

Injury and Iterability-Can Hate Speech Be Legislated?

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Introduction

What do the University of Michigan-Ann Arbor, city of St. Paul, Minnesota and village of Skokie, Illinois have in common? All were involved in legal battles over the right to free expression, in which that ‘free expression’ entailed hate speech. In all three instances, the courts decided that although the ideas curbed by the contested ordinances were reprehensible, they were part of the ‘marketplace’ of ideas inherited by the First Amendment. A common theme of the decisions in each respective case was that while the content of expressed ideas may be offensive-especially to the people targeted-proscribing such expression on the basis of content would be an unforgivable violation of First Amendment rights. In the opinion for *Doe v. University of Michigan*, Judge Avern Cohn stated, “It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values.”¹ The issue in *Doe*, as well as in *R.A.V. v. St. Paul and Village of Skokie v. National Socialist Party* was whether it is possible to proscribe a form of expression on the basis of its content. In all three cases, it was decided that banning speech because of content was not legal.

Recent history has produced a strained relationship between First Amendment rights and Fourteenth Amendment protection in terms of hate speech. As Judge Cohn’s opinion illustrates, the ‘right’ of a person to express his thoughts is often pitted against the right of the addressee to be free of those ideas. Debates over how the right to “free

¹ Arthur, John, and William H. Shaw. Readings in the Philosophy of Law. 4th ed. Upper Saddle River: Pearson Prentice Hall, 2006. pg. 624

expression” ought to be balanced against the right not to be addressed in an injurious way have not produced a satisfactory answer. Most of the time, responses fall into one of two camps. One school of thought is that some forms of speech are so reprehensible that they ought to be proscribed. Hate speech can be banned because it does so much damage to the people who are addressed by it, and has no redeeming social value. The other is the absolutist position that any proscription of speech at all is a dangerous violation of First Amendment rights, and can only lead to unlimited censorship. Even if they agree that a community without hate speech would be preferable, they are concerned that not allowing hate speech today would lead to prohibiting, for example, controversial speech or criticism of the government in the future. I believe that while there are merits to both of these positions, neither is entirely correct. Arguments in favor of using the law to curb hate speech generally do not account for the nuances of language that make legislation difficult. The result is that hate speech ordinances tend to be either too constricting or used inappropriately. At the same time, refusing to prohibit hate speech places an unfair burden on the people who are subject to slurs on a daily basis. Is legislation the only way to combat hate speech, or can there be a more workable solution?

My interest in this topic stems from a conviction that while government regulation of hate speech is not an appropriate response to the problem (the cases I mentioned above illustrate how poorly the law addresses it) we cannot expect the ‘marketplace of ideas’ to remove it either. Although the law is the first tool that comes to mind to remove unfavorable behavior, it tends to be ineffective, if not dangerous when attempting to treat the problem of hate speech.

Yet I will also show that the argument against legislating hate speech makes certain assumptions that not only weaken it, but also lead to the same problems that make it difficult to legislate hate speech in the first place. My purpose is not to jettison the argument against regulating hate speech or suggest that it is unworkable. Indeed it makes several considerations that deserve more regard in the hate speech debate. Instead I hope to display the difficulties in combating hate speech more clearly and show where the argument against legislation could be strengthened.

One Argument Against Legal Protection of Hate Speech

One argument for rescinding the protected status of hate speech is presented by Mari Matsuda. In *Words That Wound* she proposes that certain forms of hate speech are so degrading and debilitating, and without any redeeming properties, that they can be proscribed without compromising First Amendment values. She contends that the effects of hate speech on those targeted are bad enough that protecting such speech prevents targeted group members from exercising their own rights. Matsuda states, “Each person...is entitled to basic dignity, to nondiscrimination, and to the freedom to participate fully in society.”² An active presence of hate speech compromises targeted people from partaking in those entitlements. When an argument is made in favor of protecting hate speech, it usually refers to fear of creating a precedent for other kinds of censorship. Matsuda believes that concerns such as these should not deter us from finding a way to remove hateful slurs. Instead, she utilizes these arguments to find a more feasible way to rinse hate speech from the public sphere.

² Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 48

Matsuda argues that hate speech ought not be tolerated the way other contentious speech is. Unlike, for example, controversial political opinions that warrant protection, racist speech is universally understood as wrong. Many countries have outlawed it without conceding the freedom or livelihood of their citizens. The absolutist First Amendment position, a current legal norm in the United States, leaves the people most vulnerable to bigoted attacks (verbal or otherwise) the least protected. Matsuda contends that forms of speech that compromise someone's personhood to the extent that hate speech does should not be tolerated. The First Amendment, she argues, is "not allowed to supersede completely the reputational interest and personal integrity of the victims of certain forms of expression."³ If collective legal understanding has made an exception to the First Amendment for defamation or privacy rights, then it is possible to make another exception for racist speech. In summation, she suggests that any benefit of allowing hate speech to circulate is severely compromised by its negative effects, and thus that the fear of censorship should not prevent us from providing protection from verbal assault. This fear has gone so far that it may have even led us to not recognize other forms of censorship that exist under current understandings of the First Amendment.

Matsuda also argues that protection of hate speech is contradictory to the Bill of Rights. When the government refuses to prosecute hateful individuals, it diminishes the ability of the targeted victims to enjoy the liberties that they are entitled to. "The constitutional commitment to equality...[is] emptied of meaning when target group members must alter their behavior...because of hate group activity."⁴ The law is not

³ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 34

⁴ Ibid. pg. 48

applied equally to them. Defamation, for example, is not tolerated in general, but racist speech is a similar attack on minorities, which falls under the category of free speech. In addition, competing constitutional values, such as basic dignity or the right to participate in society are denied when racist speech is protected. Finally, state protection of hate speech is equivalent to support for hateful groups and the result is that hate groups have more liberty than the people they target.⁵ These effects compromise the victim's ability to add their thoughts to the marketplace of ideas. Hate speech does not invite a response, instead it is meant to assault and silence members of a community. Although hate speech is protected under the rubric of free speech, it only reduces the number of opinions that are heard. In the attempt to protect all speech from encroachment, we have removed many voices from the free market.

Matsuda looks to the stories of victims to understand how hate speech is so silencing. One of her concerns is that responses to hate speech often mimic responses to physical assault. Effects that are commonly experienced include restrictions in personal freedom such as having to leave a job or a home, emotional distress, rapid pulse, difficulty breathing, or even psychosis or suicide.⁶ These effects occur as the result of verbal attacks directed towards individuals, but also in instances when hate is not directed towards them, such as hearing a supposedly neutral report, or overhearing the slur. Given the nature of the victim's response to hate speech, both in the long and short term, removal of hateful slurs and epithets is the only way to guarantee equal access to constitutional rights.

