography ordinance can be viewed as an unlikely alignment of leftist philosophers with conservative pundits – both, in their own way, proposing limits on “free speech.”⁵⁶ Now, “alignment” is a strong word; however, the work of Catharine MacKinnon, Mari Matsuda, Andrea Dworkin, Rae Langton, and others understand enlisting state power as part of the solution to the problem of oppression as opposed to merely part of the problem. As Henry Louis Gates remarked, “Today the aim is not to resist power, but to enlist power.”⁵⁷ Although I ultimately favor redress by alternate means, in their proposals we see how enlisting state authority can empower those who need it most.

The Dworkin-MacKinnon anti-pornography ordinance

Pornography is speech. So says the strikingly consistent exercise of 1st Amendment protection on its behalf. Under that same legislative theory, pornography “expresses an idea” – and no matter how hateful, degrading, or vile that idea may be, the government

⁵⁶ Post, Robert. 1998. *Censorship and Silencing*. In *Censorship and silencing: Practices of cultural regulation*, ed. Robert Post. Los Angeles, CA: Getty Research Institute.

⁵⁷ Gates, Henry Louis, Jr. 1994. War of Words: Critical Race Theory and the First Amendment. In *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*, Henry Louis Gates et al. New York: New York University Press, 42. “You don’t go to the teacher to complain about the school bully,” Gates writes, “unless you know that the teacher is on your side” (ibid.).

has no business telling people what ideas they can hold and air. (We'll see later how the idea that "speech is *expression*" avails us with the opportunity to understand pornography as a "false" idea – given that inequality is a false idea – and, thus, open to restriction. But that's later.) Given that regulations on speech often coincide with civil rights violations, attempts to regulate or restrict the making and consuming of pornography in this country have consistently failed – and perhaps for good reason. In spite of findings by various court opinions recognition (and even *because* of its recognition) that the ideas expressed in pornography are harmful to women, pornography is speech (so says the law) and thus ought to be protected from regulation. But, of course, not all see protecting pornography (as speech) as a form of justice.

In response to a request by the city of Minneapolis, Andrea Dworkin and Catharine MacKinnon crafted an ordinance meant to provide a type of recourse for the sex inequality prescribed and done by pornography. Their conceptualization of the harm of pornography is distinctly Austinian; they argue that pornography subordinates women and it does so in the very "uttering" of images on the screen or page. That being said, MacKinnon herself considers Austin's theory to be "foundational" to her exploration of the power of words to do as much as they say but not an "authority" on which her view is based.⁵⁸ Rae Langton more thoroughly engages in an analysis of the Austinian illocutionary act in order to clarify MacKinnon's view. Langton defends MacKinnon's argument, through an Austinian lens, and in so doing clarifies the claim that the *illocutionary force* of pornography is to silence women. Much like the *assigning*

⁵⁸ MacKinnon, Catharine. 1993. *Only Words*. Cambridge, MA: Harvard University Press. 121.

that is accomplished when, in the right context, Captain Orange says, “I pick Pilot.” The uttering *is* the choosing of Pilot for the team – it makes Pilot a member of the team.

What MacKinnon and Dworkin propose with their anti-pornography ordinance is a civil redress, made available to those who are injured, against those who produce and profit from the harm that is pornography. For purposes of the proposed ordinance, they define pornography as:

[T]he graphic sexually explicit subordination⁵⁹ of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities, enjoying pain or humiliation or rape, being tied up, cut up, mutilated, bruised, or physically hurt, in postures of sexual submission or servility or display, reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.⁶⁰

This definition may sound circular, and many philosophers will be concerned about defining pornography in general, but it serves a necessary purpose – namely, it circumscribes what is actionable under the ordinance from what is not. The point, one imagines, is to delineate subordinating pornography from other forms of expression that do not subordinate in the very uttering. Just as the words “I promise” are not the promise. The image qua image is nothing – it’s the image-act (just like the speech act) that is at issue. This is not a generic, philosophical conception of pornography and should not be treated as one. This definition is meant to get at the image-act – the way utterances are used, not the words themselves.

⁵⁹ Related to but distinct from the communicative subordination to which I refer with the claim that hate speech has the illocutionary force of subordinating.

⁶⁰ Dworkin, Andrea and MacKinnon, Catharine. 1988. *Pornography and Civil Rights: A New Day for Women’s Equality*. Also at:
<http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm>

It is important to note here that more than one equally important dialogue is at play. First Amendment absolutists, feminist philosophers concerned about women's sexual autonomy, *and* speech act theorists who question the concept of illocutionary force, all attack MacKinnon's description of pornography. The larger dialogue includes responses from all three of these camps – a legal response, a sexual autonomy response, and a speech act theory response. In *Only Words*, MacKinnon's audience is the first of the three – her objective is to show how the First Amendment is not as maligned by her proposal as those absolutists would assume. In the next chapter I will address one variation of the third response; namely, Butler's concern surrounding the characteristics of illocutionary force.

The model ordinance (crafted for use by the city of Minneapolis and then for Indianapolis) provides five different *causes of action*: coercion into pornography, forcing pornography on a person, assault or physical attack due to pornography, defamation through pornography, and trafficking in pornography.⁶¹ The following brief descriptions can be found in Appendix D of the model ordinance:

1. *Coercion into pornography.* It is sex discrimination to coerce, intimidate, or fraudulently induce (hereafter, "coerce) any person into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance(s). The maker(s), seller(s), exhibitor(s) and/or distributor(s) of said pornography may be sued for damages and for an

⁶¹ Dworkin, Andrea and MacKinnon, Catharine. 1988. *Pornography and Civil Rights: A New Day for Women's Equality*. Also at: <http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm>

injunction, including to eliminate the product(s) of the performance(s) from the public view.

2. *Forcing pornography on a person.* It is sex discrimination to force pornography on a person in any place of employment, education, home, or any public place.

Complaints may be brought only against the perpetrator of the force and/or the entity or institution responsible for the force.

3. *Assault or physical attack due to pornography.* It is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography. Complaints may be brought against the perpetrator of the assault or attack, and/or against the maker(s), distributor(s), seller(s), and/or exhibitor(s) or the specific pornography.

4. *Defamation through pornography.* It is sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image, and/or recognizable personal likeness. For purposes of this section, public figures shall be treated as private person. Authorization once given can be revoked in writing any time prior to any publication.

5. *Trafficking in pornography.* It is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs.

We see here that the cause of harm is the basis for action. The ordinance is not censorship of pornography (in the proper sense of prior restraint); it creates, for those harmed by pornography, the legal standing to seek redress.

Throughout *Only Words* MacKinnon frames the question of pornography's harm with analogous speech situations in which the focus is the act and not the expression. Social life is full of "words" that are legally treated as the acts they constitute. The thing to note, she claims, is when the First Amendment is invoked and when it is not. She says,

*Saying "kill" to a trained attack dog is only words. Yet it is not seen as expressing the viewpoint "I want you dead" – which it usually does, in fact, express. It is seen as performing an act tantamount to someone's destruction, like saying "ready, aim, fire" to a firing squad. Under bribery statutes, saying the word "aye" in a legislative vote triggers a crime that can consist entirely of what people say. So does price-fixing under the antitrust laws. "Raise your goddamn fares twenty percent, I'll raise mine the next morning" is not protected speech; it is attempted joint monopolization, a "highly verbal crime." In this case, conviction nicely disproved the defendant's view, expressed in the same conversation, that "we can talk about any goddamn thing we want to talk about."*⁶²

The law already recognizes – as do all of us, for that matter – when an act is done, even if it is done through speech. "No one confuses discussing them with doing them," MacKinnon notes, "for instance discussing a verdict of 'guilty' with a jury's passing a verdict of 'guilty'. *Nobody takes an appeal of a guilty verdict as censorship of the jury.*"⁶³ It is interesting to note, as MacKinnon does in these passages, when the First Amendment is considered untouchable and when it is not even part of the concern of legislators. It appears that those of the appropriate authority are not concerned with the fact that the utterance "aye" expresses the idea "I concur" when the vote is bribed – they are concerned about the act that it constitutes – but are concerned about the freedom of pornographers to say something like, "her 'no' means 'yes' – see it, it's right there on

⁶² Ibid *Only Words*. 12

⁶³ Ibid. 13. Emphasis mine.

the screen.” The “aye” and “kill” are not considered speech at all, while pornography is considered as nothing but expression. MacKinnon provides these examples as a way of analogizing pornography with already existent legislation against “highly verbal crimes.”

Elsewhere MacKinnon notes that courts and culture have already determined that sexual harassment is not “only words.” She says,

If ever words have been understood as acts, it has been when they are sexual harassment. For fifteen years, unremitting pressure for dates, unwelcome sexual comments, authoritative offers to exchange sex for benefits, and environments permeated with sexual vilification and abuse have been legally actionable in employment and education. Only words – yet they have not been seen as conveying ideas, although, like all social practices, they do: ideas like what men think of women, what men want to do to women, what women should do for men, where women belong.⁶⁴

All this is to say that legal theory already holds the following two claims to be true: 1. Some utterances are not “only words” and, 2. All acts (including criminal ones) have an idea/thought/expression behind them. No act is understood outside of social meaning, which is maintained in and by language. As MacKinnon notes,

Social inequality is substantially created and enforced – that is, *done* – through words and images. Social hierarchy cannot and does not exist without being embodied in meanings and expressed in communication. A sign saying ‘White Only’ is only words, but it is not legally seen as expressing the viewpoint ‘we do not want Black people in the store,’ or as dissenting from the policy view that both Blacks and whites must be served, or even as hate speech, the restriction of which would need to be debated in First Amendment terms. It is seen as the act of segregation that it is... Segregation cannot happen without someone saying ‘get out’ or ‘you don’t belong here’ at some point. Elevation and denigration are all accomplished through meaningful symbols and communicative acts in which saying it is doing it.⁶⁵

⁶⁴ Ibid. 45

⁶⁵ Ibid. 13

As I said in the previous chapter, first amendment exceptions (such as the *fighting words* or *obscenity* doctrines) tend to be characterized as a type of *prior restraint* on speech, in that certain utterances are not protected (under the first amendment) before they are ever uttered. MacKinnon's proposal, though still a form of enlisting state power, is quite different and often gets mistakenly aligned with first amendment exceptions. The ordinance proposes that if any of the above five causes have been shown to be the case, coupled with pornography as it is defined in the language of the ordinance, then the alleged victim can sue for damages and legal fees in civil court. Such recourse is distinctly *not* prior restraint. Pornography is not *prohibited*. The uttering is not kept from happening; the materials are not examined and edited before they are published. Under the proposed law, pornography is actionable – a harmed party can bring suit against the pornographer.

Rather than align the anti-pornography ordinance with exceptions to free expression, it is more charitable to compare it to civil laws that “force” producers to construct safe objects for consumption. The expectation of avoiding harm to the general public on the part of manufacturer is familiar to us, but an ordinance that makes something actionable does not concern itself with the prior restraint of potential harms. Citizens have the legal power to sue and in some cases bringing suit is, in fact, reasonable. If it is determined that a product harms the general public then those harmed have the opportunity for redress. It doesn't matter if Ford intended to harm or not, the fact that the Pinto may burst into flames if mildly rear-ended provided cause

for those harmed to sue. Similarly, it doesn't matter if pornographers intend to subordinate or not. If harm occurs, those harmed have the legal standing to seek redress, i.e., to sue for damages. And, sure, the existence of such an opportunity may indirectly affect the mass production of future materials – but calling that censorship takes a little too much mental maneuvering. The anti-pornography ordinance doesn't create any laws dictating that any producer of images and texts “can't say that” and “must say this.” If tomorrow you decide to become a ladder manufacturer it is reasonable to expect you will verse yourself on all that is now known about how to make ladders safe – but not to do so is not illegal. More importantly, an ordinance that provides consumers with the legal standing to sue for damages if harmed is not equivalent to the prior restraint on the making and distributing of your product. Failing to verse yourself on safe ladder-making makes you irresponsible and callous, but that will all come out in the amount of damages you will pay once people start falling off your ladders. There is a wealth of evidence that pornography harms women – evidence that is even acknowledged by the courts. The Dworkin-MacKinnon ordinance puts in place a possible consequence of producing that harm.

In her piece, *Speech Acts and Unspeakable Acts*, Rae Langton helps to clarify this misrepresentation of MacKinnon.

MacKinnon has accordingly been interpreted as saying that pornography is un-protected conduct rather than protected speech, and one might imagine that Austin's approach gives this idea some support. If pornography is a kind of act, and action is conduct, then, one might think, pornography is unprotected by the First Amendment. But that interpretation of MacKinnon is wrong. "To state the obvious," she says, "I

do not argue that pornography is 'conduct' in the First Amendment doctrinal sense.⁶⁶ In any case Austin's approach would give it no support, for it does not help us to distinguish conduct from speech. If there is a line that divides speech from conduct in the law, it does not divide speech from action in Austin's philosophy. On his view, all speech acts are actions. To say that pornography is a kind of act is not to say that pornography is conduct, and nothing that I say will turn on that claim. The important point is that actions, whether speech or conduct, can be protected or unprotected by law.⁶⁶

MacKinnon argues for the anti-pornography ordinance as an extension of the Equal Protection Clause of the constitution. The courts currently interpret pornography as *defamation* – MacKinnon would have it understood as *discrimination*.

In this approach, the approach of current law, pornography is essentially treated as defamation rather than as discrimination. That is, it is conceived in terms of what it says, which is imagined more or less effective or harmful as someone then acts on it, rather than in terms of what it does. Fundamentally, in this view, a form of communication cannot, as such, *do* anything bad except offend.

On the assumption that words have only a referential relation to reality, pornography is defended as only words – even when it is pictures women had to be directly used to make, even when the means of writing is women's bodies, even when a woman is destroyed in order to say it or show it or because it was said or shown.⁶⁷

As seen in the preceding section, the harm that is done in pornography is not mere insult; rather, it is the subordination of women. The Dworkin-MacKinnon ordinance shares a conceptual foundation with Delgado et al but her legal move is still quite different – making something actionable. In the following passage from *Only Words*, MacKinnon articulates the power of words to reinscribe hierarchies and inequalities:

⁶⁶ *Speech Acts and Unspeakable Acts*. 296

⁶⁷ *Ibid.* 11-12.

Together with all its material supports, authoritatively *saying* someone is inferior is largely how structures of status and differential treatment are demarcated and actualized. Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized. Social supremacy is made, inside and between people, through making meanings. To unmake it, these meanings and their technologies have to be unmade.⁶⁸

Part of the process of delegitimizing the production of pornography (by stripping it of first amendment protection) is an unmaking of the meaning that women simply *are* inferior to men and that we are objects to be used according to their will. It is an unmaking of the power of pornography to “say” with authority (unqualified protection) what women are and what women are for – protecting pornography with qualifications is one way of unmaking this particular meaning. Give women legal standing to sue and you have a type of “talking back” to what pornography has to say about women.

Concluding remarks

Pornography harms women: It subordinates women in the very “uttering” of it (an illocutionary act) and it silences women (an integral part of subordinating and, often, a perlocutionary effect). These harms, it is argued, outweigh whatever good there may be in absolutely protecting pornography as free expression. Since the harms outweigh the good of absolute first amendment protection, like other categories of speech that are

⁶⁸ Ibid. 31

unprotected, we ought *not* be so outraged at the prospect of protecting against the harms produced by and done in the very “uttering” of pornography.

At the close of *Only Words*, MacKinnon argues that the first amendment and fourteenth amendment are heading for a doctrinal collision in this country. The court’s understanding of equality cannot for long withstand the current breath of first amendment interpretation. What remains lacking from current interpretation is an understanding that equality is not complete without access to speech and that protection for speech that silences minority voices is an infringement on equality. In other words, the intrinsic relationship between equality and speech is not yet recognized nor honored by current first amendment interpretation. More specifically, so long as the court continues to protect pornography as a free speech exercise it simultaneously denies that pornography discriminates against women, and thus, with the full weight of legislative authority, it challenges our national commitment to equality.

In the terms of silencing, this anti-pornography ordinance could be characterized as establishing opportunity for counter-speech. If victims of pornography’s harms have a way to address their experiences as harms done by pornography then pornography’s message is challenged. The idea is that the silencing of women can be countered, with the state’s authority providing the space for those counter-claims to actually *get heard*. The state has the power to grant women the legal standing to bring civil suit against pornographers, and this is a type of empowerment that gives illocutionary capability back to women.

On the Dworkin-MacKinnon anti-pornography ordinance view pornography is not *merely* the expression of an idea but, rather, is a violation of equal rights; it is subordination. Treating pornography as speech act, the ordinance provides a means for women to understand their experience as something more than a first amendment concern. Once we understand pornography as not simply “expressing” ideas about sex, rape, brutality, and subordination – once we understand pornography as part of the performance of those things – then the call to provide a law that protects the victims of those acts is not so hard to answer. The Dworkin-MacKinnon anti-pornography ordinance is a move to support women’s equal protection under the constitution by weighing their rights for equality against the rights of pornographers to make and consume images that subordinate women.

