Sovereign Performatives in the Contemporary Scene of Utterance

Judith Butler

Recent proposals to regulate hate speech on campus, in the workplace, and in other public domains have spawned a set of ambivalent political consequences and raised crucial questions concerning the status of language: Is hate speech a kind of action? Does it have the power to constitute offensive conduct? Not only is language—construed either as an offensive mode of address or as the uttering of offensive epithets—said to have the power to injure those to whom it is addressed, but the sphere of language has become a privileged domain in which to interrogate the cause and effects of social injury. Whereas earlier moments in the civil rights movement or in feminist activism were primarily concerned with documenting and seeking redress for various forms of discrimination, the current political concern with hate speech emphasizes the linguistic form that discriminatory conduct assumes, seeking to establish verbal conduct as discriminatory action.[1] But what is verbal conduct? Clearly, the law has definitions to offer, and those definitions often institutionalize catachrestic extensions of ordinary understandings of speech; hence, the burning of a flag or even a cross may be construed as speech for legal purposes. Recently, however, jurisprudence has sought the counsel of rhetorical and philosophical accounts of language in order to account for hate speech in terms of a more general theory of linguistic performativity. Strict adher-

1. Catharine MacKinnon writes that "group defamation is a verbal form inequality takes" (Catharine A. MacKinnon, *Only Words* [Cambridge, Mass., 1993], p. 99; hereafter abbreviated *O*).

Critical Inquiry 23 (Winter 1997)

ents of First Amendment absolutism subscribe to the view that freedom of speech has priority over other constitutionally protected rights and liberties and is, in fact, presupposed by the exercise of other rights and liberties. They also tend to include all "content-based" utterances as protected speech and consider forms of threatening verbal conduct as subject to the question of whether such threats remain speech or whether they have wandered over into the domain of conduct. Only in the latter case is the speech in question proscribable. In the context of hate speech controversies, a recent view of speech is emerging that troubles any recourse to such a strict distinction; that view holds that the very content of certain kinds of speech can be understood only in terms of *the action that the speech performs*. In other words, racist epithets not only relay a message of racial inferiority, but that relaying is the verbal institutionalization of that very subordination. Thus, hate speech is understood not only to communicate an offensive idea or set of ideas but to enact the very message it communicates; thus, the communication itself is at once a form of conduct.[2]

I propose to review some of the senses in which verbal conduct is thought in proposed hate speech regulation and to offer an alternative view on 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.[3] Indeed, the actlike character of certain offensive utterances

2. First Amendment jurisprudence has always allowed for the view that some speech is not protected, and it has included in that category libel, threats, and fraudulent advertising. Mari Matsuda writes, "there is much speech that comes close to action[:] conspiratorial speech, inciting speech, fraudulent speech, obscene speech, and defamatory speech" (Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," in Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* [Boulder, Colo., 1993], p. 32; hereafter abbreviated "PR").

3. Matsuda and others employ powerful metaphors to explain how such words can be said to wound. Whereas the argument is that words can effect injuries that are not the same as physical injuries, the metaphors through which an injury is communicated tend to draw from scenes of physical injury, thus calling into question the distinction between physical and psychic harm. It may be that the kind of injury produced through language requires such a mixing of metaphors, but then it would be important to underscore the relation between psychic and somatic senses of injury conveyed through language. Charles Lawrence refers to words that "are like receiving a slap in the face," "strike a blow," and "disable the victim" (Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in Matsuda et al., *Words That Wound*, p. 68).

Judith Butler is professor of rhetoric and comparative literature at the University of California at Berkeley. Author of *Gender Trouble: Feminism and the Subversion of Identity* (1990) and *Bodies That Matter: On the Discursive Limits of "Sex"* (1993), she just completed *Excitable Speech*, which will appear in 1997.

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

Some of the legal scholars and activists who have contributed to the volume *Words That Wound*—Mari Matsuda, Charles Lawrence, and Richard Delgado—tend to expand and complicate the legal parameters of speech to provide a rationale for the regulation of hate speech. This is accomplished in part by conceptualizing utterances as both expressive of ideas and as forms of conduct in themselves: racist 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 (see "PR," pp. 35–40). 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 chilling sight of avowed racists in threatening regalia marching through our neighborhoods with full police protection is a statement of state authorization" ("PR," pp. 48–49). The utterance thus has the power to effect the subordination that it either depicts or promotes through its free operation within the public sphere unimpeded by state intervention. Effectively, for Matsuda, the state allows for the injury of its citizens, and, she concludes, the "victim [of hate speech] becomes a stateless person" ("PR," p. 25).