⁵ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 48-49

⁶Ibid. pg. 24

Matsuda's approach, given the lack of precedent for countering hate speech, is to create a separate category for it. A frequently cited argument against the proscription of such speech is that it would be removed based on content, which is generally held to be a dangerous First Amendment violation, leading to potentially limitless other content-based regulations. To address this, she recommends treating racist speech as a sui generis category, recognizing that it is unique enough to constitute its own category. Hate speech is different from other forms of speech that are frequently proscribed, and cannot be addressed adequately through most First Amendment doctrine. Unlike most types of speech which are not protected by the First Amendment, hate speech depends solely on content in order to cause harm. She states, "I believe racist speech is best treated as a sui generis category, presenting an idea 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."⁷ She argues that a narrow definition of racist speech, and a requirement that all prerequisites of the narrow definition be fulfilled in order for prosecution to take place, will prevent her suggestion from creating a precedent for further censorship. A narrow definition will also protect the people targeted by hate speech more effectively than stretching other First Amendment doctrine to include hate-motivated words. Her legal definition of removable hate speech is as follows: a recognizable message that conveys ideas of racial inferiority that is directed at a historically oppressed group, and is of a hateful or degrading nature.

Criterion 1: A Message of Racial Inferiority

⁷ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 35

Matsuda describes this first criterion as “the primary identifier of racist speech”.⁸ She explains the performative characteristics of racist speech that give it power beyond mere words: “Racist speech proclaims racial inferiority and denies the personhood of target-group members. All members of the target group are at once considered alike and inferior.” The difference between hate speech directed towards a member of a group that has been historically targeted and an insult which could be directed towards anyone is that hate speech enacts subordination in a way that chides about a person’s character do not. The effect of hate speech goes beyond offense, a difference that courts have consistently failed to recognize. Matsuda’s suggestion responds effectively to situations in which a member of a dominant group intentionally inflicts verbal harm on a member of a minority group. The language used suggests that it is meant to prevent the harm brought about by messages of superiority.

How might we decide whether this criterion has been definitively fulfilled? Matsuda argues for a highly contextualized determination of whether it makes sense to regulate in different scenarios. She suggests, for example, that if someone from one subjugated group lashes out at someone from a different subjugated group, the hateful expression should be tolerated if it is in response to an experience of oppression, but not if it is only meant to attack.⁹ The contextual approach also applies to different settings. The same word might be used in a situation in which it is meant to educate, in which case it should not be proscribed, and to subordinate, in which case it ought to be removed. A classroom discussion that employed slurs in order to have an effective discussion about

⁸ Ibid. pg. 36

⁹ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 40

racism or sexism would not warrant proscription, while a KKK demonstration would. In the first instance, a word is used to gain a better understanding of hate, while in the second scenario, the word is used to transmit hate.

Given these specifications, I would ask what it means to proliferate a message of racial inferiority. How might intention be considered, and should it matter? How should we account for the race or social status of the person who makes the potentially hateful comment? When Bill O'Reilly commented that "There wasn't one person in Sylvia's who was screaming, 'Mother-----r, I want some more iced tea'." ¹⁰, he claimed that his statement was intended to combat racial stereotypes. Even if that was his intent, the context could still make people uncomfortable. Matsuda suggests that it is possible to use racist language to make antiracist comments, however she also mentions that white students "reporting" on the use of hate speech still makes for an uncomfortable environment for non-white students.

Criterion 2: A Message Directed at a Historically Oppressed Group

After ensuring that the message is one of racial inferiority, the second prong that Matsuda requires in her theoretical solution is that the insult be directed towards a group that has historically been subject to ideas of inferiority. This criterion is meant to contextualize racist speech by recognizing it as a means for a member of a dominant group to oppress a member of a subordinated group. "Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of

¹⁰ Newsweek Magazine, October 8, 2007, pg. 27. O'Reilly made this comment about his experience in a black-owned restaurant in Harlem

subordination, reinforcing a historical vertical relationship.”¹¹ According to Matsuda’s criterion, racist speech is recognizable as racist speech because it reinforces a power structure that oppresses minorities. Racism can be understood as ideas of racial inferiority accompanied by action to enforce subordination, and hate speech is an instrument for putting those ideas into effect.

Such subordination could only take place within a particular context, and one of the requirements to fulfill that context is that the person subject to epithets is more vulnerable to it, due to historical oppression. For this reason, it is only necessary to legislate when the person would actually be vulnerable. It is not necessary, in Matsuda’s opinion, to legislate against epithets towards dominant group members, or slurs between minorities, as long as they are not persecutory. These forms of hate speech do not tax vulnerabilities, and therefore do not need to have the same penalties attached as epithets that are actually supposed to be hateful.

While a KKK demonstration, for instance, does direct a hateful message at historically oppressed groups, the classroom discussion might not be as clear. How might we understand if racism is prevalent in a situation in which the professor directs a question or comment about race to a non-white student? Should it depend on the race of the professor, or whether the word mentioned is used to degrade the student addressed, the professor, or another student in the class? Should the professor’s intention be taken into account? The student, regardless of the race or background of the professor, might regard the comment as hate speech, depending on the situation.

Criterion 3: A Message That Is Persecutory, Hateful, or Degrading

¹¹ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 36

This is the final criterion for determining if the message can be prosecuted. Matsuda argues that the message must clearly have a target audience and address that audience in such a way that will attempt to accomplish subordination. “The language used in the worst form of racist speech is language that is, and is intended as, persecutory, hateful and degrading.”¹² The person who employs these words intends to cause harm. The language used becomes an instrument for oppression, and communicates a message that is intended to dehumanize its victim or warn of future harm. At this point, the language is no longer only offensive to its target. It acts as an assault, and elicits a fight or flight (usually flight) response.

I would ask what determines the point at which language becomes persecutory. How should we account for the identity of the speaker, the recipient of the message or the intention that the speaker communicates? Matsuda suggests that hateful comments directed towards dominant group members should be protected. In such instances, “there is harm and hurt, but it is of a different degree.”¹³ The verbal attack is not backed by a larger context of subordination, and therefore does not have the same performative force. A member of a dominant group is more subject to criminalization for repeating a slur, though even then there are exceptions. A dominant group member might not be criminalized for asking about a particular word, or participating in a discussion about the harmful nature of hate speech. The response in such situations depends heavily on context.