Current first amendment doctrine supports social dominance and therein MacKinnon and Dworkin’s anti-pornography ordinance challenges us to vote against social dominance and for social equality. The idea is that our national commitment to equality is more seriously and problematically undermined by protecting pornography as free speech than our commitment to free expression is undermined by introducing human rights ordinances such as the anti-pornography ordinance. MacKinnon provides compelling evidence to this effect, all backed by empirical data that shows the direct and devastating connection between the making and use of pornography and the abuse of women and children.

MacKinnon imagines a new model in which “free speech does not most readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for

its victims, as it does now.”⁶⁹ MacKinnon compellingly argues that the fourteenth amendment already provides the path to tempering first amendment protection for speech that can be shown to subordinate. In fact, first amendment absolutism can be said to be in violation of the fourteenth amendment. The fourteenth amendment has already “decided” that social equality is a “true” idea. In first amendment theory, there is no such thing as a false idea. All ideas, as far as they are forms of expression, are equal under the first amendment. Thus, the defense for protecting pornography as free speech often relies on the claim that to do otherwise would be to essentially “say” that the ideas of pornography are false. Here’s the conflict: Inequality IS a false idea in so far as the 14th Amendment is understood. According to MacKinnon, because the fourteenth amendment has already decided that the ideas of subordination and group inferiority are not equal under the law then inequality is a “false” idea in whatever form it is expressed.

What I have attempted to show with the preceding analysis is twofold: First, MacKinnon’s proposed legal strategy is wrongly characterized as a form of censorship (proper) and thereby the anti-pornography ordinance is mistreated insofar as it is identified as an untenable political strategy. There may be alternate reasons why we ought to avoid enlisting state power as a means of combatting the harm in hate speech – alternate means are what I ultimately support – but, nonetheless, the anti-pornography ordinance is not in and of itself untenable or unethical. Lastly, MacKinnon’s argument for pornography as subordination, when analyzed through an Austinian lens,

⁶⁹ Ibid *Only Words*. 109

illuminates the *force* of hate speech to construct social reality to the detriment of whole groups of people. The reality-construction that is done in the very uttering of certain utterances (verbal or non-verbal) in particular contexts is sufficiently damaging to warrant *some* sort of redress.⁷⁰

Looking back before looking forward: The Dworkin-MacKinnon anti-pornography ordinance is a way of enlisting the power of the state to interrupt the harms done in hate speech, but it distinctly different from the strategies suggested by the authors of *Words That Wound*. Those theorists more directly attack the scope of first amendment protection and argue that it ought not protect hate speech. Lawrence and Delgado do this by imagining a wider scope of first amendment exceptions; Matsuda does this by arguing that hate speech is hate violence and should be criminalized (effectively extending the scope of first amendment exceptions). MacKinnon imagines neither – her focus is on the civil standing of the victims of violent pornography. She imagines the possibility of civil suit against pornographers (effectively deligitimating the authority of pornography to silence women).

I imagine a thread of argumentation here that connects MacKinnon's form of enlisting state power to Butler's rejection of any form of authoritative intervention. My

⁷⁰ As I conclude this critical response to the call for enlisting state power, I'm left with a deep sense of unease because I, like too many of the critics of the anti-pornography ordinance, have not witnessed the material evidence of harm that the ordinance is meant to address; I haven't watched the tokens of violent pornography against which MacKinnon/Dworkin are attempting to provide redress. Is it not likely that I would be so repulsed by the harm that I would demand action as they have done? MacKinnon and Dworkin have voiced this concern, and it is a legitimate one, that many who oppose the ordinance are not personally familiar with the kind of visual images, couched as "speech," that make up their object of concern. The call to action is often motivated by a first-hand witnessing (if not first-hand experience) of subordination. Even though I will suggest a different path, the value of proposing an ordinance cannot be underestimated.

strategy suggests something less abstract than Butler's call for resignification and less judicial than MacKinnon's call for civil action against pornography. We need a repeatable, teachable strategy (more than we get from Butler) that empowers the intended audience of hate speech to perform effective counterspeech – a way for the victim to authoritatively pervert the illocutionary force of hate speech. But this can be done, I think, without enlisting the authority of the state against the speakers of hate (like what we get from MacKinnon).

Once again, efforts to limit hate speech often are forced to rely on the idea that such speech is harmful because it offends or insults members of the group or groups that it targets. It is true that hate speech is offensive and insulting; however, as I argue, reliance on that fact in order to say what is wrong with hate speech is inherently problematic (and simply *not* the *only* harm that potentially occurs). Equally problematic is the tendency in an analysis of hate speech as speech act to locate the harm in the intention of the speaker. What is needed and warranted is a system that locates the harm of hate speech not in the feelings, emotions, or thoughts of the audience, nor in the heart, intention, or thoughts of the speaker, but in the force of certain speech acts -- when uttered in the “right” context by people with the “right” authority -- to do as much as they say.

Now it is time to move on from the first-amendment-absolutist's concern and turn toward a conceptual/philosophical concern – a concern held by Butler. In the following chapter I will address in-depth Butler's misleading grouping of the above proposals with the anti-pornography ordinance crafted by MacKinnon and Dworkin.

The structure of Butler's analysis in *Excitable Speech* implies (not too subtly) that the ordinance and the proposals offered up in *Words That Wound* are two tokens of the same type – they're both instances of censorship.

Chapter 3: *Excitable Speech*, Sovereign Authority, and the Possibility of Felicity

*When I say before the registrar or alter, etc., 'I do', I am not reporting on a marriage: I am indulging in it.*⁷¹

*The total speech act in the total speech situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating.*⁷²

The work that has been done by Catharine MacKinnon, Andrea Dworkin, Rae Langton, Mari Matsuda, and the like to elucidate the dimension of performative speech *as working on the world with socially constructive power* is taken up and ultimately rejected by Butler in her work, *Excitable Speech*.⁷³ In that work Butler directly engages the regulatory proposals of Mari Matsuda and, in greater depth, Catherine MacKinnon and rejects both proposals as censorship. Putting aside (for now) Butler's erroneous conflation of their diverse proposals, Butler takes issue with both their conceptual analysis of speech acts and the underlying principles these theorists espouse. In the following I hope to tap into the spirit of both projects – MacKinnon's and Butler's – in that both are concerned with the harm done in the various ways that power is wielded through speech. Regardless of how persuasive we find Butler's argument against the use of government-sanctioned regulations on hate speech to be, she misrepresents the anti-pornography ordinance as censorship and, likewise, misrepresents the Enlisters as attributing a sovereign power to the performative. This point has been made before, most notably by Schwartzman, "Contrary to Butler's contention, Matsuda, Langton, and MacKinnon do

⁷¹ J.L. Austin, 1962. *How to do things with words*, 2nd ed. Cambridge, Massachusetts: Harvard University Press. Pg. 6.

⁷² Ibid. Pg. 148

⁷³ Butler, Judith. 1997. *Excitable speech: A politics of the performative*. New York: Routledge.

not claim that the words that are uttered – or the images that are depicted in pornography – are ‘efficacious’ or ‘transitive’ in the sense that they necessarily succeed.”⁷⁴ Like Schwartzman, I hope to show that while Butler's argument against enlisting judicial power to regulate speech needs to be taken seriously, her critique of MacKinnon (and the Enlisters in general) is flawed on more than one count. For my own part, more troubling still is what seems to follow for Butler from her analysis of speech act theory.

Excitable Speech can be read as providing three distinct criticisms of the move to enlist state power⁷⁵:

- i. One thread of Butler's analysis addresses general concerns regarding the process of enlisting an authoritative power such as the state, which includes, for Butler, what I have called the specificity problem, the trustworthy problem, and the problem of deniability.⁷⁶ I argue that all three problems fail to absolutely undermine the plausibility of enlisting state power as a form of redress against hate speech.
- ii. Another thread of her analysis concerns the Dworkin-MacKinnon anti-pornography ordinance specifically. Butler identifies and critiques the ordinance as a form of state censorship and I argue that she is mistaken. In fact, her

⁷⁴ Schwartzman, Lisa. “Hate Speech, Illocution, and Social Context: A Critique of Judith Butler.” *Journal of Social Philosophy*, 33:3. Fall 2002, 421-441.

⁷⁵ The criticisms of enlisting state power that constitute *Excitable Speech* are directed at all of the theorists that I have called *the Enlisters*; however, the reader will note that Butler specifically engages Mari Matsuda and Catherine MacKinnon. The majority of my analysis of Butler is a response to her criticism of MacKinnon and the Dworkin-MacKinnon anti-pornography ordinance. I spend most of my time and energy in the following on Butler and MacKinnon since I see them as unnecessarily talking past one another.

⁷⁶ From Chapter 1 of this project.

characterization of the ordinance as a form of state censorship *a la* “Don’t Ask, Don’t Tell” constitutes a failure on the part of Butler to recognize the variety of avenues of possible redress at play in the larger dialogue.

- iii. The last thread of Butler’s analysis that I address concerns the picture of the performative that Butler attributes to the Enlisters. It is a picture of speech acts in which the illocutionary act has sovereign authority. Here too I argue that Butler is mistaken. Not only is the textual evidence lacking, Butler fails to adequately support her claim that these theorists implicitly construct the performative as sovereign. More importantly, positing such a picture (on the Enlisters and speech act theorists in general) is wholly unnecessary in order to successfully and satisfactorily utilize speech act theory in response to hate speech.

Count (i.) was addressed in the preceding chapters when the focus was the practical problems with enlisting state power. Although I wish to stop short of unequivocally rejecting the use of judicial authority in response to hate speech – in fact, I see no reason to believe that legislation is *always* ethically questionable or politically untenable – I do not here argue for legislation against hate speech as do the Enlisters. My interests lie generally with the conceptual issues, and so I will attend to counts (ii.) and (iii.) above in the following discussion.

The critique of the Enlisters that makes up the bulk of *Excitable Speech* obscures the sense in which Butler and MacKinnon’s views are not so oppositional – the ground on which they all may meet is lost – and, thus, a fruitful discussion is prematurely

foreclosed. At the very least it appears that Butler and MacKinnon are talking past one another, and perhaps unnecessarily. Overall, the philosophical debate over the nature of the performative and the legitimacy of hate speech regulation in which Butler engages MacKinnon *et al* leaves the audience with the sense that there is no clear resolution. More notably, Butler forecloses the possibility of a rich variety of address that she herself would like: namely, what she gestures toward with her recommendation of *resignification*.

A quick example to get things started...

Butler introduces *Excitable Speech* with a series of quotes from Austin: “Infelicity is an ill to which all acts are heir which have the general character of ritual or ceremonial, all conventional acts” and “There are more ways of outraging speech than contradiction merely.”⁷⁷ Butler’s overarching concern, in general, has to do with the indeterminability of context, the supposedly “sovereign” power that is wielded when an illocutionary act is successful, and the point at which these two ideas intersect. The concept of infelicity is the locus of discussion – and the locus of conceptual confusion between Butler and MacKinnon.

An example helps to illuminate the interesting nature of performative speech – a nature that includes the pervasive possibility of infelicity and a plethora of ways in which its force can be outraged. Often when I “punch the numbers” on the keypad I, as

⁷⁷ Both quotes can be found in *How To Do Things With Words*, pg. 19 and pg. 48 respectively, though Butler doesn’t cite the text here.

such, “dial the phone.”⁷⁸ These two utterances are separate descriptions of what most of us would understand (in casual conversation) to be *the same act*. When I call a friend up for a chat, she may assume that I “dialed the phone” or “punched the numbers” and the two descriptions are equally intelligible to her. The picture she forms in her mind could be described as either “Meredith dialed the phone” or “Meredith punched the numbers” and the use of either description (or both) likely makes no difference to her understanding of the act that I performed. It is equally true that, in certain contexts, the *best* description (the most illuminating, or the most understandable) of “dialing the phone” is indeed “punching the numbers” or vice versa. If I’m teaching a new phone user how to “dial the phone” I will be showing them how to punch the numbers. Upon examination, however, the two descriptions do not necessarily align always, universally, consistently, every time. There are imaginable contexts (real contexts, not just in the imagination) in which “dialing the phone” is *not* “punching the numbers” and vice versa. A child’s toy phone, for example, is one where the numbers can be punched but no one is dialed. As Austin says, “Infelicity is an ill to which all acts are heir which have the general character of ritual or ceremonial, all conventional acts.”⁷⁹ Calling someone up on the phone is an act that takes place in a culture, by people – and thus the performance of the act is open to hiccups, hitches, and downright failure.

I use these examples here to introduce a serious flaw in Butler’s interpretation of

⁷⁸ Thanks to Marilyn Frye for calling my attention to the connection between this example and GEM Anscombe’s, “pulling the trigger” and “firing the gun.” The idea that a single act can have multiple descriptions, complicated by the nuances of intention, is an idea worked out thoroughly by Anscombe (1957). An analysis of the connection between Anscombe’s work and speech act theory is for another project.

⁷⁹ J.L. Austin, 1962. *How to do things with words*, 2nd ed. Cambridge, Massachusetts: Harvard University Press. Pg. 19.

the Austinian illocutionary act (a flaw I will come back to later on). Austin writes of the locutionary act, the illocutionary act, and the perlocutionary act of a given utterance. However, this division in terms should not lead us to believe that *separate* acts take place. Three separate terms but not three *separate* acts; rather, one given utterance can be described according to the locutionary, illocutionary, or perlocutionary descriptions of an act that is performed by the speaker in that context. Further on I argue that, in *Excitable Speech*, Butler dismisses the illocutionary dimension of speech all together based on her conviction that speech and conduct are not to be conflated, ever. I find this to be the most philosophically problematic claim made by Butler in her quest to deny the use of judicial authority as a response to hate speech.

Section I: Censorship, Silencing, and the Dworkin-MacKinnon anti-pornography ordinance

The harm in hate speech is real; so real, in fact, that some would think it calls for enlisting the authority of the state to restrict or prohibit speech as a civil rights violation. As seen in my earlier chapter on *Words That Wound*, there are important practical and conceptual problems with restricting racist speech. Note here that *restricting speech* is but one sub-category of *enlisting state power* to combat assaultive speech. As noted previously, there are important differences among prohibiting speech, not protecting speech, and making certain utterances *actionable* under the law.⁸⁰ In *Excitable Speech*,

⁸⁰ A note here on the difference between *restricting* speech and *regulating* speech: Theorists who propose enlisting a type of authority – state power being just one – to address the harm in hate speech can be said to be proposing various types of *regulatory* policies. I take a regulatory policy to be a rule or set of rules that circumscribes behavior and attaches to it some negative consequence with the backing of judicial authority. Restrictive policies, on the other hand, are characterized by *prior restraint*, which is a technical

Butler misidentifies the anti-pornography ordinance as tantamount to prohibiting speech when, in actuality, the ordinance makes pornography as speech actionable under the law. The difference is significant.

In the preceding chapter we saw that the Dworkin-MacKinnon anti-pornography ordinance is a distinct proposal when compared to, for instance, Matsuda's proposal to criminalize racist speech. Although I have identified both MacKinnon and Matsuda as *Enlisters* – both propose enlisting a type of judicial authority – I do not claim that their distinct proposals are the same type of legislation. Butler, on the other hand, not only lumps their proposals together as if they were suggesting the same type of legislation, she sees both proposals as proposing *censorship*. Butler titles her final chapter of *Excitable Speech*, “Implicit Censorship and Discursive Agency.” She opens the chapter by stating, “To argue that certain speech acts are more properly construed as conduct rather than speech sidesteps the question of censorship.”⁸¹ She clearly thinks such a move is problematic and goes on to implicate the Dworkin-MacKinnon anti-pornography ordinance specifically, hate speech, pornography, and gay self-declaration in general. Butler attributes the following line of reasoning to Matsuda *et al*:

[R]acist speech in particular both proclaims the inferiority of the race to whom it is addressed, and effects the subordination of that race through the utterance itself. To the extent that the utterance enjoys first Amendment ‘protection,’ it is viewed, by Matsuda and others, as enjoying the backing of the state. The failure of the state to intervene is, in her view, tantamount to an endorsement by the state... The utterance thus has the power to effect the subordination that it either depicts or promotes

term in legal theory that points to the banning of the identified utterances and the enforcement of that ban through seizure and censor of the material before it is disseminated.

⁸¹ Pg. 127.

precisely through its free operation within the public sphere unimpeded by state intervention.⁸²

Pornography effects subordination, the state fails to intervene (tantamount to endorsement), and so, Butler claims, the Enlisters conclude that the power of pornography to effect subordination is done “precisely through” state protection.

In the above passage, the move that Butler makes from Matsuda’s “failure of the state to intervene” to “free operation within the public sphere *unimpeded by state intervention*” is a slight but significant mischaracterization of Matsuda’s argument. Butler correctly describes Matsuda’s view as problematizing a kind of *backing by the state* that happens when it fails to intervene, but she goes on to say that the problem Matsuda identifies is with public speech *unimpeded by state intervention*. Butler’s problematic sleight of hand is the move in the above passage from “backing by the state” to the less intrusive “unimpeded” speech allowed by the state. Here is where Butler fails to describe the full gravity of Matsuda’s claim. It’s not, precisely, that the force of state protection comes from racist speech as “unimpeded by state intervention.” Rather, the force is located in the *protection* that the state provides for such speech. What the state protects, it legitimates and it simultaneously delegitimizes interfering [further down: what it purposely refuses to protect, it delegitimizes]. When the state protects a kind of behavior what it delegitimizes is interference with that behavior. This is how the victim of hate speech becomes a “stateless person” – they have no legal recourse to put a halt to what’s harming them. If you’re a citizen of a state, the general presumption is

⁸² Butler, Judith. 1997. *Excitable speech: A politics of the performative*. New York: Routledge. Pg. 73.

that you have access to recourse when someone is harming you. The availability of action to get the person to stop the harm is foreclosed by the state's protection of speech. The force of protection is stronger than the force of not intervening – the force of protection is not a stance of indifference. And here is where MacKinnon's project fits in: when I'm harmed by this behavior I have legal recourse to that harm – it's not prior restraint, it's not regulation of speech, it's making a particular harm *actionable*.

Imagine this distinction as it plays out in the relationship between a child and her parent. When the parent stands back and allows the children to play (doesn't intervene) the parent takes on a much different stance than a stance of protection. In fact, creating a space in which the child gets to play exactly as they wish *without intervention* **and** *with the assurance* that their play is "allowed" in that space – the parent will intervene on their behalf in order to maintain that space of play if necessary (protection) – is more akin to what the state provides to the KKK when they are "permitted" to march, or when a burning cross is protected expression. Such assurance is as good as condoning the behavior.

Taking the example further, imagine that one young member of a household is learning to play a musical instrument. When the child is allowed to play in her room even though and when the rest of the house is disturbed (annoyed/distracted/offended) by the noise – and allowed to play uninterrupted by the other members of the household who are currently disturbed – we can say that the child's playing is protected by a powerful authority. The child, in understanding that her practice is protected, understands that producing this noise is *accepted* and,

furthermore, the right to produce it is deemed important even when it frustrates the calm existence of others around her. The parent may even stand outside the bedroom door and keep others from intruding, which contextually, is a sign of *endorsement*; this is the (important) difference between behavior being unimpeded by intervention and its being protected. The case of Skokie, IL, once again comes to mind. An understanding of the way that protection can be tantamount to endorsement explains how the predominantly Jewish community of Skokie reacted to the government protection for a public KKK march. As mentioned in the Chapter 1, this nuanced distinction would have helped the courts of Skokie, IL argue that a public Klu Klux Klan march can (and ought to) be regulated on grounds that the message is one of racial inferiority.

Protection does not entail endorsement in general, but contextually it will come off that way in certain scenarios (the new musician in the household and the KKK march). We protect what we value. The state claims that what is protected is only and importantly the right to free expression. And yet, in particular contexts, that protection will be (justifiably) read as endorsement of the content of that expression. Here, precisely, is Matsuda's claim and the reasoning behind her argument for the criminalization of hate speech. Matsuda's concern is with state protection, not with unimpeded space.

Butler aligns MacKinnon's project with Matsuda's. Here again from *Excitable Speech*:

In *Only Words* pornography ought to be construed as a kind of 'wound,' according to MacKinnon, because it proclaims and effects the subordinated status of women. Thus, MacKinnon invokes the constitutional principle of equality (the Fourteenth Amendment, in

particular) and argues that pornography is a form of unequal treatment; she takes this discriminatory action to be more serious and severe than any spurious exercise of 'liberty' or 'free expression' on the part of the pornographic industry. That exercise of 'freedom,' she argues, takes place at the expense of other citizens' rights to equal participation and the equal exercise of fundamental rights and liberties. In Matsuda's view, there are certain forms of harassing speech that qualify as discriminatory action, and those forms of racially and sexually based hate speech may undermine the social conditions for the exercise of fundamental rights and liberties on the part of those who are addressed through such speech.

I propose to focus here on the power attributed to the pornographic text to effect the subordinated status of women not to ascertain whether the text does effect that subordination in the way that she describes, but rather to discover what version of the performative is at work in the claim that it does. *MacKinnon's use of the performative engages a figure of the performative, a figure of sovereign power that governs how a speech act is said to act – as efficacious, unilateral, transitive, generative.*⁸³

Beyond some general concerns regarding enlisting judicial power to combat hate speech (outlined above), Butler, in no uncertain terms, identifies the Dworkin-MacKinnon anti-pornography ordinance as a form of state-censorship. However, to claim that MacKinnon and Dworkin have proposed a *prohibitive* policy is, quite simply, mistaken. To make the argument that underneath it all they are suggesting something ultimately (implicitly) prohibitive is a slippery argument to make, and one that stretches the term *censorship* beyond usefulness. A policy that specifies and dictates what can and cannot be said on pain of penalty is a prohibitive policy. The anti-pornography ordinance provides redress for pornography's harms, and pornography happens to be characterized as speech *by the law*; it does not prohibit pornographers from making pornography. If a ladder manufacturer makes a defective ladder and as a result people are hurt, those people have the opportunity (if they choose to take it) to sue the ladder

⁸³ *Excitable Speech*. Pgs. 73-74, emphasis mine.

manufacturer for damages. Such a policy does not prohibit ladder-making. My interlocutor may say that it can be argued, in a roundabout way, that the policy prohibits bad ladder-making in that being open to suit would successfully motivate safe ladder-making over defective ladder-making, but to call such a policy *prohibitive* is a stretch that leaves the argument against bad-ladder-making policies unhelpful. In specifying what they want to prohibit, these detractors have to get very imaginatively involved in what they want to prohibit. I agree with Butler that the military's "Don't Ask, Don't Tell" policy is a prohibitive policy that is plainly wrong on many counts, but lumping MacKinnon's work with this policy misses the mark. MacKinnon is *not* proposing a prohibitive policy; the anti-pornography ordinance makes harmful pornography actionable under the law.

We can assume that Butler may agree with MacKinnon that pornography construed as speech *does* effect the subordination of women. Butler's concern here is that MacKinnon and like-minded theorists construct the performative as having a *kind* of efficacy ("sovereign") that it does not possess and, furthermore, that such a construction actually contributes to the silencing of the victims of hate speech. Now, either MacKinnon does, in fact, construct this view of the performative in spite of her efforts (consciously or otherwise) not to do so, or Butler mischaracterizes the performative employed by MacKinnon *et al.* I argue that although a psychological pining for a clear-cut conception of authority is done by all parties involved in the debate, Butler gets MacKinnon wrong on this point.

That being said: Yes, as Butler suggests, it is at least possible that the military's "Don't Ask Don't Tell" policy is ideologically "supported" by sexual harassment law and its extension into areas of pornography and hate speech: "As difficult and painful as it is to imagine, could the military have targeted this form of utterance as a codifiable offense without the precedent of sexual harassment law and its extension into the areas of pornography and hate speech?"⁸⁴ The (former) military policy relies on a construal of self-identification as solicitation, and solicitation is a form of sexual harassment. Thus, without sexual harassment restrictions there may not have been the conceptual space to support a policy such as "Don't Ask Don't Tell."⁸⁵ What is conspicuously absent from this part of Butler's discussion is the acknowledgement that if you like the first amendment then you *too* are using state power.⁸⁶ The state maintains first amendment protections, and if you accept that protection (and if you like having that protection) then you are, in no uncertain terms, also enlisting state power.

Butler rejects prohibitive policies (such as the military's "Don't Ask, Don't Tell" policy) mostly with the argument that such policies – policies that attempt to circumscribe what can be said – are not cogently possible. These policies *silence* speakers in that they *keep speakers from performing* specified utterances by authoritatively establishing penalties (of varying severity) for speaking, which are backed and enforced by the state. Such enforcement is a type of silencing, but not precisely the type of silencing that concerns MacKinnon. Pornography harms women, MacKinnon argues, in

⁸⁴ Ibid. Pg. 76. One of many rhetorical questions.

⁸⁵ And yet, it's still an unseemly stretch to compare "Don't Ask Don't Tell" to sexual harassment restrictions in general given the often coerced "outing" of gays and lesbians in our culture.

⁸⁶ Does Butler also have a fantasy of sovereign power?

that it silences women. It silences in that the utterances made by particular women about their sexuality – or desire for sex in the moment – are taken as doing something that they do not intend for those utterances to be taken to do. A specific example is the still prevalent problem of “no” getting taken to be “yes.” Pornography constructs and helps to maintain “no means yes” as true in “normal” and “average” sexual encounters. Rae Langton refers to this form of silencing as illocutionary disablement, which is distinct from the form of silencing rejected by Butler when she argues against prohibitive policies. This is all to say that not ALL forms of silencing are the same. Butler agrees that malappropriation of one’s speech act is not only a real phenomenon but is one that should be countered (if not by legal action, then in some other way) – and here, perhaps to their surprise, Butler and MacKinnon are on the same page. Although agreement that illocutionary disablement is a problematic phenomenon for women does not get them very far toward agreement on anything else.

One may be able to make the case, with some nimble argumentative maneuvering, that MacKinnon’s anti-pornography ordinance silences the speech of pornographers in a particular way. The point here is that *actionable under law* is not the same sense of silencing as the sense done by prohibitive policies, such as “Don’t Ask, Don’t Tell.” The anti-pornography ordinance may have the result that pornographers are less likely to make certain kinds of pornography (like ladder-makers are less likely to make unsafe ladders) because of the possibility of paying damages to a harmed person. This sense of silencing is subtle but distinct from circumscribing what precisely cannot be said on pain of penalty. We’ve now delineated three different ways silencing

happens: (1) You are silenced in a way that keeps you from “pulling off” a particular illocutionary act; (2) You are silenced in that you speak and are punished for it (you make a defective ladder and are sued); (3) You are silenced in that you don’t undertake certain illocutionary acts in the hope of avoiding accountability and payment of damages (the ladder-maker who wishes to make unsafe ladders but refrains). There’s an additional form already mentioned: You do something and it gets counted as a particular act that you did not intend (something like *malappropriation* of one’s speech act).

The underlying presumption driving the implementation of “Don’t Ask, Don’t Tell” is the idea that speech is conduct. The military’s policy explicitly considers the utterance that one is gay to *be* homosexual conduct: “A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if the member has stated that he or she is a homosexual or bisexual or words to that effect” (10 USC, § 654, b2). Within the text of the policy, stating that one is gay is no different (and results in no less severe consequences) than engaging in homosexual conduct or intending to marry another of the same sex. But what does this mean precisely? The utterance “I’m gay” is taken to be as good as an invitation to sex.

It’s no harm to note that, in certain imaginable contexts, the utterance that one is gay is, in fact, an invitation (one can imagine the context – uttered in a particular time and space – in which stating “I’m gay” can be “testing the waters” to see if the other is interested). But this is to say nothing more than is already noted by Austin’s analysis of speech acts; namely, the meaning of the utterance is not contained in the locution. The

same utterance can have as many varying forces as there are imaginable contexts. For a simple example, the utterance “Yes” has innumerable applications – it can be a command, a question, an interrogative, a description, and so on and so forth. The military fails to note that the more typical context in which one would explicitly state that one is gay is a “coming out.” When I tell my parents, “I’m gay,” it’s not an invitation.⁸⁷

Section II: Speech acts and sovereign authority

Butler understands the enlister’s push for legislation as motivationally connected to preventing the harm in hate speech. As I said earlier, the thought is that the harm in hate speech is real and warrants a kind of redress as conduct. The implication that nothing can be done to interrupt the harm in hate speech but to prohibit the utterance seems to Butler to presuppose that the speech act is necessarily efficacious when uttered. Butler wants to argue that speech can and, indeed, does act on the world in an injurious way but still is not *necessarily* efficacious, i.e., not sovereign. She thinks the perception of a need to enlist the authority of the state betrays the Enlisters’ erroneous picture of speech and speech acts.

Butler begins:

I propose to review some of the senses in which ‘verbal conduct’ is thought in the proposed hate speech regulation, and to offer an alternative view of how one might at once affirm that language does act, even injuriously, while insisting that it does not directly or causatively ‘act on’ the addressee in quite the way that proponents of hate speech legislation tend to describe. *Indeed, the act-like character of certain offensive utterances*

⁸⁷ I return to this example in my final chapter with the interesting case of the performative turned constative utterance, “I want you.”

*may be precisely what keeps them from saying what they mean to say or doing what it is they say.”*⁸⁸

As we know from Austin, the speech act is *the one that it is* in virtue of the context of the utterance, not the words themselves. Austin identified the locutionary act (the saying of something meaningful in a language) as distinct from the illocutionary act (the doing of something in the saying of something). Think back to my example of Pilot getting picked for the varsity team. The same utterance – “I pick Pilot” – if said in the context of a classroom in which the professor is instructing her students on speech act theory is decidedly *not* the speech act of *choosing*. In this context it may be described as the speech act of *giving an example*. For Butler, the problem is that the Enlisters appear to presume that the context of the speech act is determinable in some exhaustive way; but, of course, the context of any given speech act is never totally determinable.⁸⁹ Butler relies on Austin’s model – specifically that infelicity is a problem to which “all acts are heir” – but she fails to see the pervasive possibility of infelicity in MacKinnon and Matsuda.

The legitimacy of producing certain illocutionary acts is created by the delineation of the speakable (permitted) from the unspeakable (forbidden) by a given authority. For example, the parent in the household has the authority to delineate the speakable from the unspeakable. And yet, conversely, *the possibility to defy the parent is also created by the delineation of the unspeakable*. In simpler terms, we may say to Butler: Sure, the very act of “legislating” creates categories, but the mere constructing of categories does not presuppose that categories must be exhaustively delineable. The

⁸⁸ *Excitable Speech*. Pg. 72, my emphasis.

⁸⁹ The possibility for every speech act of being infelicitous is precisely *how* hate speech is vulnerable to effective responses.

argument that hate speech is socially constructive is not to say that hate speech is always felicitous. When felicitous, hate speech is socially constructive – but infelicity is always a possibility. In fact, as Butler herself notes, infelicity is precisely what also makes the pornographers open to counterspeech.⁹⁰ An implicit reliance on sovereign authority, contrary to Butler's claim, is not necessary for the successful and perhaps even satisfactory use of speech act theory in response to hate speech.

Something about the illocutionary force of the utterance – or, rather, something about locating the harm in hate speech as illocutionary (rather than perlocutionary, we presume) – is problematic for Butler. She thinks it is the “act-like” character of certain utterances that ultimately, and against one's will, creates the possibility of infelicity in that very particular sense of illocutionary disablement; the kind of silencing that gets one's actions taken to be something other than, and even hostile to, what is intended by the speaker.

A quick and dirty detour of note...

Allow me a quick note about the use of the term ‘causal’ in the above quote: “one might at once affirm that language does act, even injuriously, while insisting that it does not directly or causatively ‘act on’ the addressee.” Austin's model clearly distinguishes between the perlocutionary act (that which is brought about by speech) and the illocutionary act (that which is done in speaking). The distinction is there, in fact, to delineate a causal connection between the utterance and the effects, typically in another

⁹⁰ Pornographers are themselves practitioners of perverse infelicity making.

(the perlocutionary act), and the idea that uttering is itself the doing (the illocutionary act). When in the realm of illocutionary acts, a careful analysis of the total speech situation will not refer to the effects of the speech on the audience, whether speaking of a causal connection or some other type of subsequent occurrence. Illocutionary force is socially constructive, not causal.

The small detour was necessary since throughout *Excitable Speech* Butler is concerned with the presumed *causal* efficacy of hate speech. Butler proposes to show how MacKinnon and her fellow Enlisters construct (perhaps unknowingly) a picture of performative speech that forecloses the possibility of the recourse they seek. Namely, Butler claims that those who wish to forbid speech presuppose a type of sovereign authority to speech acts. The argument seems to go like this: Since there is no gap between the act and the utterance – between the illocutionary act and the illocutionary force (here of hate speech) – then there is nothing to do about it but forbid the speech. Thus, there is a type of sovereign authority at play in the illocutionary act and because of that sovereignty there is no way to prevent the harm but to prevent the occurrence of the speech act. I agree with Butler that *if* it were the case that one must presuppose a type of sovereign authority in order to justify the call for legislation then, yes, the arguments in support of forbidding speech would all be exposed to the problems that Butler suggests. However, it appears that one can successfully argue for imposing some form of restriction or liability to legal action without thusly being committed to the universal efficaciousness of the “forbidden” speech acts.

As Butler herself quotes, Austin is clear that infelicity is always a possibility whenever (and from whomever) a speech act is attempted. In *Excitable Speech*, it is unclear whether

1. Butler takes the Enlisters to be presupposing sovereign authority based on the supposition (Butler attributes to them) that hate speech is always felicitous, or 2. Butler takes the Enlisters to presuppose that hate speech is always felicitous because they assume a type of sovereign authority to utterances of hate speech. Most likely she proposes the former: Butler tries to provide evidence that the Enlisters assume hate speech acts to be always and necessarily felicitous. Thus, they presuppose a type of sovereign authority is in play.