¹² Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 36

¹³ *Ibid.* pg. 38-39

The criteria in Matsuda's argument depend heavily on context, which places emphasis on the importance of the victim's perspective. Matsuda looks to personal experiences of those who have been subjected to epithets to determine why and how hate speech ought to be curbed. One of her main concerns with leaving hate speech to the 'marketplace of ideas' is that its effects go beyond offense for those to whom it is directed. The three criteria all address one of hate speech's worst effects: it assaults the addressee in a way that is not only offensive and evokes a physical response, but also leaves the addressee unable to respond. There is no proper response to a derogatory address. The response goes beyond offense for those who are targeted by hateful words, and begins to resemble a response to physical assault, taking on a performative quality.

Performative Speech Acts

Matsuda's legal remedies for treating racist speech can be aligned with J.L. Austin's argument about performative speech acts in *How To Do Things With Words*. Austin begins with the suggestion that 'statement' is too general a description for many sentences. Instead of treating all sentences as statements, certain distinctions must be made. His first division is made between constative utterances, which describe a situation (for example, "the sun is shining"), and performative utterances, which perform an action (such as saying "I promise"). It is important to note that while constative utterances can be correct or incorrect, such a judgment would not apply to performative statements. "None of the [performative] utterances cited is either true or false: I assert this as obvious and do not argue it. It needs argument no more than that 'damn' is not true or false: it

may be that the utterance ‘serves to inform you’-but that is quite different.’”¹⁴ It does not make sense to place a truth-value on an utterance such as ‘I promise’. Instead, Austin categorizes such utterances as either felicitous (meaning that it works) or infelicitous (meaning that it somehow fails). The remaining question is then, what determines the performative character of an utterance?

The distinction between performative and constative becomes increasingly problematic for Austin. At a first glance, it appears that performative utterances can be characterized as sentences in the present indicative active. Words such as ‘promise’ or ‘bet’ do not describe an act of promising or betting, but instead they perform the action. However it is possible to promise without saying ‘I promise’ (such as saying ‘I will’, ‘I swear’, or even just ‘Yes’), and use the words ‘I bet’ to describe a situation (for example, when there are dark clouds in the sky saying ‘I bet that it will rain’). Austin then attempts to locate other grammatical distinctions between performative and constative utterances, all of which fail. Tone or inflection of voice, grammar, placement amongst other sentences and the non-linguistic circumstances surrounding the utterance can all indicate the performative quality of a sentence, but no single criterion is definitive. “We pointed out that there was certainly no one absolute criterion of this kind... moreover, they certainly would not distinguish performatives from constatives, as very commonly the *same* sentence is used on different occasions of utterance in both ways...”¹⁵ Some performative utterances can be made without recourse to the performative verb, such as saying ‘I will be there’ as opposed to ‘I promise I will be there’. The use of the word

¹⁴ Austin, J. L. How To Do Things With Words. Cambridge: Harvard University Press, 1975. pg. 6

¹⁵ Ibid. pg. 67

'promise' makes the performative statement more explicit, but does not actually change its performative quality. This observation leads Austin to reconsider whether constative utterances are not also performative. After all, a sentence such as 'The promise is made' is constative, but adding a performative verb to the sentence fulfills the same function as it did for other performative statements-'I declare that the promise is made'. This shows that constative statements can also be performative. This leads Austin to conclude that the constative-performative distinction ought to be abandoned in favor of a more general theory of speech acts.

After making this shift, Austin goes on to claim that a person actually performs up to three different acts when speaking. She performs a locutionary act, an illocutionary act, and possibly a perlocutionary act. She says something that has meaning (as opposed to gibberish), which is a locutionary act. She does something *in* saying something, which is illocutionary. Examples of illocutionary acts include asking a question or stating a fact. Finally, she might also do something by saying something, that is, her sentence will have perlocutionary effects as a result of its utterance. She might invoke an answer to her question or convince someone else of something as a result of the fact she stated.

Austin focuses on illocutionary speech acts and suggests that they are frequently assimilated (incorrectly) with either locutionary or perlocutionary speech acts. This is significant because the capacity for truth or falsity depends on the illocutionary force of the sentence. The sentence 'The promise is made.' might be a true or false sentence, depending on how it is used. If, in saying 'The promise is made', I am stating a fact, then my utterance is subject to a true/false assessment. If, on the other hand, I am promising that I will not back out of a business deal, then my statement cannot be evaluated as true

or false. The significance of this discovery is that it eliminates the possibility of determining whether a sentence is true or false when the sentence stands alone. Instead, it must be located within the total speech situation, which accounts for intention, context and any other present factors.

Mari Matsuda's arguments about hate speech align with Austin's claims about speech acts for several reasons. First of all, she argues that hate messages 'do something'. They do not describe, but instead are a performance of hate. Hate speech is also described in the division into locutionary, illocutionary and perlocutionary. Finally, hateful utterances are best located within a total speech situation. Matsuda's description of hard cases shows how the power of such utterances and the message they convey is determined largely by the context they are uttered in, and the intention of the subject who utters them.

Hate speech is performative. Often times, particular epithets are not even necessarily meant to describe anything, but only to insult, which is easily classified as a performative speech act. Austin says of illocutionary acts "Unless a certain effect is achieved, the illocutionary act will not have been happily, successfully performed."¹⁶ According to Matsuda, a slur achieves the effect of assaulting and depriving the victim of a response because of the involuntary psychological response. She describes the effects of hate speech as "real and immediate for the victims."¹⁷ The circumstances surrounding an instance of hate speech make such a response inevitable. This condition can also bring

¹⁶ Austin, J. L. How To Do Things With Words. Cambridge: Harvard University Press, 1975. pg. 116

¹⁷ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 24

about the failure of the insult to act successfully, and might constitute the possibility of hateful words being used in a way that does not achieve this response.

The insult itself is locutionary. It is a word with meaning. Hateful words are also illocutionary, and perlocutionary. A single hateful word can function as an utterance that does something in its utterance. In terms of hate speech, it effects the subordination of whomever it is directed at. It is meant to have the same effect as a physical assault. As Matsuda puts it, “Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group”¹⁸. In being uttered, such slurs have an immediate effect. Perlocutionary effects of hateful words can be observed as well. The effects of insults that targeted group members experience include anxiety, uncertainty and fear. The perlocutionary effects do not end there, however. The effects that I mentioned earlier (examples include hypertension, nightmares, psychosis, PTSD and suicide) continue long after the derogatory address is made. Some feel forced to abandon their education, avoid public places, and to move and curb their own personal liberty in general in order to avoid hateful messages.

One of the problems with these effects of hate speech is that the victim’s ability to respond is compromised. If victims must “curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor”¹⁹ to avoid hate speech, and “experience physiological symptoms and emotional distress”²⁰ when facing an instance of hate speech, then they cannot be expected to find a way to counter the damage done through response, just as someone who is defamed is not expected to respond without aid from

¹⁸ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 23

¹⁹ Ibid. pg. 24

²⁰ Ibid. pg. 24

the law. This is one reason that Matsuda is adamant about legislating against hate speech. Its illocutionary and perlocutionary effects on its victims are harmful in themselves, but the fact that they negate the ability to respond means that without intervention, hateful dominant group members could exercise the power to evoke these effects in their victims unchecked. These effects are what separate hateful utterances from other forms of speech that deserve First Amendment protection.

Although Matsuda's argument considers many important points, it still leaves a few issues unexamined. One is whether injurious meaning originates from the speaking subject or the environment that produces the racist words, as well as the power dynamic that gives the address its power. Is Matsuda's intention to make the injurious words less powerful, or to remove them from public discourse? If it is the former, then how does her presumption that the subject is the origin of hate and power affect her argument? And if it were the latter, would she be at all concerned that the state must proliferate the words in order to create the legislation forbidding them? Would she trust the state as a neutral force that would implement the law the way she intends? What of the case that even the most innocuous words can be used in different contexts? Her argument suggests that racist words injure no matter who uses them or what the situation is; yet she also claims that the state's repetition cannot cause injury.

A Critique of Matsuda's Argument

Is prosecuting individuals for the words they use an effective means of combating an environment of hate? Or does treating the subject as the point of departure when approaching hate speech ignore a larger issue, and assume that hatred can be effectively

combated through indictment? Can we assume that the state would remain neutral if it were to prohibit the use of particular words? How would the words themselves be affected if the government were to control their use? What sort of power does this approach attribute to the subject, the state, and linguistic history? In *Excitable Speech*, Judith Butler critiques Matsuda's suggestion, not because she believes that bigoted people have a right to retain hateful opinions, but because she is concerned that hate speech legislation will unwittingly proliferate hate, while also covering it up.

One of Butler's concerns is that Matsuda's argument in favor of legislation treats the speaking subject as the point of departure, and in doing so, assumes that prosecution will effectively mitigate the already present hatred. Instead, Butler argues that hate speech ought to be viewed as symptomatic of an environment in which hatred already exists. She asks, "...does this [effort to legislate hate speech] not lead to a view of the power of the subject who speaks and, hence, of his/her culpability, in which the subject is prematurely identified as the 'cause' of the problem of racism?"²¹ Prosecuting individuals will prevent specific words from being uttered, but is largely ineffective against the overall environment. In addition, using the law as a response to hate speech yields dangerous effects, such as perpetuating wrong assumptions about the source of injurious power, and implicitly suggesting that the law is a neutral tool that cannot add to the atmosphere of hatred through its use. Were Matsuda's solution implemented, the words themselves might be removed from the public sphere, but at what cost?

Looking to the law for recourse mandates locating a subject as a site of responsibility, blame, and finally punishment. A legislative response is enabled only once

²¹ Butler, Judith. *Excitable Speech*. New York: Routledge, 1997. pg. 80

the subject is in place. This might lead to relief because it results in a feeling that the source of the problem has been located and removed, and will therefore dissipate. “By locating the cause of our injury in a speaking subject and the power of that injury in the power of speech, we set ourselves free, as it were, to seek recourse to the law-now set against power and imagined as neutral-in order to control that onslaught of hateful words.”²² Because removing hate speech is a stressful, seemingly unending task, locating a single responsible subject makes the problem seem solvable. Unfortunately, that relief is grounded in hasty, incorrect assumptions about how hate speech gains its power.

Butler posits that arguments in favor of prosecuting hate speech ignore the fact that the speaking subject who empowers himself does so through citing previous uses of the word. Injury only results from an epithet because of an already established context that it functions in. The slur should be understood as a declaration of membership in an already existing hateful community. “Indeed, racist speech could not act as racist speech if it were not a *citation of itself*; only because we already know its force from its prior instances do we know it to be so offensive now...”²³ It is the presence of that community, and the persistent threat of violence that such a community emanates that causes the injury, not the single individual that cites the community. If a single individual said “I don’t like you based on who you are” to another person, it might be insulting or offensive, but without the reinforcement of a social convention, injury would not result. Matsuda and other advocates of hate speech legislation confirm this by pointing out that when a member of a dominant group is insulted it is not injurious or paralyzing.

²² Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 80

²³ Ibid. pg. 80

Efforts to combat hate speech through legislation assume that the speaking subject initiates the injury at the expense of ignoring the real cause of injury. Nothing can will a performative action into existence without a context, and no subject is powerful enough to will that context into being through a single utterance. In order to utilize the performative power to inflict injury, the context that makes it possible must already exist. Lessening the instances of a word by hate speech legislation would be done at the expense of covering up a powerful history of hate that produces a subject with the power to enact subordination.

Hate speech legislation, in locating the power to injure within single subjects, does not consider what causes epithets to be as injurious as they are, and instead declares that single subjects have the ability to inaugurate injury. “This phantasmatic production of the culpable speaking subject, spawned from the constraints of legal language, casts subjects as the only agents of power.”²⁴ By assigning responsibility for injury to the subject, the law empowers the subject, while simultaneously covering up the real source of injury. Butler charges that while well intentioned, legislation is actually an inappropriate response to hate speech. It perpetuates the problem by enabling the idea that the power to harm can originate in a subject. This not only proliferates the idea that a person *can* inaugurate injury through an utterance but also diminishes the attention paid to the linguistic history that is cited in order to give the epithet its power.

The subject becomes powerful by simultaneously citing the historical linguistic community from which it derives its power and covering up the citation. Butler says, “When an injurious term injures, it works its injury precisely through the accumulation

²⁴ Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 80

and dissimulation of force.”²⁵ In order for the epithet to have the performative force the speaking subject wants it to have, the speaking subject must not only draw on the linguistic community but also must establish itself as the author. Legislation directed at individuals would perpetuate the idea that the subject is the original author of the slur, Butler insists, therefore covering over the real source of the subject’s power, while also implying that the subject can will a performative injurious statement into being.

Advocates of hate speech legislation often cite this performative power attributed to the speaking subject to argue that hateful utterances ought to be curbed by the law. Butler is concerned, though, that advocates of hate speech legislation attribute the same performative power to the law as they do to individuals, without questioning whether legal language can also have the power to injure.