But why attribute that to them? It appears that for Butler, the assumption is if hate speech is always necessarily efficacious then there's nothing to do about it but forbid it. You can't interrupt the act and the effect because the act is the doing (illocutionary force) so you can't get between the utterance and the act. When the act works, it works. But it often doesn't! There are a plethora of infelicities. When the context is just right then the speaking is the promising, the utterance is the diss. An analytic truth: When a speech act is felicitous, it's felicitous. When promising is felicitous, a promise has been made. The fact that Enlisters think that hate speech is sometimes felicitous as hate speech is apparently taken by Butler to imply they presuppose that those speech acts are always (necessarily) felicitous.

For Butler, it appears that prohibiting speech also presupposes that a speech act can always have "a" particular force. It is because these theorists (in the "hate speech regulation" camp) propose legislation that we can (must?) presume they are committed

to the view that the context of the utterance be exhaustively specifiable in some universal, consistently applicable way.

So, in response to Butler, we must ask: Does prohibiting speech *presuppose* constructing exhaustively specified requirements on the site of speech? Further, *must* we assume a sovereign authority to speech if we want to assume there is such a thing as illocutionary force? I answer no to “exhaustively specified” even though yes to “specified.” Prohibiting speech acts (not just the uttering of specified lexical items, words) does require some specification of contexts of utterance, but does not require that those specifications be exhaustive. Most prohibitions of acts require some specification of contexts, which is never exhaustive, but that doesn’t prevent us from making laws against, e.g., acts of cruelty to animals. If we were to prohibit hate speech, such prohibitions would require some specification as such (though not *exhaustive*) of the total speech context, but it is not the case that we must assume a sovereign authority to speech when we subscribe to Austin’s model of illocutionary force.

The characterization of MacKinnon as invoking the idea that speech has sovereign power is inaccurate. The efficaciousness (and infelicity) of any speech act is determined by convention. In particular, in order for a particular speech act to do something in the saying of something the speaker must have a certain kind of authority. All speech *acts*, in fact, take a *certain kind* of authority. The speaker is perceived as having authority – more precise still, the speaker is *granted* authority by the person whose uptake is needed in order for the speech act to do what it says. Furthermore, it is precisely this very social character of speech that provides the space for all the

possibilities of counterspeech. The type of authority at play is determined by the type of speech act that is performed in a particular context, and all of that is bound by context, which, in turn, is determined by convention. It's not MacKinnon that invokes power; the whole concept of illocutionary force, what it is and how it works, is a concept that invokes power (including, but not limited to, individual authority) in language. For example, when the umpire calls a "run," the score of the game changes. Clearly, the umpire does not intrinsically have the authority to change the score of the game – authority is bestowed on the official by the very people who are impacted by the official's speech act.

In such examples from Austin, and speech act theorists in general, Butler sees an exaggeration of the unilateral efficaciousness of power. If she were correct, we can imagine that such an exaggeration is a natural consequence to observing the pervasive and constant plays of power in social life – when one feels powerless, then, yes, the response is to enlist state power. Butler seems to suggest that attributing a sovereign power to the performative utterance (as she wrongly claims is done by MacKinnon) is nothing more than a symptom of a psychological longing for the sovereign nature of power in general.⁹¹ Her concern, which is shared by many critics of enlisting state power to counter hate speech, lies in the well-established history of discriminatory practices perpetuated by the state and maintained in law – granting the state the power to regulate speech only provides more opportunities for the degradation of oppressed groups. Butler's concern is warranted and worth our attention but is also, according to

⁹¹ Ibid. Pg. 74.

MacKinnon, overstated. The concern over enlisting state power is its own psychological state, brought on by what MacKinnon calls the “trauma” of McCarthyism.⁹²

In noting the back-and-forth trading of accusations of varying pathologies, perhaps some insight is to be gained regarding what is at stake for the opposing sides of this debate. My own concern with the debate over hate speech regulation consists mainly with the tenor of talking past one another rather than engaging in a fruitful dialogue. Each side poses legitimate concerns, and provides support for the legitimacy of those concerns with persuasive arguments. And yet, any practical recourse to subordination and inequality, as it is perpetuated by hate speech, is delayed by muddying the debate with each side accusing the other of pathology.

A full analysis of the power (whether sovereign or not) of any speech act requires an analysis of the context in which the speech in question is uttered – for Austin, the “total speech situation.”⁹³ What we say and do, and attempt to do and fail to do, with speech is always enmeshed in a cultural matrix. Thus, Butler’s characterization of “total” in “total speech situation” is problematic, if not plainly mistaken. It appears that Butler reads ‘total’ from a Derridian standpoint and just such a reading, although informative philosophically, is not necessary for a politically conscious response to hate speech as *speech act*. Butler reads speech act theory and the “total speech situation” as if Austin were arguing that an analysis of context requires a *complete* description of that

⁹² From *Only Words*, “[T]he examples that provide the life resonance of the expressive freedom...derive mostly from attempts to restrict the political speech of communists during the McCarthy era. Through this trauma, the country relearned its founding lesson: not to stifle political dissent” (74-75). Throughout *Only Words*, MacKinnon argues that the trauma of McCarthyism provides the psychological underpinnings of current first amendment theory, with the protection of women’s inequality as one of the consequences.

⁹³ J.L. Austin, 1962. *How to do things with words*, 2nd ed. Cambridge, Massachusetts: Harvard University Press. Pg. 52.

context. Austin does not suggest such an analysis of speech acts is possible; the total speech situation, for Austin, does not mean “the speech situation, totally specifiable and specified.” Furthermore, even if a complete description of the context were possible, such an analysis isn’t necessary in order to determine which speech acts are performed with success.⁹⁴

*Section III: The case of Anita Hill*⁹⁵

MacKinnon uses the testimony of Anita Hill against Clarence Thomas as an example of one way the sexualization of women is done through words in a world in which pornography provides the definition of sex. MacKinnon writes:

So far I have been discussing words of abuse uttered by dominant others and the way they work as acts of inequality. That sexual words make sex happen, with extended effects on women, is further supported by observing what happens when victims of sexual harassment speak the abuser’s words, testifying to what he said. When she says what he said, what is she *doing*? Anita Hill’s allegations of sexual harassment by Clarence Thomas in his confirmation hearing for the Supreme Court show how sexual words work as acts in racism and sexism by showing what happens when a woman, a Black woman, speaks in public the sex words a man spoke, in isolation, to her.⁹⁶

⁹⁴ It is worthwhile to note here that the various examples employed by both sides of the debate over regulation are of both individual utterances as well as the speech of an institution. Matsuda focuses on the former while MacKinnon is concerned with what “pornography” or “the pornography industry” has to “say” about women. It’s not necessarily problematic to lump these two theorists together in this way, but it’s (once again) slippery. Not least of all because prohibition can’t be done by a broad social institution, such as the media, or the pornography industry. There’s no prohibiting these entities from doing or “saying” something because, in fact, they are not codified entities.

⁹⁵ In the following section I will report on four intersecting themes and will attempt to keep my analysis of each distinct by clearly indicating when each theorist is quoted with in-text citations rather than endnotes. The four are: what Butler says as Butler in *Excitable Speech*, what MacKinnon says as MacKinnon in *Only Words*, what Butler says MacKinnon believes, and how I think Butler gets MacKinnon wrong.

⁹⁶ MacKinnon, Catharine A. 1993. *Only words*. Cambridge, Mass.: Harvard University Press.

MacKinnon is impressed by the pervasiveness of pornography's hold on public consciousness. It seems that women are at a loss – there is no way in which what pornography says can be contradicted. And MacKinnon is right, to a degree; there is a *strong pattern* that happens to women's speech that is supported by the discourse of pornography – for example, in sexual encounters a woman's "no" is taken as "yes." Langton calls this illocutionary disablement – the speaker utters the words with a particular intention in mind but her intention is thwarted. This same problem happens to Anita Hill when she testifies to her abuse at the hands of Clarence Thomas. Hill's utterance "he sexualized me" gets taken as evidence of her own sexual prowess rather than as her victimization.

Butler takes the various examples in MacKinnon's text of *illocutionary disablement* (here more precisely called *illocutionary defeat*) as evidence that MacKinnon is positing a sovereign authority to speech acts – here the "speech acts" of pornography. Butler takes the use of the trial by MacKinnon as revelatory. According to Butler, MacKinnon holds a series of presuppositions about speech act theory that Butler takes to be false. MacKinnon's use of the Anita Hill case exposes those presuppositions. Butler takes up the case to show her readers how precisely MacKinnon gets Austin wrong, mainly as an example of one way that MacKinnon attributes a sovereign power to the speech of pornography – what pornography says, goes. Butler writes:

To the extent that the speaker of hate speech is understood to effect the subordinating message that he or she relays, that speaker is figured [by MacKinnon] as wielding the sovereign power to do what he or she says, one for whom speaking is immediately acting. Examples of such illocutionary performative in J.L. Austin's *How to Do Things With Words* are very often culled from legal instances: "I sentence you," "I pronounce

you:" these are words of the state that perform the very action that they enunciate. As a sign of a certain displacement from the law, this very performative power is attributed now to the one who utters hate speech – thus constituting his or her agency, efficaciousness, and likelihood of being prosecuted. The one who speaks hate speech exercises a performative in which subordination is effected, however 'masquerading' that performative may be. As a performative, hate speech also deprives the one addressed of precisely this performative power, a performative power that some see as a linguistic condition of citizenship. The ability to use words efficaciously in this way is considered to be the necessary condition for the normative operation of the speaker and the political actor in the public domain.⁹⁷

Butler identifies a possible contradiction in MacKinnon's analysis: MacKinnon wants to enlist (and thereby empower women with) the same authority that the authoritative speakers at Anita Hill's hearing use to silence her. As Butler sees it, MacKinnon is (perhaps subconsciously) thinking that the efficacy of pornography is of the same kind as the that of legal speak (what the judge can do, "I sentence you"), and Butler sees this as problematic especially given that MacKinnon wants to employ the efficacy of legal speak against the efficacy of pornography. MacKinnon uses what happened to Hill at the Senate hearings as an example of what she means by pornography's speech against women (and, as Langton explains, its illocutionary force) and, yet, as Butler sees it, MacKinnon's anti-pornography ordinance is an attempt to "give" that same power back over to an authoritative state. Butler reads MacKinnon et al. as identifying legal speak as a paradigmatic example in Austin (e.g. "I sentence you," "I pronounce you") of illocutionary force but that's a crucial misreading of Austin and MacKinnon et al. Legal speak is no more paradigmatic for Austin of illocutionary force than the act of

⁹⁷ Butler, Judith. 1997. *Excitable speech: A politics of the performative*. New York: Routledge. Pgs. 80-81.

christening a ship or the act of promising. The crucial misstep comes when Butler figures the performative as sovereign for these theorists based on their use of these examples.

Butler lays out what she takes MacKinnon to mean in the following: Understood as hate speech, pornography deprives the addressee (the one depicted who is at once presumed to be the one to whom pornography is addressed) of the power to speak. The speech of the addressee is deprived of what Austin called its "illocutionary force." The speech of the addressee no longer has the power to do what it says, but always to do something other than what it says (a doing distinct from the doing that would be consonant with its saying) or to mean precisely the opposite of what it intends to mean.⁹⁸

The case of Anita Hill is an example of how a cultural context, created and maintained by a whole society, can bring about an atmosphere in which an entire social/political grouping of people get their illocutionary acts perverted. Butler rightfully characterizes the scene as a context perfectly aligned to reappropriate a speech act – to get testimony taken in as confession. Butler writes:

In that reappropriative reception by which testimony is taken as confession, the speaker's words are no longer taken as communicating or performing what they appear to be doing (exemplifying the illocutionary force of utterance); they are, rather, a display or enactment of sexual guilt. As Hill utters the sexualized discourse, she is sexualized by it, and that very sexualization undercuts her effort to represent sexualization itself as a kind of injury.⁹⁹

And again, further down:

⁹⁸ Ibid. Pg. 82.

⁹⁹ Ibid. Pgs. 82-83.

This is what some would call a performative contradiction: an act of speech that in its very acting produces a meaning that undercuts the one it purports to make.¹⁰⁰

In the larger social event of the trial – on the TV, in the room, by the whole wider audience – Hill’s words were taken up as *confession*. Confession is contrary to what she intends to do with her speech acts; namely, report her abuse. Through Austin we see that sometimes one or another illocutionary act is done despite the speaker’s intention to perform a different illocutionary act. Unlike involuntary or unintentional action, cultural meaning dictates which illocutionary acts happen. A locutionary act can be unintentional (a slip of the tongue) but illocutionary acts are contextually and culturally specific (“picking” is “choosing” only when the context is such). Illocutionary acts can get done by a speaker who doesn’t intend that particular act to get done and this is different from doing something unintentionally. For example, to say, “I did not intend to warn him” implies that warning is what happened regardless (or in spite of) the speaker’s intention. According to Butler, the construction of the performative as sovereign includes the idea that illocutionary acts are never done involuntarily or unconsciously. But, of course, certain illocutionary acts are and can be done, on occasion, involuntarily and/or unconsciously. Sovereignty has no place in Austin’s picture of performative speech.

In the context of the senate hearings, no one can honestly say that Hill showed up intending to confess – her consent to that particular speech act is absent. I share Butler’s (and MacKinnon’s) concern over the lack of consent, especially when we’re

¹⁰⁰ Ibid. Pg. 84.

talking about not having control over *saying what one means*. What I question is Butler's suggestion that speech act theory presupposes an absolute power in doing what one intends to do – that we have the authority to always do what we say. Again, from

Excitable Speech:

To the extent that she speaks, she displays her agency, for speech is taken to be a sign of agency, and the notion that we might speak, utter words, without voluntary intention (much less unconsciously) is regularly foreclosed by this construal of pornography. Paradoxically, the problem with the pornographic construal of her speech is that it sets her words [what she is taken as doing] against her intentions, and so presumes that the two are not only severable, but able to be posed against one another. *Precisely through this display of linguistic agency*, her meaning becomes reversed and discounted. The more she speaks, the less she is believed, the less her meaning is taken to be the one she intends. But this remains true only as long as the meaning she intends is consonant with the sexualization of her utterance, and the one she does not intend is in opposition to that very sexualization.¹⁰¹

The intention of the speaker and the uptake in the hearer's reality are severable, and, indeed, can be at odds. Hill's testimony specifically is about sexualization. The meaning she intends is, "He sexualized me," which is an accusation against Thomas. Because her testimony had to do with the sexualization of her person by another, in this context conditioned by pornography, her testimony brought on the very sexualization that she wants to defend against. Hill's case is an instance when the content of an utterance in some sense promotes the very severance between what one intend to do with one's words and what happens (that one, in fact, don't want to happen). The case involved

¹⁰¹ Ibid. Pg. 84, my emphasis. I'll pause briefly to note that Butler fails to distinguish Langton's addition of the term "illocutionary disablement" to MacKinnon's discussion of pornography and speech act theory. What Butler is critiquing in this section of *Excitable Speech* is a hybrid of MacKinnon and Langton.

content of a report that is itself fodder for sexualization. The locutionary content of my illocutionary act is contributing to the severing of my will/intention from what becomes the social reality in the discourse. Such cases are exceptional and more likely to befall marginalized and oppressed groups. The hope is to change this.

Butler says it is “precisely through the display of linguistic agency” that the reversal of Anita Hill’s meaning occurs. It is as if the reversal is contained in the very act of speaking. Yes and no. Once again Butler overlooks the *total speech situation* – it is the context constructed and maintained by pornography that “produces” the reversal of meaning. It’s not Hill’s agency that’s making the speech act co-optible (it is because she performs a speech act that there is something there to co-opt). Rather, it is the cultural climate in which she acts (is an agent) – a climate of pornography as normal sexual expression. The fact that Hill is caught in the bind of “testimony taken as confession” that is wrong – that’s the harm, a harm that warrants some recourse. Butler and MacKinnon are as close to being on the same page as they ever are.

Consider the following: There is a range of illocutionary acts that can be performed in any given context. The interaction between context and speaker is rich. Butler sees MacKinnon *et al.* as figuring the performative as sovereign – meaning, the illocutionary force as always efficacious. One thing Hill does *not* do when uttering the words spoken to her is harass another in a sexual manner. She may not pull off *testifying*, in spite of her intention to do so, and she may (as both Butler and MacKinnon describe) pull off *confession* in spite of the absence of intention to confess, but there are still quite a few illocutionary acts that are not done and are not even possible. And, yes,

this example is a case of the illocutionary disablement of women created by pornography. MacKinnon writes:

You are lowered by proving your injury. He is not. He allegedly said these things. If they were said, they were his words. She said them in quotation marks. But it is the woman to whom they are attributed when she speaks them. When she says them, it is believed they are true of her somehow, but not believed of him. ...The offensiveness, the dirt, the uncleanness stick to the woman, the woman of color in particular.