We have established that hate speech must cite prior instances of hate speech in order to have the powerful effect that it does. Indeed, does the law not also cite hate speech in order to succeed, albeit in a different way? If so, can we still understand law as neutral, or does it thereby encompass and perpetuate the hate that it claims to control or remove? If law is neutral, how should we understand situations such as the one in 1990, when 2 Live Crew’s album, *As Nasty As They Wanna Be*, became the first album to be legally declared obscene,²⁶ in which the law was used to perpetuate racist hatred under the guise of combating sexism and obscenity? The Broward County, Florida sheriff, Nick Navarro investigated *As Nasty As They Wanna Be* and declared it obscene, threatening to

²⁵ Ibid. pg. 52

²⁶ Pareles, Jon. “An Album is Judged Obscene; Rap: Slick, Violent, Nasty and, Maybe Hopeful.” The New York Times Online. 17 June 1990. 11 April 2008. < <http://query.nytimes.com/gst/fullpage.html?res=9C0CEFD1330F934A25755C0A966958260&sec=&spon=&pagewanted=1> >.

arrest any store owners who continued to sell the album. Two days after a judge declared the album obscene, the members of 2 Live Crew were arrested for a performance that took place in an adults-only club. None of the nude dance clubs or adult bookstores in Broward County had ever been charged with obscenity, and no other musical performance had ever been declared obscene. This distinction raised questions as to why the members of 2 Live Crew were indicted, and whether race had been a factor in the prosecution.²⁷ The law was supposed to respond to the degradation of an already oppressed group (women), but was utilized in a way that targeted another group (African Americans).

Another of Butler's criticisms of Matsuda is that Matsuda figures the state as neutral in order to propose legislation as a viable solution to hate speech. Matsuda suggests that the law can be a ratchet tool, which can be wielded against hate. The 'outsider jurisprudence' that Matsuda advocates looks to the effects of hate and then figures methods to counter those effects. Tools such as affirmative action and desegregation in addition to criminalizing hate speech defy the supposedly neutral principles that allow hate to flourish.²⁸ Butler is concerned that Matsuda does not question whether these tools might also carry the effects of hatred, and is too easily convinced of their neutrality. She contends, "...the decision to select which of the various acts of speech will be covered under the rubric of hate speech will be decided by the courts. Thus, the rubric is a legal norm to be augmented or restricted by the judiciary in

²⁷ Crewshaw, Kimberle W. *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in Words That Wound. Boulder: Westview Press, 1993. pg. 120-123

²⁸ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 19-20

the ways that it deems fit.”²⁹ Once a law is in place, it will not necessarily be executed or enforced according to the intentions of the person who proposes it. In turning to the law to remove hateful words, Matsuda does not think about how the words will appear, who will use them, who will be charged with using them, or who the law will be used to prosecute in her proposal for legislation. By imagining a neutral state, Matsuda assumes that the word will be employed only to make a point about its harmful qualities, and does not imagine how her laws might be use in a different context.

In the same vein, Matsuda suggests that law does not have one unchangeable meaning. When she says, “Nothing inherent in law ties our hands...”³⁰ she argues that law cannot pinned down to one essential meaning, and that legal language can be refigured to tackle hate speech. However, she does not consider whether hate speech is vulnerable to the same refiguring. Butler says, “...the speech of the law is considered to be resignifiable beyond any limit...hate speech, however, is not recontextualizable or open to resignification in the way that legal language is.”³¹ How is it possible to distinguish between words that can be recontextualized and words that can't? At root, can there be words which only function in one context?

In addition, Matsuda suggests that law can be redirected to combat hate speech, but does not question whether, in the instance of such recontextualization, law might be subject to further recontextualization, making it a vehicle for prejudice. She suggests that hateful racist structures are susceptible to failure, and that the law can be used to topple them. According to her argument, criminalization of hate speech is one inroad to

²⁹ Butler, Judith. *Excitable Speech*. New York: Routledge, 1997. pg 97

³⁰ Matsuda, Mari. *Public Response to Racist Speech*, in *Words That Wound*. Boulder: Westview Press, 1993. pg. 50

³¹ Butler, Judith. *Excitable Speech*. New York: Routledge, 1997. pg. 99

collapsing hatred altogether. Matsuda does not foresee any possibility of her argument being used to transport other quieter, more implicit forms of hate or keep hate within the legal system and societal structure. Laws whose purpose is to end hatred could serve no purpose other than criminalizing hatred. Instances such as the 2 Live Crew controversy suggests otherwise. While Matsuda imagines the law as an instrument, Judith Butler sees it as a conduit for forms of hate that are not readily apparent. In addition, Butler believes the law cannot escape the structure that all words, hateful or otherwise, are subject to.

There are many similarities between law and hate speech. Both must cite prior instances of hate speech in order to have any effect. I have already shown that a derogatory address only becomes injurious if it alludes to prior epithets. The law must cite hate speech as well, perpetuating it in different ways. I will explain exactly how this happens in the next section. The subject that cites the slur can only be efficacious by establishing itself as the point of departure through the way it positions itself in reference to the hateful word and the victim. The law also needs a subject to be the point of departure in order to maintain efficacy, and reinforces the structure that the bigoted individual calls upon in order to succeed. A result of this positioning is that both the law and the hateful speaking subject cover over the fact that they cite prior instances of hate. Most conceptions of a hateful address position the subject as inaugurating an insult without the help of a linguistic history. Matsuda's proposals would reinforce this conception.

We have seen how hate speech legislation is ineffective to combat the problem that it is seemingly meant to solve. But what if the intent of those who suggest legislation is only to remove the words from the public sphere? What if the aim is not to remove

hatred entirely? Matsuda notes that under her criteria, "...arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible."³² She appears to be more concerned with preventing insults than affecting the environment that leads to epithets. Butler argues that even if legislation is only intended to check hateful insults, it does not prevent the repetition of the epithets but actually causes further repetition with different harmful results. Now that we understand how hate speech legislation does not affect the environment that produces hate, I will explain how hateful words are not in fact removed from public discussion by legislation, and how attempts to do so actually result in further harm.

The law might prohibit individual citizens from using hateful words within the public sphere, but this alone cannot remove hate altogether. Matsuda is eager to assume that it would. She pictures a sovereign subject, silenced by a neutral law. Butler criticizes these assumptions, and argues instead that hate speech legislation is ineffective for removing hate from society. While Matsuda suggests that hate speech ought to be legally removed for the good of the people targeted by such speech, and in spite of protests from dominant group libertarians, Butler suggests that hate speech laws actually cause more harm to those they are meant to protect.

On Not Prohibiting Hate Speech

Judith Butler disagrees with Matsuda about the value of hate speech legislation, suggesting that such legislation has little value, and many negative consequences, more so for the victims of hate speech than for the dominant group members whose use of hate

³² Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 36

speech is meant to be curbed. Not only are efforts to reduce hate speech misguided, she asserts, due to the assumption that silencing individuals will reduce hate altogether, but the hate is also reproduced by the state. Slurs reappear in a state-approved form, and for this reason we cannot look to the state to quell hate speech. The words cannot be suppressed. It may appear initially that the reappearance of an epithet for the purpose of penalizing its use is not a bad enough consequence to warrant the removal of any legislation at all, but Butler argues that this is not so. Such claims rest on the assumption that the state can and will only ever suppress the word, or that the word can even be suppressed, and that hateful words cannot be iterable.

Butler bases many of her claims on the idea that words must always repeat. She takes this reasoning from Derrida's argument in *Signature Event Context*. In this essay, Derrida argues that words only have meaning insofar as they are iterable. The meaning of a word depends on the convention it is a part of. Insofar as a word gains meaning from convention, the word must repeat. A word that could not be used beyond a particular context or intention could not function as a word. "A writing that is not structurally readable-iterable-beyond the death of the addressee would not be writing."³³ Any word, in order to be a word cannot be bound to one particular intention or context. If a person says something, and what is said can only be understood in the person's presence but not in a physical absence or in the absence of a fully realized intention—a word that cannot even be quoted—then it is not a word. Yet each repetition signals a shift in the meaning of words to. As words are used in different contexts, their meaning changes. There can

³³ *Signature Event, Context*, pg. 6

never be two identical contexts, and for that reason the word can never mean exactly the same thing twice.

Butler applies this idea to hate speech and the legislation that might prohibit it. She argues that hate speech, like all other speech, must repeat in one form or another. For this reason, it is impossible for hate speech not to repeat, even when prohibited by law. “There is no possibility of *not* repeating. The only question that remains is: How will that repetition occur, at what site, juridical or nonjuridical, and with what pain and promise?”³⁴ Words always repeat, either as government speech or on the street. The difference is that hate speech will instead appear in the form of legislation, on official documents, in the news or during debates. Legislation still proliferates the word it means meant to demolish. One response to such proliferation is that these uses do not have the same detrimental effects as injurious slurs on the street, and therefore might not be as much of a problem. Butler argues that government proliferation is still bad, but in ways that are less malleable than nongovernmental proliferation.

The difference for Butler is that when the government prohibits a word, it will only reappear, this time with a government sanctioned definition. “[Hate speech regulation] will not simply be a legal discourse on racial and sexual slurring, but it will also reiterate and restage those slurs, reproduce them this time as state-sanctioned speech.”³⁵ The government must repeat the word with an approved definition, which implicitly suggests support for the definition. In repeating the word with the sanctioned definition, the government implicitly agrees with the definition, suggesting that it is an accurate description of the people who are supposed to be shielded from hate by the

³⁴ Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 102

³⁵ Ibid. pg. 101

legislation. When this implicit suggestion is read against the explicit act of prohibiting the word, it conveys the forbidden nature of the words, but not the idea that people should not be addressed with slurs because the words are untrue.

This result is what Matsuda and other critical race theorists hoped to avoid by advocating hate speech legislation. Butler has two concerns about the implications of hate speech legislation: first of all, the negative definition cannot be altered when the state has turned its definition into a law, and second, a state-sanctioned definition reduces the ability that a person has to control their self-identity.

When the state sanctions a definition of an epithet, the negative definition is made more permanent. The meaning of the word will not shift the same way when it is legally defined. While it might not be possible for the word to be said publicly, the repetition still occurs, but the state is now the one saying the word instead, and it is said in such a way that the meaning will not be altered. A person might try to reject a state definition, but their rejection could not cause the word to change. A racist linguistic structure, for example, is still unstable even if different uses of the word tend to retain a hateful undertone. A hate speech ordinance would define the racial slur, and fix the meaning such that the meaning of the word is not affected by repetition.

The permanent negative connotation also means that the people who are defined by the word are stuck with a negative definition of themselves. They have no agency to change how they are defined. Even if she rejects the government definition, she can do nothing to change it, and change the fact that other people will understand her in terms of it. She cannot escape being associated with the negative definition. If legislation were

passed to remove words like “queer” from public discourse because of the words potential to harm, then the word could never be reaffirmed.

When combined with the argument about iterability, we end up with the very people who are supposed to be helped by hate speech legislation being cast as government-sanctioned bad commodities that need to be protected, but are also accurately defined by the definitions provided in hate speech ordinances. This is reason alone to reject hate speech legislation. Butler points out, though, that attempts at hate speech legislation have still more consequences which are only felt by the targets of hate speech.

Once the state has control of a word, it is not guaranteed that it will use its legislative and judicial powers the way that proponents of legislation intend. Butler points out that the state has actually inflicted hate speech charges to curb cultural expression and self-definition. She writes, “...it is only upon the affirmative decision of the court that the speech in question becomes hate speech.”³⁶ There are slurs that exist prior to legislation, but it is only legislation, and the court decision that follows, that determine if a word warrants removal. The state has used this power in the past to charge Mapplethorpe and rap music that includes ‘signifying’ with obscenity and hold such displays as responsible for their own cultural expression. “...hate speech arguments have been invoked against minority groups, that is, in those contexts in which homosexuality is rendered graphic (Mapplethorpe)...and those in which African-American vernacular, especially in rap music, recirculates the terms of social injury and is thereby held responsible for such

³⁶ Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 96

terms.”³⁷ Given that courts have held cross burning to be an acceptable contribution to the free market of ideas, the neutrality of hate speech legislation is questionable at best. Matsuda argues that hate speech is a burden of free speech that is carried most heavily by the people who are least able to pay. However, as Butler points out, hate speech legislation has been unwittingly redeployed in such a way to make those people pay twice. Not only are the hate tactics committed against them held to be acceptable when uttered by members of a dominant group, but when they ask the court to refigure the words in a way that displays the existence of hate, they are charged for it. A seemingly neutral instrument (the law) turns into a tool both for further oppression, and for preventing an escape from such oppression.