Women know this. It explains their fear of speaking about sexual abuse in public, their sense of revilement when doing so, their shame. It is because of how they are seen.¹⁰²

Again, further along:

Once you are used for sex, you are sexualized. You lose your human status. You are sex, therefore unworthy of belief and impossible to violate. Your testimony that you were sexually abused proves your abuse, which defines you as sex, which makes it incredible and impossible that you were sexually abused. In a world made by pornography, testimony about sexual harassment is live oral pornography starring the victim. Because the account becomes a form of sex, the abuse is rendered consensual in the mind of the viewer.¹⁰³

MacKinnon argues that the kind of illocutionary infelicity ("disablement") witnessed at the Thomas-Hill hearings would be challenged for the first time under law with something like the proposed anti-pornography ordinance. According to MacKinnon, neither current rape law nor current sexual harassment law has found a way to challenge women's lack of sexual credibility (i.e. the presumption that women fantasize or ask for sexual abuse). She says:

¹⁰² MacKinnon, Catharine A. 1993. *Only words*. Cambridge, Mass.: Harvard University Press. Pg. 66.

¹⁰³ Ibid. Pg. 67.

The challenge to pornography as sex inequality is the first time this dynamic has been confronted directly, by any law existing or proposed. Now resistance to that challenge, through invoking speech protection for pornography at work, is being used to attempt to undermine existing protections from sexual harassment and racial harassment as well. Stopping pornography, and with it the sexualization of aggression and legitimized use of women from brothels to courtrooms, is women's only chance to gain, in or out of court, a voice that cannot be used against us.¹⁰⁴

It is unclear whether Butler takes MacKinnon's use of Anita Hill's testimony as an instance of unobserved, internalized racism (here by MacKinnon), or just a problematic example (or both)? At a minimum, Butler is troubled by MacKinnon's use of Hill's testimony as a "paradigmatic" example of pornography's role in the reversal of speaker meaning (or, more specifically, illocutionary disablement); and yet, Butler herself goes on to use the example of Hill's testimony to elucidate Langton's point:

[J]ust as Hill's testimony was converted within the Senate chambers into a confession of her complicity or, indeed, her powers of sexual fantasy, so the speech of the class of persons depicted by pornography, namely women, is converted into its opposite; it is speech that means one thing even as it intends to mean another, or it is speech that knows not what it means, or it is speech as display, confession, and evidence, but not as communicative vehicle, having been deprived of its capacity to make truthful claims.¹⁰⁵

Butler and MacKinnon both are right to describe the speech situation in which Hill testified as one that turned Hill's testimony into confession. Hill's speech act that was intended to have the force of testimony got uptake as having the force of confession with the perlocutionary effect of the overt sexualization of the entire scene. And, as

¹⁰⁴ Ibid. Pg. 68.

¹⁰⁵ Butler, Judith. 1997. *Excitable speech: A politics of the performative*. New York: Routledge. Pg. 85.

Butler has described above, it thus appears that Hill cannot do with her words what she wants to do. More from *Excitable Speech*:

Indeed, the act of speech, though it signifies agency, *undoes itself* precisely because it does not say what it means; the act of speech implicates an always already active and choosing being, indeed, a consenting subject whose “no” is always undercut by her implied “yes.” Although this attribution of a reversed intention effectively violates the sovereignty of the speaking subject, it seems equally true that this account of pornography also exploits a certain notion of liberal sovereignty to further its own aims, insisting that consent always and only constitutes the subject.¹⁰⁶

Further along in the text, as she continues her assault on the Austinian speech act, it appears that Butler loses sight of the nature of authority as it is precisely constructed in Austin’s project. Namely, Butler gives insufficient attention to the notion that the more authority the speaker has the less influence others have over what is actually said/done (versus uttered and intended) by the speaker in a given context.¹⁰⁷ Butler writes:

For if one always risks meaning something other than what one thinks one utters, then one is, as it were, vulnerable in a specifically linguistic sense to a social life of language that exceeds the purview of the subject who speaks.¹⁰⁸

¹⁰⁶ Ibid. Pg. 85, my emphasis.

¹⁰⁷ As far as Butler is working within a Derridian framework, the speaker is not even in total control of her own intention. Intention is also socially constructed – there’s no part of the “individual” that is not infused with society. In the context of this project, MacKinnon and Butler are two theorists from different philosophical zones and I don’t think we need to bring them together into one, shared frame of thinking.

¹⁰⁸ Ibid. Pg. 87.

Butler figures MacKinnon as figuring the performative as sovereign and in so doing (in her quest to establish the sovereign nature of power as she sees it at work in speech act theory) Butler imposes a one-way street of power as though Austin's theory locates power only with the speaker. Austin's theory, however, provides a picture of authority that is wholly conventional; it is located, gained, wielded, and lost only within a complex social matrix. The very reason pornography has the "authority" to construct and maintain the illocutionary disablement of women's speech about sex (e.g. "no means yes") is because that authority is "granted" and re-granted by an "audience" (here, the members of our linguistic culture). Thus, women do *not* "always risk" meaning something other than what one wants to mean any more than pornography is always at risk of losing the meaning and hold on society that it currently enjoys. In some very generic way every speaker always risks illocutionary failure or illocutionary defeat. Situationally, it's more complicated. Women are subject to more risk of illocutionary disablement than the pornographers. *Butler proposes a characterization of the performative (as it is employed in arguments for hate speech regulation) in which there is seemingly no escape from the pitfall of a type of silencing, discussed previously, which Rae Langton has termed **illocutionary disablement**.*

Concluding Remarks

Butler's interlocutors are exercised by the power of certain utterances *to act*. (Butler herself wants to distinguish between speech that acts and speech that "acts on" the audience.) She takes those theorists to be exaggerating the power of speech and, yet,

Butler appears to be exaggerating the opposite. She calls the picture of the performative, as it is found to be (by her) in MacKinnon et al, the “overdetermination” of language. What happens, rather, is that Butler overstates the underdetermination of the performative – not only is the conception of the performative at work in MacKinnon not as deterministic as Butler describes, but Butler herself paints an “all or nothing” picture of illocutionary force. Consider this: Sometimes when a punch is thrown it lands and sometimes it is blocked – and only when it lands does the “thrown punch” become a “hit.” Just because in this instance you got hit doesn’t mean there is never an opening for counter-action; and just because sometimes, in some cases, you block the punch it still does not follow that you will never be hit. Just because my speech act in this instance was infelicitous does not mean it will be in the next instance, in the next context. *For Butler, it appears that there’s nothing between “sovereign” and “impotent” and in so doing she misses the opportunity to use speech act theory to its fullest potential as an approach to recourse against hate speech.* No wonder there’s not a more robust explanation of resignification – we are unable to tell what resignification entails because we do not have in Butler an analysis of the speech act. Resignification is a response to something – but to what? The “hail” calls the other into being – shifting the power of response onto the hearer in virtue of recognizing the hearer as an agent – the-one-who-disses unwittingly transfers some power to the responder, but without a more robust analysis of the speech act that is done by the disser we have no hope of contextualizing the hearer’s response.

Here's a shift in focus on the context: Look! The hearer is being uncooperative. And look how powerful and effective uncooperative engagement can indeed be. Now is the time to give that power to Anita Hill rather than the committee at the Senate hearings. Butler is *overly* committed to the pervasiveness of infelicity -- illocutionary defeat is but one possible infelicity, and infelicity happens. She thinks her interlocutors miss this idea on at least two counts: First, proposing legislation presumes there are at least some contexts in which infelicity can be written out. The law would make it so. And second, in MacKinnon *et al.* there is the suggestion that the same illocutionary act is sovereign in one area (for men, against Anita Hill) but not in another (for women, Anita Hill's testimony) perpetually resulting in the illocutionary disablement of women. When we subscribe to the claim that illocutionary acts are sometimes felicitous – sometimes the deed is done in the uttering – we need not subscribe (by some logical connection, as Butler seems to claim) to the idea that a given speaker can have the “final word” in a moment. The done deed need not be the last deed; the dissed person can “hit back,” e.g. with irony or reframing the deed so the deed is done but uncool or, for example, the insult is only a jest. This leads us to considerations of effective counterspeech. I turn now to a shift in focus from the role of the speaker to the role of the audience in any given speech situation and a concept I call *uncooperative engagement*.

Chapter 4: Illocution, Intention, and the Role of the Hearer

In the following discussion I introduce Grice with the interest of establishing alternate modes of social intervention, short of a call to the state. An analysis of the Gricean model of meaning will provide an alternate view of the hearer/audience – one in which that role is quite powerful. In the preceding chapter we saw Butler attend to the feeling of helplessness on the part of the victim of hate speech – we are often undone by the force of the hate-speaker’s speech – but we are also in a position to respond. Butler fails to attend to the role of the audience in speech act theory. In her construction of the enlister’s argument, Butler attributes to the enlists a type of absolutism and yet she adopts a type of reverse absolutism – *the performative is either sovereign or it is impotent* – but such a construction is mistaken: sometimes the performative actually does work even though infelicity is always a possibility. More importantly, sometimes *the audience* can introduce infelicity into the talk exchange.

As mentioned earlier, in Grice we see that humans are beings that interpret constantly – we are intensely social and we are intensely socialized to read each total speech situation “correctly,” in accordance with the current cultural norms and conventions; in Grice’s terms, to *engage cooperatively*. Someone hails me and I’m there, responding. Learning to respond but to engage uncooperatively is perhaps the most difficult political move to make – these situations have a manipulative/coercive dimension – but it is a possible move and one that is politically viable.

Section I: Speaker Meaning

In his much-cited 1957 paper on the subject, Grice proposes a psychological theory of meaning (as an alternative to the causal theory) in which meaning is determined by much more than the words uttered. The suggestion that utterances neither contain nor convey anything but their literal meaning is best characterized, and most widely cited, by Donald Davidson in his piece, "What Metaphors Mean" (1978). Davidson claims that, quite simply, "metaphors mean what the words, in their most literal interpretation mean, and nothing more."¹⁰⁹ He posits a causal relationship between the utterance and the hearer's response. If anything, according to Davidson, the metaphor nudges us to notice something, not unlike a bump on the head.¹¹⁰ Grice's theory of meaning is in direct contrast to Davidson's – it takes much more than something like a bump on the head to grasp the meaning of an utterance.

In *Meaning*, Grice begins by calling our attention to the difference between what he calls *natural* meaning and *nonnatural* meaning. The natural meaning of an utterance is less bound to convention than the nonnatural meaning, as in the sentences "Those spots mean measles" or "Those black clouds mean rain." Those spots are measles and that's what clouds look like when it's going to rain. Grice contrasts the former with sentences such as "Three rings of the bell means the 'bus is full'" or "That remark means that his wife is indispensable."¹¹¹ As a first approximation, Grice contends that the nonnatural is *cancelable* – a notion he develops further when attending to conversational implicature – while natural meaning is not. In other words, it is possible

¹⁰⁹ Donald Davidson, "What Metaphors Mean." 32.

¹¹⁰ Ibid. 41.

¹¹¹ Grice, 1957. *Studies in the Ways of Words*. 213-214.

that the driver of the bus got it wrong. One could respond, “But the driver got it wrong, the bus isn’t full” while it does not make sense to report, “Those spots meant measles but she didn’t have measles.” The rest of the 1957 paper lays out a series of examples that push this notion of nonnatural meaning. In these first few formulations of his theory of meaning, Grice confines his analysis to a speaker’s/agent’s nonnatural meaning when s/he utters something (although all of his examples are non-verbal) to an audience on a particular occasion. Grice called it *nonnatural occasion meaning*, but it is commonly referred to in the literature as *speaker meaning*. For my purposes (finding ways to thwart the intentions and effectiveness of the hate-speaker) an analysis and application of *speaker meaning* will suffice.

Grice’s first two attempts at an adequate description of speaker meaning leave him unsatisfied. For S to (speaker) mean something S must intend to produce a belief in an audience. But consider, Grice says, that I leave a handkerchief at the scene of a crime intending to produce the belief in the detective that Smith is the culprit. Smith’s handkerchief at the murder site may very well induce that belief in the detective even if I drop it accidentally as I flee, not intending to produce any belief at all in any audience by my accidental gesture. So this first formulation is incomplete. Next, Grice considers King Herod’s presentation of John the Baptist’s head on a silver platter to Salome. Clearly Herod intends to produce the belief in Salome that John the Baptist is dead and intends that Salome recognize him as having that intention. And yet, similar to the case of Smith’s handkerchief, Salome can come to believe that John the Baptist is dead regardless of Herod’s intention to have Salome recognize that he intends her to believe

that John the Baptist is dead. All she has to do is look at the severed head to have the belief that the man is dead. There still appears to be a gap between Herod's intention and Salome's response. Anita Avramides explains why this second formulation still won't do for Grice:

What is missing is some link between the audience's recognition of the speaker's intention and the response the audience is intended to have. We need in the analysis a condition ensuring that communication is essentially dependent upon the audience's recognition of the speaker's intention. Without such a firm anchoring in the psychological, there will be no difference between "letting someone know" (or "getting someone to think") and "telling." It is the latter that is crucial to understanding nonnatural meaning.¹¹²

Grice's next example is meant to show the difference between "letting someone know" and "telling." Suppose that I show Mr. X a photograph of his wife and Mr. Y together intimately posed. Grice draws our attention to the difference between showing Mr. X a photograph and drawing him a picture of his wife and Mr. Y together intimately posed. According to Grice the latter example captures my intention to produce a belief in Mr. X plus my intention that he recognize that I intend to produce a belief plus my intention that the belief Mr. X comes to have about his wife and Mr. Y is due at least in part to his recognizing my intention. It is this complex intention that is the sense of the expression "means" that Grice wants to illuminate. In the following passage, Avramides summarizes the point of the analysis:

Grice's analysis of nonnatural meaning begins with the following rather obvious observation: the difference between a mere sound and an act of communication is that when there is communication, human beings with appropriate audience-directed beliefs and intentions produce the sounds.

¹¹² Avramides, Anita. Pg 44

To capture this difference Grice makes it a condition of the analysis that the audience's response be occasioned by its recognition of the speaker's intentions. As Grice explains, it must make a difference to the effect the utterance has on A (i.e., a difference to A's response) that A takes the utterance to have been produced with a certain intention to convey information.¹¹³

Meaning, according to Grice, cannot be separated from intention – meaning *is* intending by uttering the expression that my utterance produce a particular effect in an audience via the audience's recognition that I have an intention to produce that effect. It is in just this way that Grice's theory of meaning (specifically, speaker meaning) prompts a closer look at the extensive (and often subconscious) cooperation that both the speaker and the audience must contribute in any given conversational exchange. The players are hard at work (subconsciously, mostly) toward a shared end goal – communication! In order for an utterer to *mean* something in the Gricean sense, and their interlocutor to *get their meaning*, many overlapping assumptions are in play on both the part of the speaker and the hearer.

Grice's *nonnatural occasion meaning* nicely illustrates the requirements on the audience to read the speaker's complex intentions and to fulfill some or all of them (but more on this later). A working definition of nonnatural occasion meaning from Grice goes like this:

“*U* meant something by uttering *x*” is true iff, for some audience *A*, *U* uttered *x* intending:

- (1) *A* to produce a particular response *r*
- (2) *A* to think (recognize) that *U* intends (1)
- (3) *A* to fulfill (1) on the basis of his fulfillment of (2)

¹¹³ Ibid. pg. 45

The above is taken from the version of “Utterer’s Meaning and Intentions” found in *Studies in the Way of Words*.¹¹⁴ Returning now to the example of Herod, Salome, and John the Baptist’s head on a platter. Herod tells Salome that John the Baptist is dead by presenting her with his head. In order to say, according to Grice, that Herod “tells” Salome that John is dead (rather than merely “lets her know”) we must assume several concurrent intentions (in Herod) and simultaneous recognition (in Salome). Herod means_(nn) that John is dead if and only if Herod intends to produce response *r* (that Salome believe that John the Baptist is dead); Herod intends that Salome recognize Herod as having this intention; and that Salome’s response *r* arise at least in part because of her recognition of Herod’s intention to produce that response.

Grice recognized that often we (as speakers, wishing to communicate) intend to mean something in particular and we have not successfully communicated unless that intention to produce a certain response in our audience is recognized by the audience in question as, specifically, wishing to produce that particular response. Grice would say we have not “said” something unless this condition is met. With Grice’s theory of nonnatural meaning we have the key element that turns noise into *communication*.

I see the analysis of speaker meaning, coupled with an illustration of conversational implicature, as providing a schema, based on Grice’s model, for interrupting the harm in hate speech. Cooperation with the underlying intentions of conversation is required. The hearer must attend to the Cooperative Principle – along with the maxims Quantity, Quality, Relation, and Manner – and assumes that the

¹¹⁴ Ibid. 92.

speaker is following along, and takes the speaker to assume that she (the hearer) is following along too. The hearer must *infer* the speaker's meaning, which is available to the hearer in virtue of these overlapping assumptions, along with background information and any shared knowledge that exists between the hearer and the speaker. The method of interruption that I explore I call "uncooperative engagement." I begin with several examples that illustrate nonnatural occasion meaning.

To mean something through saying is to intend for the hearer to "get" you. The speaker's initial intention is internally complex. The audience is required to make several inferences, something akin to reading the speaker's mind.¹¹⁵ The feature of Grice's work worth special attention is the role of the *hearer* and the indispensability of that role for utterance *meaning* (and, thereby, for the intended felicity of our speech acts). He explicitly attends to the importance of the role of the hearer (certainly more so than Austin), but even Grice fails to see the robustness of his own model when it comes to the hearer's involvement in what gets said.¹¹⁶ But more on that later.