Overall, it appears that when the state attempts to enact hate speech legislation it draws upon and cites the same linguistic community that makes hate speech possible. It proliferates the same ideas that others do when they use an epithet. Instead of fixing the problems that cause hate speech, legislation is only another repetition of hate. Although the words may not have the same intention behind them in the form of legislation, the injury is still propagated. The difference is that this time the words cannot be altered or controlled by the people who are described. But does this mean there no way to remove hate speech? Should people targeted by epithets resign themselves to avoiding hateful individuals, sometimes at the cost of their livelihood?

An Alternative to Legislation

³⁷ Ibid. pg. 97

Butler suggests that hateful words should be aggressively reappropriated as a feasible alternative to legislation. Hate speech language, she argues, should not be removed from the public, but instead should be used in new contexts that display its potential to harm. “The possibility of decontextualizing and recontextualizing such terms through radical acts of public misappropriation constitutes the basis of an ironic hopefulness that the conventional relation between word and wound might become tenuous and even broken over time.”³⁸ Reappropriating a word severs the connection between word and wound by exposing and changing the degrading meaning of the slur. It makes more sense to exploit repetition to try to change the word, instead of attempting to extinguish the word altogether.

Butler utilizes Derrida’s argument in *Signature Event Context* to explain her suggestion. I am going to explain two components of his argument that contributes to Butler’s argument: citation, and the necessity of words failing.

Citation is closely related to iterability. Insofar as a word is iterable, it is always a citation. The repetition of a word means that it is always taken from somewhere else, and grafted onto a new context. The word never exists outside of a context, but instead only exists within unlimited contexts. The structure of the word that forces it to exist in unlimited contexts allows it to take on different force. Even seemingly meaningless phrases such as “the green is either” can take on new meaning.³⁹ As Derrida says, “Every sign, linguistic or nonlinguistic, spoken or written...in a small or large unit, can be cited, put between quotation mark; in doing so, it can break with every given context,

³⁸ Butler, Judith. *Excitable Speech*. New York: Routledge, 1997. pg. 100

³⁹ *Ibid.* pg. 12

engendering an infinity of new contexts in a manner which is absolutely illimitable.”⁴⁰ No word or phrase ever has a contextual and noncontextual meaning. Instead, it always functions within a context but is not bound to any context in particular. “This does not imply that the mark is valid outside of a context, but on the contrary that there are only contexts without any center or absolute anchoring.”⁴¹ Butler argues that this must be true for hate speech as well. But all words assume different contexts, without being tethered to a particular one, then how should we understand hateful words in terms of their history? If hate speech can be mitigated by assuming new contexts, does it also require that it be unanchored from its hateful origin? Is it possible to find a context for hate speech that does not insult or subordinate anyone?

The third and final aspect of Derrida’s argument that I intend to address is his claim that all words are subject to failure. This failure, as a structural characteristic is not a negative, (as Austin assumed), but instead should be understood as the “internal and positive condition of possibility”⁴² of language. Butler says of this failure “That performative utterances can go wrong, be misapplied, or misinvoked, is essential to their ‘proper’ functioning...”⁴³ Butler suggests exploiting this characteristic in order to make hate speech fail.

How might we understand a failed instance of hate speech, and what effects would the failed utterance have? Who would play what role in making hate speech fail? Is it possible to erode the power of hate speech via its possibility of failure?

⁴⁰ Ibid. pg. 12

⁴¹ Ibid. pg. 12

⁴² Ibid. pg. 17

⁴³ Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 151

Butler suggests that we exploit the iterable characteristics of words in order to erode the power that hate speech has accrued. Putting slurs in a context in which the purpose is not to subordinate but to expose the hateful context in which they exist might accomplish this goal. In order to display hate, the words must be repeated. This particular repetition, however, causes the citation to fail. It does not enact subordination, insult anyone or exude assaulting qualities. Such repetitions can be used to exhibit how injurious hate speech is. "...[slurs] become a kind of linguistic display that does not overcome their degrading meanings, but that reproduces them as public text and that, in being reproduced, displays them as reproducible and resignifiable terms."⁴⁴ Instead of trying to plug up hate speech and force it to stop repeating, Butler suggests we treat these words like any other word, albeit words with an unfortunate history. "...what is the performative power of appropriating the very terms by which one has been abused in order to deplete the term of its degradation, rallying under the sign 'queer' or revaluing affirmatively the category of 'black' or 'women'?"⁴⁵ Instead of trying to force words to do something they can't do (stop repeating), the natural tendencies of words are harnessed to make them less hateful.

Earlier, we saw how the success of a word or phrase is always provisional, and depends on context. This argument weakens any boundary between general instances of success or failure of the word or phrase. If a word's success is always dependent on its presentation amongst other words, then how could the word to ever succeed or fail on its own? If there is no border between a meaningful and a meaningless word, then is it not necessary for reappropriation to take place within a protected environment? When

⁴⁴ Ibid. pg. 100

⁴⁵ Butler, Judith. Excitable Speech. New York: Routledge, 1997. pg. 158

defined by the state, a word cannot take on another meaning, and therefore is more inclined to succeed. The definition cannot be positively revalued, and any use of the word would be criminalized. Positive occurrences of the word (cultural self definition, expression, educational opportunities) cannot exist. What would organizations such as Parents, Families and Friends of Lesbians and Gays or the National Association for the Advancement of Colored People call themselves, if words like 'gay' or 'colored' can only take on a negative connotation? Butler's suggestion for reappropriation would mean that words like 'gay' or 'colored' cannot be used only in derogatory ways, and organizations such as the ones named above could claim the words in new, positive ways.

Presumed Agency in Reappropriation

Butler is concerned that hate speech legislation would create a definition of a subject that is out of the subject's control. If the definition were dictated by the state, the subject who is most affected by the slur would be unable to shape its meaning. The one who controls the meaning of the word would not be addressed by it, and therefore not affected the same way by its connotation. She argues that reappropriation would not lead to the same problem because there would not be one force controlling the definitions of the slurs in question. In the case of reappropriation, the negative definition would not stabilize, and the word could always be revisited. Anyone, including the targeted subject, could affect the meaning of the word by using it in such a way that it ceases to harm. In making this suggestion, Butler assumes that the environment that reappropriation takes place in will enable everyone to redefine the word.

Yet Butler's proposal does not account for circumstances that would prevent a person from contributing to reappropriation. Matsuda argues that one of the main reasons

that hate speech legislation is called for is that the presence of hate speech affects the people who are addressed by it adversely, reducing their ability to participate in society. My own concern is that the people who are most able to take an active role in reappropriation are the ones who are not addressed by the slurs. If true, then several aspects of hate speech legislation that Butler takes issue with would not be resolved by reappropriation. One consequence would be that the subjects who are directly affected by a slur would be the least empowered to participate in reappropriation. The effects of hate speech are such that the victim is disempowered from acting in an environment that the words appear in. If the victim cannot act to reappropriate the words, then the people who will be most active in reappropriation will be the ones who are not targeted by the words.

Matsuda argues that one of the main problems with hate speech is that it paralyzes the person it is addressed to. When someone is targeted because of her minority status, it challenges her security in such a way that makes a response difficult or impossible. “Their [hate groups or individuals] presence and the active dissemination of racist propaganda means that citizens are denied personal security and liberty as they go about their daily lives.”⁴⁶ Matsuda’s argument for legislation is that hate speech compromises the agency of the people who are targeted to respond. An example can be found in Charles Lawrence’s contribution to *Words That Wound*. Lawrence describes an experience related to him by one of his students, a gay white male. When attacked because of his sexual orientation, the student experienced a reaction that made response impossible. The student found himself in a state of shock, and instead of thinking of a

⁴⁶ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg 17

witty response, he could only think of a recent incident of gay bashing.⁴⁷ Lawrence points out that in such incidences, there is no opportunity for a sufficient response. It would not work for the student to deny the claim. It also would not be appropriate or effective for the student to counter that the meaning of the word was degrading. If a person is using the word already, he will most likely not be swayed by a protest that the word is degrading. In addition, when a person is reminded of violence that accompanies the word they are addressed by, it is unlikely that he will want to do anything that might incite more violence. When addressed because of his being white or male, the insult was only offensive, but the attack on the student's sexuality was paralyzing.

Matsuda points out that even in instances in which a particular person is not addressed but hateful words still appear, the ability of the person to respond who is targeted by the word is compromised. The presence of epithets can still paralyze, even when the words are not directed toward a particular person. She uses the example of Mark Twain, who used racist language to expose racism, but notes that sometimes children are still harmed from the "further exposure to racist language, particularly in a white-majority setting."⁴⁸ In addition, when students proliferate a word under the guise of neutral reporting, other students still feel harassed.⁴⁹ A person does not need to be directly targeted by a word for the effects of hate speech to take place, and for her ability to respond to be compromised.

⁴⁷ Lawrence, Charles R. *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in Words That Wound. Boulder: Westview Press, 1993. pg. 70

⁴⁸ Matsuda, Mari. *Public Response to Racist Speech*, in Words That Wound. Boulder: Westview Press, 1993. pg. 43

⁴⁹ *Ibid.* pg. 43

Butler points to Matsuda's claim that hate speech is a continuation and affirmation of the subordination that targeted group members must constantly undergo. She explains Matsuda's argument, saying "Matsuda's assumption is that calling someone a name or, more specifically, being addressed in an injurious way establishes that person's social subordination, and, moreover, has the effect of depriving the addressee of the capacity to exercise commonly accepted rights..."⁵⁰ She later explains that Matsuda considers this subordination to have taken on a universal, structural status. "For Matsuda, it appears that certain historical forms of subordination have assumed a 'structural' status, so that this generalized history and structure constitutes 'the context' in which hate speech proves to be efficacious."⁵¹ If Matsuda is correct that history and the current structure constitute a context in which targeted group members are constantly deprived of their rights, then the ones who are the most injured by this structure are also deprived of their ability to alter the structure that effects their subordination. I do not mean to suggest that the structure cannot be altered, or that it is somehow permanent. I do wish to ask, though, how the people who are simultaneously targeted and deprived of their rights and abilities to affect the conditions of their injury will be enabled to respond within the solution that Butler proposes. Although groups such as the NAACP affirm a name that was at one time used to oppress can be reconfigured it does not mean that everyone is able to reappropriate a subordinating structure.

Butler's argument necessitates that epithets be repeated in order to draw attention to their hateful qualities. Who would repeat the words? Would it be the people who are targeted and subordinated? If the arguments that Matsuda and Lawrence make are true,

⁵⁰ Butler, Judith. *Excitable Speech*. New York: Routledge, 1997. pg. 75

⁵¹ *Ibid.* pg. 76

then it is doubtful that the people who are targeted by hate speech would be able to proliferate the words. There would be a constant danger of the words being flung back at them for purposes of subordination. Would dominant group members repeat the words? Although it would be much easier for someone from a dominant group to reproduce the words, this type of proliferation is what causes discomfort in the first place, regardless of the intention of the person who exhibits the word. Those who are most severely affected by the presence of a particular word would be the least able to participate in its reappropriation.

Butler is concerned that the people who are targeted by a particular word, who might in some cases use the word for self-definition, or whose definition is fixed by the state definition of a word, would no longer be able to determine how they are described. My concern is that a strategy calling for reappropriation will yield similar results. While the definition would not be fixed by the state, the ones who are most affected by the hateful word in question would be the ones least able to participate in reappropriation. The state may not prevent targeted people from affecting words that are used to describe them, but those same people will not necessarily be in a better position to affect reappropriation and create the type of change that they want to see.

Conclusion

Cases like *R.A.V. v. St. Paul* serve as a reminder that turning to the law to eliminate hate speech is ineffective on many levels—a burning cross was ruled as protected speech, while the ordinance that prohibited the burning cross also restricted non-hateful behavior. This case illustrates both problems with hate speech legislation, namely that it

does not necessarily protect the people it is meant to protect and it can also criminalize innocuous speech. The arguments in *Words That Wound* criticize court decisions such as *R.A.V. v. St. Paul* for ignoring history and context, and yet, the authors do not consider that it is impossible to govern the law so that similar decisions can no longer be made. They acknowledge that the law casts the cross burner as the injured victim, but they also assume that their own suggestions could prevent such decisions in the future.

The issues surrounding hate speech legislation are complex and difficult to navigate. The complexities of language make it impossible to counter a word with a law. This observation should not thwart efforts to prevent people from being targeted. It should suggest instead that the law is not the only way to put an end to linguistic injury. Butler's argument might provide a solution to the problem of actively trying to remove hate speech without turning to the judiciary to prevent slurs from being said. However, unchecked repetition of hateful words, even for the purpose of deflating a hateful connotation, can still wound.

This debate should highlight the importance of actively countering hate speech by reappropriating words. It should also show us the importance of considering how reappropriation takes place. A word may always repeat, and just as it is important to steer the repetition away from causing injury, it is equally important to make sure that the process of repetition is not alienating for the people who are targeted.

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