The Cooperative Principle

It is perhaps the simplest point that H.P. Grice ever made on the subject of meaning: when two speakers enter into any type of conversational exchange they do so *cooperatively*. Less simple is the series of overlapping intentions and assumptions that happen in rapid succession in the minds of each of the players in even the most

¹¹⁵ So much is going on, in fact, it is a wonder that anything ever gets communicated successfully, ever! Let alone the sheer magnitude and pervasiveness of successful conversational exchange.

¹¹⁶ In fact, I imagine that Butler would have found more support in her effort to show the supposedly sovereign authority of the speech act in Grice's model over Austin's.

mundane conversational exchanges, as seen in the previous section, but, first and foremost, whenever we enter into any type of conversational exchange, we enter cooperatively.

We begin with the expectation that all parties involved are following (implicitly, subconsciously) the Cooperative Principle and its attendant maxims. Grice introduces The Cooperative Principle in his work, “Logic and Conversation”:

Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction. This purpose or direction may be fixed from the start... But at each stage, *some* possible conversational moves would be excluded as conversationally unsuitable. We might then formulate a rough general principle which participants will be expected (*ceteris paribus*) to observe, namely: Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged. One might label this the Cooperative Principle.¹¹⁷

To illustrate the Cooperative Principle at work, Grice gives us the example of happening upon a stranded motorist. Player 1 in the exchange starts the conversation with, “I’m out of gas,” to which Player 2 replies, “There’s a station around the corner.” In this example there’s a clear purpose or direction the conversation is meant to go. Player 1 takes Player 2 to mean that the solution to her problem is nearby – but that is not what Player 2 has actually *said*. Here are just a few of the facts that Player 1 (motorist) assumes Player 2 (passerby) to believe to be the case:

1. Said station is the type of station needed (here, a gas station).
2. Said station is open.

¹¹⁷ Ibid. 26.

3. Said station is the closest one to us.
4. Said station is functioning at present.

Note how much Player 1 (now the hearer) has to undertake just to “get” what Player 2 is thinking. When we unpack what it means to follow the Cooperative Principle – even in this very simple exchange – we see various assumptions at play. In Gricean terms, each of the above assumptions aligns with a general maxim for successful conversation, namely the maxims Quantity, Quality, Relation, and Manner. Again, from Logic and Conversation:¹¹⁸

1. *Quantity* – Make your contribution as informative as is required (for the current purposes of the exchange). Do not make your contribution more informative than is required.
2. *Quality* – Do not say what you believe to be false. Do not say that for which you lack adequate evidence. That is to say, try to make your contribution one that is true.
3. *Relation* – Be relevant!¹¹⁹
4. *Manner* – Be perspicuous! In other words, be brief, be orderly, avoid obscurity of expression, and avoid ambiguity.

¹¹⁸ Ibid. 26-27.

¹¹⁹ Grice elaborates: “Though the maxim itself is terse, its formulation conceals a number of problems that exercise me a good deal: questions about what different kinds and focuses of relevance there may be, how these shift in the course of a talk exchange, how to allow for the fact that subjects of conversation are legitimately changed, and so on. I find the treatment of such questions exceedingly difficult...” I, too, see a particular specialness to the maxim of Relation. It may be the almost constant attention to keeping our utterances relevant that ever gets anything like communication done. And, thereby, it will be attention and purposeful misreading of Relation that will present the opportunity for *uncooperative engagement*.

Player 1 assumes that Player 2 is saying something true or at least for which she has good evidence (Quality). If it turns out there's a closer gas station and Player 1 knew of it, then the utterance violates Quantity. There's also an assumption that said station is open for business and able to provide gasoline (Relation). If Player 2's response had been something like, "It's 9 AM," Player 1 must assume that the time is relevant to the conversation at hand (perhaps Player 2 thinks the gas station isn't open or may not be). If it's not – if Player 2 is just giving me the time – then Player 2 is violating the rule of Relation. If the response was "There's a gas station around the corner but it's 9 AM," Player 1 must assume that Player 2 thinks the gas station isn't open yet (or Player 2 is violating Quantity). The "reading" of Player 2's response as "there is gasoline close by but not yet available" is what Player 1 does readily – we *all* do when both players quietly go along with the assumption that the Cooperative Principle is being followed. The brief response by Player 2 is following the maxims Manner and Relation. If Player 2 had said something like, "There's an off-brand station around the corner," then Player 1 assumes that 'off-brand' is *relevant* to the conversation at hand. If either turns out to be false then Player 2 has violated one or more of Grice's conversational maxims.

Grice – interestingly, I think – draws an analogy between the above verbal exchange and nonverbal "transactions." For instance, if you are assisting me to mend a car or bake a cake, I expect you will not hand me four screws when I only need two at that moment, or you've violated Quantity. If I need sugar, do not hand me salt (Quality).

These analogies are relevant to what I regard as a fundamental question about the Cooperative Principle and its attendant maxims, namely, what the basis is for the assumption which we seem to make, and on which (I hope) it will appear that a great range of implicatures depends, that

talkers will in general (*ceteris paribus* and in the absence of indications to the contrary) proceed in the manner that these principles prescribe. [I]t is just a well-recognized empirical fact that people do behave in these ways; they learned to do so in childhood and have not lost the habit of doing so; and, indeed, it would involve a good deal of effort to make a radical departure from the habit.¹²⁰

Grice sees the analogy between verbal and nonverbal utterances as illustrative of the commonality of the Cooperative Principle and its attendant maxims. I see the analogy between verbal exchanges and nonverbal transactions as relevant on another level; namely, meaning arises through action. It is the *act* in “speech act” that is the relevant feature. It is the *act* that may harm someone, not the words. In Austinian terms, it is the illocutionary force of the utterance, uttered in a complex speech situation – and not the locutionary act – that is the relevant feature. When the maxims are violated, implicature arises. In the following section I explore Grice’s notion of conversational implicature – a feature of language fundamental to the job of “reading” the speaker badly and on purpose.

Conversational Implicature

As mentioned above, the calculations figured by both parties in any conversational exchange are complex, practically instantaneous, and often enough erroneous – but the truly amazing bit is that we get heard and understood much of the time. Grice describes the calculation for conversational implicature as follows:

To work out that a particular conversational implicature is present, the hearer will rely on the following data: (1) the conventional meaning of the

¹²⁰ Ibid. 29.

words used, together with the identity of any references that may be involved; (2) the Cooperative Principle and its maxims; (3) the context, linguistic or otherwise, of the utterance; (4) other items of background knowledge; and (5) the fact (or supposed fact) that all relevant items falling under the previous headings are available to both participants and both participants know or assume this to be the case. A general pattern for the working out of a conversational implicature might be given as follows: "He has said that p; there is no reason to suppose that he is not observing the maxims, or at least the Cooperative Principle; he could not be doing this unless he thought that q; he knows (and knows that I know that he knows) that I can see that the supposition is that he thinks that q is required; he has done nothing to stop me thinking that q; he intends me to think, or is at least willing to allow me to think, that q; and so he has implicated that q."¹²¹

Note how much the hearer has to do in order to "get" the intended meaning of the speaker's utterance – leaving the hearer anything but powerless to respond in ways that interrupt the speaker's intention.

Returning now to Pilot and Team Apple, imagine that Pilot is a member of the junior varsity team and knows that try-outs for the varsity squad are today, in the gym, at 3 o'clock. Imagine that Captain Orange approaches Pilot in the hallway prior to try-outs.

Captain Orange: "See you today at 3 o'clock."

Pilot: "I'll be there."

Given the relationship and background knowledge that Pilot and Captain Orange share, we understand the above exchange as one in which Captain Orange means for Pilot to recognize her intention that Pilot try out for a varsity seat. In turn, Pilot recognizes that intention and, in reply, means for Captain Orange to recognize that she

¹²¹ Ibid. 31.

recognizes that intention. What Pilot means by her response is that she plans on trying out. All through *Logic and Conversation* we see how struck Grice was with the difference between *what is said* and *what is meant*. He argues that Captain Orange means (something like) “I expect you’ll be at try-outs today” when she utters “see you at 3 o’clock.” Any other reading of either utterance would presume that the speaker violated the maxim of Relation. Now, in this example, the utterance “I expect you’ll be at try-outs today” is *not* what is said. *What is said* is “See you today at 3 o’clock.” Here is where a description of *conversational implicature* is helpful. The way that Pilot correctly “reads” what Captain Orange means – in effect, reads Orange’s mind – is by assuming that Captain Orange is attending to the Cooperative Principle and maxims and, in turn, that Captain Orange assumes Pilot is playing along. Assuming that all parties involved in the conversational exchange are following the Cooperative Principle, and assume that of each other, then Pilot reads Captain Orange’s utterance as implicating that Pilot should try-out, otherwise the utterance would violate at the least the maxims of Quality and Relation.¹²² There are endless, fun examples of purposefully violating one or more maxim in order to generate implicature. Grice’s example: Player 1 says, “Smith seems to be getting on” and Player 2 replies, “He hasn’t been to prison yet.” Given the players’ shared background information, Player 2’s response is (likely) obviously true to both, therefore a violation of Quantity (more information than required). Assuming Player 2’s

¹²² There are a host of ways in which Pilot can “get it” wrong. For instance, if C.O. is also the hall monitor then Pilot may take him to mean that he just got detention. Such a reading illustrates the possibility of uncooperative engagement. Pilot knows C.O. as the coach and the hall monitor (both social positions are held at the same time) and he shows up for try-outs rather than detention. Pilot has read the utterance as made by his coach and willfully ignores the utterance as made by the hall monitor. We’ll return to this example in the following chapter on ways to be uncooperative.

utterance is relevant to the conversation at hand, we then “get it” that Player 2 means Smith is less than well but better than incarcerated.

An everyday example

Imagine that my trusted housemate, who is also my friend, utters the words to me, “Dinner’s ready,” and means something by them. Suppose that we have agreed that she is making dinner that evening for the house while the rest of us work. I know that dinner is being prepared for me so I continue to work expecting that I’ll be alerted when it’s time for me to stop working and join the group. What she means by “Dinner’s ready,” we assume (via conversational implicature) is “Come to the table” and her intention is to get me to show up. A Gricean analysis unfolds as such: Speaker *S* (my housemate) means_{S(nn)} (“Come to the table”) by uttering *x* (“Dinner’s ready”) if and only if she *intends*...

- (a) to produce a certain response *r* (the belief that dinner is ready)
- (b) that I (her audience) recognize her as having the intention to produce response *r* in me.
- (c) that my recognition of her intention (a) is at least in part the reason that my response *r* arises.

Here’s where the doctrine of implicature comes into play: My belief that dinner is ready is secondary – or, even, unnecessary (do I really have to believe that dinner is ready to know that I’m meant to come to the table now?) – to the belief that I am to join my housemate for dinner now. The calculation that the audience has to do in order to fulfill

the speaker's intentions is complicated and conversational. And, yet, we do pull off this complicated calculation and instantly "read" the intended response. Conversational implicature and the maxims that govern adequate communication help show how something like illocutionary construction is done (and so quickly!) by the audience. In saying, "Dinner's ready," the speaker intends to get the response of you having the belief that you are expected at the table and she expects that you will do that by coming to the belief that dinner's ready. If my housemate only intended to produce the belief in me that dinner is prepared then her utterance violates the rule of Relation – there is no identifiable reason for her to tell me that dinner is ready unless she is expecting that I am interested in knowing when dinner is ready.

Section II: The connection between felicity and nonnatural meaning

There are a myriad of ways, as Austin noted, that a speech act can be unhappy. Sometimes the deed gets done; sometimes the deed does not get done; and sometimes the deed is done but infelicitously – it is flawed in some way but still done.¹²³ The relative happiness/unhappiness of the speech act, in Austinian terms, is an interesting concept, rich with epistemological merit. It is notable that Austin introduces *infelicity* early on in *How To Do Things With Words*.¹²⁴ Long before he introduces the locutionary/illocutionary/perlocutionary distinction, he introduces the idea that the performative utterance can fail in a multitude of ways. This from *How To Do Things With Words*:

¹²³ The richness inherent in the concept of infelicity is an important concept for the development of a third path, but more on that in the next chapter.

¹²⁴ Austin, Lecture II.

To bet is not, as I pointed out in passing, merely to utter the words 'I bet, etc.': someone might do that all right, and yet we might still not agree that he had in fact, or at least entirely, succeeded in betting. To satisfy ourselves of this, we have only, for example, to announce our bet after the race is over. Besides the uttering of the words of the so-called performative, a good many other things have as a general rule to be right and to go right if we are to be said to have happily brought off our action. What these are we may hope to discover by looking at and classifying types of case in which something *goes wrong* and the act – marrying, betting, bequeathing, christening, or what not – is therefore at least to some extent a failure: the utterance is then, we may say, not indeed false but in general *unhappy*. And for this reason we call the doctrine of *the things that can be and go wrong* on the occasion of such utterances, the doctrine of *Infelicities*.¹²⁵

In general, a speech act is unhappy if some or other sin is committed against one of the following six rules:

- (A) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances.
- (B) The particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invokes.
- (C) The procedure must be executed by all participants both correctly and
- (D) Completely
- (E) Where, as often, the procedure is designed for use by personas having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the

¹²⁵ Austin, pg. 14.

procedure must in fact have those thoughts and feelings, and the participants must intend so to conduct themselves, and further

(F) Must actually so conduct themselves subsequently.

Austin's paradigm example is of a marriage ceremony gone awry. All the contextual, conventional relationships must be in place if two people are to happily perform the speech act of marrying. For instance, if one or the other participant really does not want to marry the other (i.e., the act is insincere – a type of abuse) then they do not felicitously marry. If the officiant is not sufficiently certified, they do not felicitously marry (i.e., a misexecution – the act misfires). In some states, if the two are of the same gender, they do not felicitously marry. All while uttering the words, "I do."

The above are examples of a few infelicities that can interrupt the intended speech act – the act is done but flawed. Except for maybe the last: It is interesting to note that uttering the words "I do" in the context of a marriage ceremony but in a state in which it is expressly illegal to marry someone of the same gender as you is nothing more than making noises, at least when it comes to the felicity of the speech act of marrying.

Here I'd like to pose a question to which I don't yet have the answer: Is it that the intended illocutionary act was not done or that there was *no* illocutionary act? An answer to this question will have something to do with whether our analytical focus is the speaker or the hearer. For example, let's imagine that a non-speaker of Italian is prompted to say various cuss words in Italian to an audience of Italians. Does she cuss? Perhaps not, but she does something. Mimic? Recitation? Similarly, if you call the

Queen “fat and ugly” it’s unclear that you can accomplish insulting her – a commoner cannot accomplish that act in relation to the Queen – but do you actually perform no illocutionary act? It’s exciting to imagine that if everyone in the world held that much respect, we would do away with hate speech. When we’re focused on illocutionary acts, it makes more sense to me to say that the intended illocutionary act may not get done but that some illocutionary act is accomplished. Illocutionary acts are socially constructed – which makes them dynamic, sometimes unavoidable, but also malleable. So, the audience has the power to make the hate speaker no more. The objective of this project is to cultivate situations/conventions in which hate speech is a non-starter – it doesn’t get done. In other words, a world in which there is no convention for hate speech.

Through a Gricean lens we see the role of the hearer as particularly significant for *the felicity of the speech act*. The hearer not only has to read the situation but also has to assume that the speaker is following the maxims (Quantity, Quality, Relation, Manner) – or that the speaker is purposefully violating one or more of those maxims to generate implicature. When all is read by the audience “correctly” or “appropriately” then we may call that *uptake* (an Austinian term). Thus, (and here’s the rub) the hearer can also *interrupt* an illocutionary act by engaging in unexpected and unconventional ways. Some things just don’t get *done* if maxims are not followed *by the speaker* and inferences are not made *by the hearer*. For instance, to invite felicitously the speaker requires more on the part of the hearer than to simply “hear” (or, we would also say, “receive”) the invitation. The speaker has various intentions and the hearer reads the

intentions but also fulfills them – thus, there are two ways the speaker’s act can be thwarted.

Imagine Player 1 (speaker) says to Player 2 (invitee), “join me.” (The words used to invite can range from the informal – “Join me” – to the formal – “You are cordially invited to attend...”) On this model, a break down of the act looks like the following:

- i. Player 2 takes Player 1 to be sincere (which, in this instance, may mean that Player 2 takes Player 1 to be *intending* to invite, or serious about inviting and not joking around).¹²⁶
- ii. Player 2 takes Player 1 to be providing all the relevant information, at least for this moment in the conversation. (If Player 2 asks Player 1 where the event is taking place and she responds that she doesn’t know, then Player 2 will justifiably reconsider whether or not Player 1’s invitation is “real”).
- iii. Player 2 takes Player 1 to be saying something relevant in that, for instance, if Player 1 goes on to discuss colonizing Mars, Player 2 may take Player 1 to not have intended to invite her to anything possible at all.

If you invite – you say, “join me” – but you give a location that cannot possibly be met by the recipient (“Mars”) then you haven’t really accomplished inviting the person. If you invite – you say, “join me” – but you’re visibly intoxicated when speaking then you

¹²⁶ If we were talking about *constatives* (rather than performatives) the maxim of quality would refer specifically to *truth* or that the speaker has reasonable evidence to say what she says. But we’re not...performatives are the not the sort of things that are true or false. Rather, the performative is taken to be sincere when the Cooperative Principle is being followed.

haven't *feliculously* accomplished inviting the person. Just as we have seen with Grice, Austin's picture illuminates the web of complications and complexities that both the speaker and the hearer must interpret and navigate in order to get anything actually *said*. For Grice, in order for the utterance to count as a "real" invitation (likewise, for Austin, for the speech act to be felicitous), Player 1 assumes that Player 2 assumes that Player 1 is following the maxims of Quantity, Quality, Relation, and Manner. Likewise, Player 1 assumes that Player 2 is following all the same maxims.

Background information and any shared knowledge there is between Player 1 and Player 2 will also inform how closely everyone is assuming everyone else is following the maxims. If the speaker is someone who has bullied or alienated the hearer regularly in the past then the hearer likely will infer that the speaker is not being truthful or real in her invitation. Plainly put, the hearer may take the speaker to be playing a cruel joke or trying to be hurtful if the speaker is someone who has made it known that she doesn't appreciate your company. This is but one example showing the role of the hearer in the felicity conditions of the speech act – the hearer must assume that the speaker is following the maxim of Quality (and Quantity, Relation, and Manner) and can, given the conditions and background information, infer otherwise.

To determine the illocutionary force of an utterance we typically attend to the speaker and the conditions that accommodate the speaker in accomplishing her speech act felicitously. That is to say that Austin's model focuses on the speaker and the act while Grice's model attends more directly to what gets *said*, which includes the role of the hearer.

In short, a Gricean lens gives us a picture of what the speaker is attending to but also what the hearer must attend to in order for the invitation to get done as an invitation.

Continuing on with the example of inviting: Consider again for a moment the violation of Quantity that you have performed if, for instance, you invite – you say, “join me” – but tell the recipient that the party is “somewhere on Main Street” then you haven’t really accomplished inviting the person. In fact, you may have accomplished something entirely different (via implicature). The speaker utters the sentence with the intention that the hearer will read their intention as inviting. The hearer is supposed to hypothesize and act on the presumed intentions of the speaker. And here we see that the hearer can easily hypothesize and act on the idea that the speaker has other intentions – the intentions can be chosen by the hearer to a certain degree. One model of uncooperative engagement is the “messing with” the intentions of the speaker – deciding which intentions you will respond to and act on. Even when the speaker is doing fine, the hearer can do stuff to interrupt the felicity of the illocutionary act. Another mode of resistance: Viewing the speaker as unintelligible. In ordinary cases, all parties involved assume that we are following the maxims, and assume that each of us take the other to be following the maxims.

The really beautiful part of this coming together of Grice and Austin is how we see that the hearer is anything but powerless. This one point is actually so harmonious with Butler’s project, if she could only see it. Every utterance in a conversational

exchange is interpretable and malleable but also forecloses a certain number of responses.

Section III: Hate speech

Grice's theory illustrates a key element of what delineates some utterances as "hate speech": the audience's recognition of the speaker's intention to produce response *r* is what communicates degradation, objectification, and so on and so forth. For example, leaving a pornographic image on your co-worker's desk is not merely sharing a picture – it's sexual harassment in virtue of the speaker's intention to have the audience recognize the speaker's desire for a particular response to "sharing" that particular image.

It's suggestive for our analysis of hate speech that the utterance, for Grice, is an *act* and not necessarily a verbal one; in fact, most of Grice's examples are nonverbal. For Grice, it's the *act* that has meaning, not the sentence or the words themselves. Note all the nonverbal examples given by Grice: John the Baptist's head, laying money down on the counter at my regular tobacconist's, drawing a picture of Mr. X's wife. Likewise, it's the *act* of the student at Stanford defacing the poster of Beethoven that is relevant for understanding the move as an instance of hate speech. What the speaker means_(nn) is unpacked by an analysis of conversational implicature. Even the utterance "It's raining" is only merely an expression or report outside of context. But, of course, no utterance is outside of context – just simply in some context the utterance "It's raining" is just a description. The act of the Stanford student and the act of the pornographer are the

moments of analysis for us. The vehicle is language – we need language in order to read the meaning of the act – but the speech is not the object of analysis.

Torture

It's notable (and curious) that the clearest illustration of what Grice *means* by speaker (or nonnatural) meaning *that he provides* comes from the example of torture. Applying thumbscrews, the "speaker" has the following layered intention: (1) that audience A (the tortured) produce particular response r (giving the torturers the information they want to hear); (2) that A recognize the speaker's intention to produce response r; (3) that A fulfills (1) in virtue of fulfilling (2). When being tortured for information it is abundantly clear to the "audience" that the "speaker's" intention is that A produce a particular response (again, give the torturer's the information they want), that the torturer's intend for A to recognize their intent to produce this particular response, and that the torturer's intend that if A provides them with the information they want to hear that such a response will occur at least in part because of A's recognition that the torturer's intend for A to recognize this intention. In brief, when tortured, it is simply known (if such a thing is really ever possible) that a particular multi-layered *intention* is at play. Speaker meaning is all about *intention*, so no wonder the clearest examples of speaker meaning come from situations in which the speaker's intentions are clear and likely not to be misread. It is for this very reason, however, that information garnered under duress is never totally trustworthy. Grice's theory of speaker meaning tells us why.

Sexual Harassment

I'll borrow and re-imagine another example from Grice to illustrate an instance of hate speech: Imagine that Mr. X draws a picture for Ms. Y, in the presence of Ms. Y (and possibly other coworkers), of Mr. X performing a sex act with Ms. Y. As Grice notes, all the features of "saying" something (here an instance of sexual harassment) as in "telling" someone something (as opposed to "letting someone know" or "getting someone to think") are present: In drawing a picture (versus showing a photograph) Mr. X clearly intends to produce a particular response in Ms. Y (the belief that she is an object of sexual interest, perhaps to intimidate Ms. Y, for her to believe that she is rapable). Ms. Y recognizes Mr. X's intention to produce this particular belief (although it may be a number of different propositions, the general belief is the same). And, finally, Ms. Y's response arises in part on the basis of her recognition of Mr. X's intention to produce the belief that she is an object of sexual interest.

It doesn't seem or feel like it but the hearer has to do a lot in order for the speaker to succeed at his intention. What must the hearer do in response in order for the speaker to have his way? The speaker has the intention to bring about belief *p* (along with a host of subsequent beliefs). The hearer has to recognize the speaker's intention to bring about just that in order for the utterance to be a successful piece of hate speech, according to this view. Imagine an example in which the hate speaker gets it just right and pulls off precisely what he wants to pull off.

It strikes me how amazingly terrible it is that the above situation is so readily intelligible for women. The intention to intimidate or denigrate or simply sexualize is

right there – instantly readable. Even more terrible is the fact that it provides the space for the harasser (or the establishment that supports such behavior) to manipulate the hearer's response even further – it is precisely the fact that the hearer has to do so much work in any given conversational exchange that makes it the case that the speaker can get out of admitting to a particular intention by saying that he was simply “misread.” The speaker's “wiggle room” to say he was misinterpreted is a pervasive phenomenon applicable to most instances of hate speech – and it's a problem.

The joke

Consider the following: “I'm sick of all the Irish stereotypes. As soon as I finish this drink I'm punching someone.” And, now, consider how you “got” the joke. It's safe to say that the intended response the speaker wishes to elicit from the audience is laughter. The utterance doesn't play as a joke unless my audience produces that expected response (laughter or, perhaps, the belief that I am telling a joke). But my audience must also recognize that I intend that response and her laughter must be in part in virtue of her recognition that I'm looking for that laughter. Since the intended response is integral to the joke playing correctly – it is, quite literally, not a joke otherwise – jokes provide rich material for imagining ways to respond to hate speech.

One way of perpetuating hate is through joke telling; specifically the availability and complacency surrounding racist/sexist/heterosexist joke telling. That availability helps maintain institutionalized oppression through microaggressions. With the help of

Grice's model, a way of thwarting the intended response from the hate speaker is imaginable.

We continuously come back to the idea that the speech act doesn't get done (in the Gricean sense) without a lot of ancillary information and, more importantly, without the hearer "playing along." As Avramides says of Grice: "It must make a difference to the effect the utterance has on A (i.e., a difference to A's response) that A takes the utterance to have been produced with a certain intention to convey information."¹²⁷ It is quite relevant to hate speech in particular that the audience (either those who share the hate, or the hated, or both) respond however they respond in part by virtue of recognizing the speaker's intention. In just this way it makes sense to call it "hate" speech.

The hearer must find the speaker intelligible. Hence, one way of performing "uncooperative engagement" is to purposefully (or at least pretend to) find the speaker unintelligible. Giving the speaker the impression (whether it's totally true or not) that they are unintelligible is also a distinct form of recourse to hate speech – distinct from counterspeech and walking away. Note that both situations – counterspeech and walking away – are situations in which the speaker knows they have been read correctly, that they are intelligible. And now, finally, allow me to turn to what it may indeed look like to engage uncooperatively.

¹²⁷ Avramides, pg. 45.

Chapter 5: Uncooperative Engagement: An Active Response to Hate Speech

Allow me to call your attention one last time to the quote with which I began this discussion of possible interventions on hate speech, “The total speech act in the total speech situation is the only actual phenomenon which, in the last resort, we are engaged in elucidating.”¹²⁸ This project is about how the social construction of reality via illocutionary force can be interrupted and redirected for the better. As mentioned in Chapter 1, in a world in which people are placed in groups of varying social and political import and aligned hierarchically within and among those groups, subordination is something that happens, and sometimes it is done through speech – “doing” hate is sometimes done simply by speaking hate and, in this way, hate speech not only perpetuates oppression but is itself an act of subordination.

There is no escaping power relations in the social world (likewise, there will always be the “diss” even if we intervene on hate speech) – the question is, given that power relations are capable of being manipulated, how do we manipulate them to intervene on hate speech? What is often ignored is the significant role of the hearer in any given conversational exchange. It is exciting and interesting to return to Grice since most of the theorists who engage the problem of hate speech do not attend to the significant role of the hearer. Most of their time and energy is devoted to showing the harm in hate speech done by the speaker. For us, here and now, the point is that the hearer is an important part of the total speech situation, with a role in the speech act

¹²⁸ J.L. Austin, 1962. *How to do things with words*, 2nd ed. Cambridge, Massachusetts: Harvard University Press. Pg. 148. Quoted at the top of Ch. 3.

and moves that can be made. Instead of closing out speech act theory, as Butler may (unintentionally) propose, we can open it up with a shift in focus to the role of the hearer. Now, we have clearly seen that Butler has read 'total' in "total speech situation" as *totalizing*. As clear as that appears to Butler, it seems equally clear to me that 'total' can and should be read here in a non-totalizing way. At the end of the day, all the pieces and parts of the context must be taken together in order to elucidate the speech act – the total act is entirely conventional and, thus, culturally located and specifiable (and perhaps unavoidable in certain situations)¹²⁹ but not exhaustively determined or determinable. There's no ontological totality needed here.

It is a strong feeling of helplessness on the part of the audience (the targets of hate speech), Butler believes, that motivates the call for state intervention. I take Butler seriously on the following point: *the call for authoritative intervention reveals the feeling of helplessness/powerlessness on the part of the caller*. I have argued that the possibility of formulating concrete, manageable interventions does not require or necessitate support of government-backed legislation (even the relatively weak intervention that is the Dworkin-MacKinnon anti-pornography ordinance). I imagine an active response to hate speech that can be described, taught, and employed. Of course such a formulation is necessarily incomplete and open to failure, but that need not mean that the formulation is indecipherable or unmanageable. Sometimes the promising isn't accomplished...but sometimes it is! I suggest we take another page from Austin's playbook and look to what we actually do (when we are our best, most clever selves in the face of hate

¹²⁹ It is a note from my teacher, Dr. Jamie Nelson, that I often reiterate to my own students: Just because social construction is *constructed* and requires maintenance does not mean it is easily escaped or unavoidable.

speech) in response to instances of hate speech – you’ll note that what I call for is a move with which we are intimately familiar. On the ground is where we will find interventions that are describable and manageable but are not dependent upon the coercive power of the state.

A response to hate speech has got to be more than counterspeech – “just” counterspeech is too much like the liberal response (the “marketplace of ideas” approach). And it’s got to be more than merely “turning away” (ignoring speech takes on the myth that words do not wound). Grice sees speaking as calling the other into cooperation. The call to cooperate brings with it a tiny element of suppression of counterspeech. What would it look like to resist the suppression of counterspeech in answering the call to cooperate? I believe there is an active response to the hate speaker that is not direct counterspeech and it is not simply turning away – there is a third path; namely, a refusal on the part of the hearer to work out or “read” the speaker’s intended meaning. Refusing to work out the speaker’s intended meaning is one way that people mess with the expected relationship they may have with the speaker – sometimes to play out their disrespect, sometimes just to be playful. Young people are especially good at this: “Come to dinner.” “But you didn’t tell me the time.” Or, let’s say Pilot doesn’t show for try-outs. Captain Orange: “I didn’t see you at try-outs.” Pilot: “But you didn’t tell me where.”

Something more than “turning away” or direct counterspeech is an intervention that both Butler and MacKinnon will appreciate and can incorporate into their existing theories. I propose that we call this third path *uncooperative engagement*. Uncooperative

engagement may be supported *conceptually* by judicial authority, but it is not maintained or enacted by the coercive power of the state, and it is not turning away or sticking your nose in the air or letting them know you are offended. I call this uncooperative *engagement* because it is engaging in the conventional moves dictated by the total speech context – it is engaging the speaker as intending to produce a certain response, even if I thwart that intention with an unexpected response. I call it *uncooperative* because the kind of engagement in play is a “messing around” with Grice’s Cooperative Principle – i.e., I recognize the intention but do not “play along” with the expectations of the speaker. In the spirit of Austin, there aren’t necessary and sufficient conditions for engaging uncooperatively in the interest of thwarting an illocutionary act. Just like the conditions for pulling off an illocutionary act cluster into rough categories, ways of engaging uncooperatively can also cluster in various ways, but are not absolutely delineable. Perhaps what Austin was thinking about in building his chart of hitches, hiccups, and the like can be seen as an opportunity for engaging uncooperatively.

*Infelicities*¹³⁰

Misfires				Abuses	
Act purported but void				Act professed but hollow	
A. Misinvocations		B. Miexecutions		A. Insincerities	B. ???
A.1. ?	A.2. Misapplications	B.1. Flaws	B.2. Hitches		

Could we imagine that a type of abuse in the above chart – namely, the space that Austin filled in with a question mark – could possibly be something like the audience

¹³⁰ Ibid. Pg. 18

(rather than the speaker) generating an unhappy performative? I see the ultimate objective as making it “uncool” to diss *in a particular way*; namely, that *the conventions that make hate speech what it is will no longer be available*. Just as mores are established and people are gotten to internalize them, certain customs can be established (by an authority) that in turn (over time) determine which moves are socially available.

When a social gaffe has been made, the skilled hostess can shift the position of the speaker from one of “social offender” to “regular partygoer.” An utterance as seemingly innocent as “I would never paint a room yellow,” (in the presence of your host’s yellow dining room) can be shifted from an insult to a remark with a quick-witted response, “Yes, it takes a certain boldness doesn’t it? I didn’t think I had the chutzpa either.” Such a subtle move, when practiced and performed at the right moment, can diffuse the potentially awkward (or even hostile) speech act. The kind of move made by the skilled hostess is the kind that can thwart the intention of the hate speaker as well. And sometimes, if desirable, it can do this *kindly*, providing the speaker with the opportunity to abandon their original intention for a new, less harmful one (see the example of “the threat” below). I hope to show that uncooperative engagement is a less antagonistic response than direct counterspeech or turning away. As moves that are made in this social/political game, it has a different spirit – a tone of friendliness that I believe will work to the advantage of motivating social change. This kind of active response is one that would resonate with Butler, I believe, because the hearer gets to construct what the speaker did – we’re still working within a set of conventions but the illocutionary act is not absolutely fixed. The norms set up what

would happen if the hearer were optimally cooperative, but otherwise, all sorts of hitches and hiccups can be motivated by the hearer. What you actually pull off in way of illocutionary acts is not absolutely bound to the speaker's intention.

Consider the following example (borrowed from the television series, "Arrested Development") as a first look at where lies the possibility of uncooperative engagement. This example showcases the complexity of the context, the plethora of communication moves, and the social construction of illocutionary force done by the audience. Additionally, as an analytic tool the Austin/Grice picture helps to sort out things that are going on in a complicated communication situation such as this: Recently kicked out of his house, Tobias plans to reinsert himself by posing as a British housekeeper (as the narrator notes, it is the exact plot of "Mrs. Doubtfire" with a bit of "Mary Poppins" thrown in). He dons a wig, glasses, prosthetic nose, stomach and breasts, dress, and an accent. He presents himself to his family as a British nanny ("Mrs. Featherbottom") applying for a housekeeping position. His wife immediately recognizes him as Tobias but she allows him to stay and pretend to be Mrs. Featherbottom because she recognizes his attempt to deceive as his desire to be near his family again after moving out. Tobias believes he has successfully disguised his true identity and that his family believes him to be Mrs. Featherbottom *in virtue of* his disguise.

Tobias originally intends *not* to be recognized as anyone other than Mrs. Featherbottom. (Alas, his family immediately recognizes him. It's his obliviousness of his own ineptitude that makes the gag funny.) On this particular occasion, Tobias means(nn) by wearing a disguise to be disguised – he intends for his audience to believe

he is a British nanny. Tobias intends to produce in his audience a particular response (that they take him to be Mrs. Featherbottom) and that their response is at least in part due to their recognition that he has this particular intention. He presents himself as Mrs. Featherbottom and he means to be taken to be Mrs. Featherbottom.

Eventually Tobias wants to “get discovered” as himself. He continues to work as a nanny for the family, and wears Mrs. Featherbottom’s wig, nose, glasses, and dress, but lets his five o’clock shadow grow in. But he doesn’t get to mean, “Look! It’s me, Tobias,” because his original disguise failed – he was never recognized as being anyone but Tobias.¹³¹ He intended to produce a response (that his family take him to be Mrs. Featherbottom) and he got the response he expected but only because his family made certain inferences about his true desire and played along *with that desire* (and not with his original intention). It turns out he’s the only one not in on the joke. On this latter occasion, Tobias does not communicate what he intends to communicate because of the recognition by his audience of his meaning as something other than his intention. Tobias is the subject of the joke rather than the protagonist and in this way the example is almost the cruelest sense of merely “letting someone know” versus “telling” – Tobias thinks he’s telling his audience something but he only succeeds at letting them know. In much the same way that Herod’s intention is incidental to Salome’s response – she comes to believe that John is dead because his severed head is on a platter and not because Herod presents her with that platter.

¹³¹ Tobias in costume is not the funny element of this story line; what’s funny is that Tobias doesn’t get to be discovered as himself in drag because he didn’t pull off the original play – there’s no discovery since he didn’t successfully disguise himself in the first place.

In the following I hope to show the possibility of an active response to hate speech in which we harness the phenomenon of infelicity to shift the illocutionary act of the speaker. In the interest of elucidating *uncooperative engagement* as a mode of resistance, consider the following examples of various contexts in which uncooperative engagement is in play. As mentioned above, uncooperative engagement can be clustered into rough categories of like types. In the following, I consider a series of examples that run the gamut of what we call hate speech in order to elucidate the idea that one move to be made is to engage the hate speaker but uncooperatively.

The Ujamaa Incident

Recall that the Ujamaa Incident at Stanford originated as an argument between two white freshmen and a Black student over the ethnicity of Beethoven. A poster of Beethoven was defaced by the white students and pinned to the door of the Black student. There was another poster, this one advertising a Black fraternity dance, also found defaced. The word “niggers” had been written in large letters across the face of the poster.

In this instance of hate speech the intended audience is clear: Ujamaa is the Black theme house on Stanford’s campus. The context is just right for “reading” the message the white student wishes to send. The illocutionary force of the speech act is to put the Black student “in his place.” This act was also done with certain Gricean intentions. For the sake of argument we’ll say that the speaker’s intention is to get the Black student to come to the belief that the argument that Beethoven could be of African descent is

ridiculous, laughable. The speaker intends that the audience come to that belief in part in virtue of their recognition that the speaker has that intention.

As all acts that are bound by convention, altering a famous image is not intrinsically hateful. The French word *detournement*¹³² (roughly translates to “abduction” or “embezzlement”) identifies the co-opting and altering of famous paintings, documentaries, newspapers, and books seeking subversive ideas in the found objects of popular culture. It was considered a revolutionary act, helping to channel the frustration of the Paris student riots of 1968. One can imagine that if the “defaced” poster were framed and hung in a place with some prestige that the intention of the speaker to reduce the Black student’s argument to parody would be deflated. He is now “read” as providing an argument for Beethoven’s Black heritage, rather than the other way around. The response engages with the original intention of the speaker but doesn’t play along.¹³³

More importantly, how do we create a climate on campus where this performative cannot be done, where this set of conventions is not available? Hate speech and conduct codes are a start. But beyond codes of conduct and silent protest, I can imagine a world in which simply out of universal respect for other beings no one can *read* that intention. The utterance as hate speech act is not available or intelligible as such, just as insulting the Queen is not available to the commoner.

¹³² <http://www.cddc.vt.edu/sionline/presitu/usersguide.html>

¹³³ I’m reminded of my own college experience when a cutout of paper dolls was slapped to my door in the middle of the night, clearly meant for me to recognize that I had been identified as lesbian. In response, my friends, living on the same floor, all posted cutouts of paper dolls corresponding to the number of women living in the dorm room, to all of their own doors. I left mine up.

Name-calling

Perhaps the clearest case of hate speech where the intention of the speaker is easily readable (in no small part because the context is so familiar) is the case of name-calling.¹³⁴ Take any number of examples, but for the time being, imagine two women (or two men) holding hands and a passerby utters “Fucking dykes” in such a way and with a direction such that the intention is clear. This is an instance of hate speech. An Austinian-Gricean analysis goes as follows: The speaker performs a (hate) speech act given that the total speech situation is one oriented toward the cultural conventions for subordinating. The speaker intends the force of the utterance to be a kind of ranking that puts the audience “in her place.” Given that the speaker is not an actor on a stage, or a lecturer in front of a classroom, the intention is clear – the speech act is one of name-calling and the intention is to injure. The social position and relative authority of the speaker to the audience is always part of an Austinian analysis of the total speech situation. In this example there’s an antagonistic relationship between the speaker and the audience that lends itself to injury; specifically, the possibility of threatening the safety of the audience in the very uttering of the name.

Locutionary Act: The structure of the utterance is meaningful in a language – it fits the conventions in the English language for name-calling and, thus, is intelligible and understood as name-calling.

¹³⁴ It is no coincidence that one of Austin’s paradigmatic examples of performative speech is *christening*.

Illocutionary Act: In this context, in uttering, “Fucking dykes” the speaker names the intended recipient as inferior, a type of ranking occurs in which the audience is put “in her place.” I would even argue that a threat occurs in the very uttering of the call.

Perlocutionary Act: We can imagine a range of consequences that this utterance brings about in the audience and others in the vicinity. The audience may experience insult or injury, may attempt to leave the vicinity quickly, may feel fear, may feel hated, or may feel pity for the speaker and his obvious lack of self-esteem. A particularly interesting feature of hate speech, as mentioned before, is the role of the peripheral audience. Beyond the intended recipient, there is typically a kind of “showing off” for a group of peers that happens in hate speech. A common *intended* perlocutionary effect is to get the peripheral audience (likely the speaker’s peers) to feel aligned with the speaker along social and political ties. Name-calling as hate speech can be a typical form of soliciting solidarity.

And therein lies an avenue of recourse; namely, the intention of the speaker to show/ elicit solidarity with his peers is one area in which the audience can thwart his intention by responding in unexpected ways. First and foremost, as most anti-bullying campaigns propose, the peripheral audience can respond by *not* providing the expected show of solidarity with the speaker. Likewise, the audience can respond by calling out the speaker’s performance for his peers, “You must feel so self-assured.” Or, by noting that the speaker has done nothing more than stated the obvious, “How clever.” Such a response can be wonderfully disruptive.

The threat

Imagine a speaker that wishes to threaten his audience. In the context of close quarters, in which a drink might be spilled, he says, "If you spill your drink on me I'll choke you." Given the content of the locution in the context of the possibility of accidentally spilling a drink, the utterance is justifiably read as a threat.

His intention is to threaten (illocutionary) and perhaps to intimidate (perlocutionary) – among other intentions, such as, that you believe that he will hurt you, that you feel vulnerable, that you see that he is more powerful than you. In order for his intention to be realized, the response from his audience must arise at least in part from the audience's recognition of his intention to produce that particular response (the audience is threatened). There are a plethora of ways in which the speaker's intention can be frustrated and his goal unrealized. One such way is if the audience engages the speaker with the recognition of the speaker's intention but purposefully fails to provide the expected response.¹³⁵ In other words, the hearer remains as interlocutor but doesn't "play along" – *uncooperative engagement*. If the audience responds to the speaker as if the speaker were making a joke rather than as if the speaker intended to seriously intimidate. Like the skilled hostess that can deftly shift the social gaffe to something

¹³⁵ In my own life, in which this exact scenario occurred, I did not recognize the speaker's utterance as a threat at first. I responded, "you're kidding, right?" without sarcasm – I genuinely believed that the threat was actually a joke, even though I wasn't sure I got the joke. I note this here because there is a pleasant innocence to the way the speaker's intention is thwarted when that intention is read incorrectly by the audience. The misreading is accidental, which shows that the speaker really is outside the zone of intelligibility. I imagine a different social order than the one we currently inhabit in which, for example, someone commenting on your attire could never be read as a diss. Developing uncooperative engagement as a response is a way of imagining farther down the line, when the unintelligible hate speaker will be the result of this work against bullying now – the intention to subordinate will not be available. Uncooperative engagement is purposely or, in fact, perversely misreading the speaker's mind. But first the audience must read the speaker's mind.

more appropriate, the one threatened can shift the intention of the speaker from a threat to a joke by simply refusing to read the threat as a threat. “I don’t get the joke,” the audience may say in response, to alert the speaker

But did the speaker still intimidate even when the audience is not threatened but recognizes the intention to intimidate? Let’s say that I interrupt the speaker’s intention to produce a particular response in me by perverting the expected conversational exchange but I still feel threatened by him. Do I have to say that he accomplished harm even though I didn’t play along? On the one hand, the opportunity for the audience to engage uncooperatively requires recognition of the speaker’s original intention. Only with that recognition can the audience perverse the speaker’s intention. Thus, the speaker does accomplish his intention to some end. A speaker’s meaning(*nn*) requires that the audience believe that *p* – not merely that the audience recognize your intention to get you to believe that *p*.

Allow me to note again here that the objective of this project has to do with the opportunity to mobilize and localize a prevailing threat (e.g. “you’re rapable”) and make that threat no longer available to the speaker. That takes all manner of reframing meaning and shifting social structure. Here (this project) is one way to motivate that shift. The harm in hate speech is the illocutionary force of constructing reality. Hate speakers contribute to the maintaining of this structure. One possible way of perverting the capability of hate speech to subordinate is to engage uncooperatively as an interlocutor.

Sexual harassment

The office worker that shows pornography to his female co-worker is performing hate speech in the form of sexual harassment. Just as in the example of name-calling above, the co-worker is put “in her place,” she is told that her body is available, that she is seen as nothing more than an object of sexual pleasure. I would, once again, argue that the speech act is a threat. Among the myriad of perlocutionary effects, the audience understands the speaker’s intention to come to the belief that she is all those things and nothing more, and to have that response in part in virtue of her recognition of the speaker’s intention to produce that particular response.

This is a tough case. The conventions that support and maintain hate speech in the form of sexual harassment are persistent and ubiquitous; so much so that even legislation against sexual harassment has only gone so far. The pervasiveness of pornography as a means of sexual expression also contributes to the problem. But the speech act is still bound by convention, as all acts are, and so it is subject to infelicity. The intention of the speaker to bring about the response in his audience that she believes she is a sex object can be thwarted by refusing to provide the speaker with recognition that response. This example is perhaps the right scenario for showing the speaker that their performance is no longer the cool thing to do – there is no love for that kind of performance. I can imagine the audience responding in such a way that it is very clear that the speaker has done something uncool, perhaps with just a telling look. One response: “Are you kidding?” The audience can take you up on that kind offer and

then the threat/the harm/the insult is diffused. Rejecting an associated meaning with a bit of humor is one form of uncooperative engagement.

A return, briefly, to "Don't Ask, Don't Tell"

As mentioned in a previous chapter, I agree with Butler that the military's "Don't Ask, Don't Tell" policy is a prohibitive policy that is plainly wrong on many counts even though it is not the same kind of policy proposed by MacKinnon, but here I'd like to focus on what is wrong with the military's presumption underlying the policy. The underlying presumption driving the implementation of "Don't Ask, Don't Tell" is a construal of speech as conduct. The military's policy explicitly considers the utterance that one is gay to be tantamount to homosexual conduct: "A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if the member has stated that he or she is a homosexual or bisexual or words to that effect" (10 USC, § 654, b2). Within the text of the policy, stating that one is gay is no different (and results in no less severe consequences) than engaging in homosexual conduct and intending to marry another of the same sex. But what does this mean precisely? The utterance "I'm gay" is taken to be as good as an invitation to sex.

It's no harm to note that, in certain imaginable contexts, the utterance that one is gay is, in fact, an invitation (one can imagine the context – uttered in a particular time and space – in which stating "I'm gay" can be "testing the waters" to see if the other is interested). But this is to say nothing more than is already noted by Austin's analysis of

speech acts. The same utterance can have as many varying forces as there are imaginable contexts. (For a simple example, the utterance “yes.”) The military fails to note that the more typical context in which explicitly stating that one is gay is when “coming out.” When I tell my parents, “I’m gay,” it’s not an invitation. Explicitly stating that one is gay (coming out) holds a complicated, but important, place in our culture – not only because it is necessary in certain circumstances but also because it is expected by society at large of gays and lesbians in many contexts.

The utterance “I want you” is related in an interesting way to the above case. “I want you” (in Austinian terms) is a *constative* statement in its structure. It’s a description of an internal feeling. And, yet, it is almost *never* taken as a mere description. It functions regularly in our culture as a pick-up line (whether effectively or not is another matter). The uptake that it gets is as a solicitation; an invitation to sex (or, in other regular contexts, as a threat of sexual harassment). Similarly, we almost never say “I invite you to have sex with me” (the explicit performative). That sort of pick-up line would be considered socially awkward and not attentive to social norms and cues of “picking up.” Here’s the fun part: If one were to respond to the utterance “I want you” as *if* it were a mere description then a type of interruptive counterspeech is done. Suppose you say in response, “You want me? What a nice feeling that must be for you.” You’re not *playing along*. You’re being *uncooperative* (in the Gricean sense) by not providing the *expected* uptake (in the Austinian sense).

The off-handed remark

This project began with a deep concern over the *unintentional* acts performed in the utterance, “That’s so gay.” This expression seems to persist as a way of indicating one’s disgust or general disapproval of the referent, in spite of the PSA telling us to “be more clever.”¹³⁶

I find this case particularly fascinating and important in that the *intention* of the speaker does not (in all instances) match up with the illocutionary act performed. I believe this is a case where the speaker performs an instance of hate speech even when she does not intend to do so. In that way, the injury is lessened, but it is an injury worth redressing all the same. The scenario to which I refer is one where the speaker only intends to describe the world – she imagines her speech as constative rather than performative – but the performance of *something* is done nonetheless. On Austin’s chart of infelicities we find that her act misfires – she intends to report on her feelings about the subject but in so doing performs an instance of hate speech.¹³⁷

Uncooperative engagement as a mode of resistance can work in the case of the unintentional hate speech act as well. The audience can “read” the speaker as performing a hate speech act even while intending to merely describe the world. And then, with some grace, respond in turn with something like, “You mean ‘gay’ as in ‘happy’?”¹³⁸

¹³⁶ <http://www.thinkb4youspeak.com/psa.asp>

¹³⁷ Since the *intention* to perform hate speech is integral to the actual performance of hate speech, we may give the unintentional hate speech act a new name.

¹³⁸ Another lovely example from Marilyn Frye: In response to the off-handed “That’s so gay,” one may respond, “Hmmm... doesn’t seem so merry to me.”

There will *always* be such a thing as “bad words.” Even if these words (cunt, nigger, dyke, faggot) are *reclaimed* and *resignified*, there will be others. This is, of course, because it isn’t the *word* that is the problem – it is the way the word is employed and what it is employed to do that is politically and socially significant. As a community we can come together in response to hate speech and teach *uncooperative engagement* – an active response that leads to a world in which the conventions that support hate speech are no longer intelligible.

I believe that the coming together as a community in response to hate speech can easily be imagined as classroom workshops in which we teach uncooperative engagement, much like the consciousness raising workshops popularized in the late 60s and 70s, which led to the PSA’s and diversity training workshops of today. Uncooperative engagement as a tool used to undermine (and perhaps abolish) hate speech can even be included in current anti-bullying workshops and campaigns. Students can imagine their own responses that thwart the intention of the hate speaker – from the snarky to the generous – and be coached on how to utilize that precious moment when the intention of the speaker is recognized by the audience and purposefully rejected. I believe with such training we have the opportunity to move toward a cultural climate in which hate speech is no longer “readable” as hate speech – one simply cannot “diss” in a way that reinstantiates subordination and puts one “in her place” as inferior in social and political status. The problem of hate speech is clear – the speech act has the force of subordinating. I believe that uncooperative engagement is part of the solution.

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 With focus on: Part I: pages 1-36 (the initial language game), 65-88 (family resemblance), 150-186 (no "common characteristic"), 187-209 (rule following considerations), 316-403, 656-693; Part II: pages 193-229 (seeing/seeing as)