Relying on recently proposed hate speech regulation, Catharine MacKinnon makes a similar argument concerning pornography. In *Only Words* (1993), she argues that pornography ought to be construed as a kind of hate speech and that it both communicates and enacts a message of subordination.[4] Pornography wounds, according to MacKinnon, precisely because it proclaims and effects an inequality, that is, it institutes the subordinated status of women. Thus, she 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 pornography 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—or who, by virtue

4. "Whatever damage is done through such words is done not only through their context but through their content, in the sense that if they did not contain what they contain, and convey the meanings and feelings and thoughts they convey, they would not evidence or actualize the discrimination that they do" (*O*, p. 14); or "crossburning is nothing but an act, yet it is pure expression, doing the harm it does solely through the message it conveys" (*O*, p. 33).

of being *depicted* in such speech are presumed to be addressed by it as well. MacKinnon agrees with this position, yet she never makes clear how being depicted within pornography is the same as being addressed by it. The equation, however, is central to her argument to extend Matsuda's position to include the pornographic text. Although primarily a visual text, pornography is considered by MacKinnon, through a legal catachresis, to be a form of speech and a harmful utterance at that.

In making the claim that pornography, through its depiction, effectively subordinates women, MacKinnon makes a number of assumptions: (a) that the formal and expressive features of a visual text can be fully and effectively transposed onto a spoken utterance; indeed, (b) that whatever is at play visually can be translated and reduced to a *spoken* utterance, a form of verbal conduct; further, (c) that pornography is "delivered as an imperative," one that not only demands but also effects the subordination of women. In her view, the pornographic imperative has the power not only to "evidence and actualize" that subordination but, as a "performative" (*O,* p. 21), to establish the subordinated status of women and thereby, to use her newly found language, "construct[s] the social reality of women" (*O,* p. 25).[5]

MacKinnon's argument rests on a number of such premises that I cannot investigate thoroughly in this essay. I propose to focus on the power attributed to the pornographic text to effect the subordinated status of women, not to ascertain whether or not 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. Finally, I read the figure of sovereignty as it emerges within the contemporary discourse on the performative in terms of the Foucauldian view that contemporary power is no longer sovereign in character. Does the figure of the sovereign performative compensate for a lost sense of power, and how might that loss become the condition for a revised sense of the performative?

The interest in this figure of the performative follows from a conviction that a similar way of regarding speech as conduct is at work in several political spheres at the same time and for political purposes that are not always reconcilable with one another. Utterance itself is regarded in inflated and highly efficacious ways, no longer as a representation of power or its verbal epiphenomenon, but as the *modus vivendi* of power itself. We might regard this phenomenon as the "linguistification" of the political field (one for which discourse theory is hardly responsible but which it

5. For a fuller account of MacKinnon's view of the pornographic text as a verbal imperative with the power to make happen that which it commands, see my "Burning Acts: Injurious Language," in *Deconstruction Is/In America: A New Sense of the Political,* ed. Anselm Haverkamp (New York, 1995), pp. 149–80.

might be said to register in some important ways). Consider, then, the paradoxical emergence of a similar figure of the efficacious utterance in recent political contexts that would appear to be inimical to those just mentioned. One is the U.S. military, in which certain kinds of *utterances,* namely, "I am a homosexual," are, within the recently contested policy, now considered to be offensive conduct.[6] The statement, however, ceases to be offensive at the moment that a disclaimer is appended to it, one that takes the form "and I have no intention to act upon my desire." Similarly—but not identically—certain kinds of sexually graphic aesthetic representations, such as those produced and performed by 2 Live Crew or Salt 'n' Pepa, are debated in legal contexts on the question of whether or not they fall under the rubric of obscenity as defined by *Miller* v. *California:* Is the recirculation of injurious epithets in the context of the performance (where performance and recirculation are importantly equivocal) substantially different than the use of such epithets on campus, in the workplace, or in other spheres of public life? Further, at issue is whether such works are expressive or communicative of ideas that have "serious literary, artistic, political, or scientific value," whether they "depict or describe . . . offensive" forms of sexual conduct, and/or "appeal to prurient interest."[7] The question is not simply whether they participate in recognizable genres of literary or artistic value, as if that would suffice to guarantee their protected status. The controversy here, as Henry Louis Gates, Jr. has shown, is more complicated. Appropriating and recirculating established African American genres of folk art, signifying being one central genre, such artistic productions participate in genres that may not be recognizable *to the court.* It in turn discounts African American cultural production as such through the arbitrary and tactical use of obscenity law.[8] Paradoxically and poignantly, investing the courts with the power to regulate such expressions produces new occasions for discrimination.

It may seem at first that these various instances of speech-as-conduct are not at all commensurate with one another, and I do not propose to argue that they are. In each case the figure of the efficacious utterance emerges in a consequentially different scene of address. In Matsuda's discussion, harassing and injurious speech is figured as an address from one citizen to another, or from an employer or manager to a worker, or from

6. The most recent ruling as of this writing has struck down the new policy on the grounds that homosexuals ought not to be held responsible for "exciting the prejudices" of those who object to their homosexuality.

7. *Miller* v. *California,* 413 U.S. 15 (1973).

8. See Henry Louis Gates's comments in Jon Pareles, "Rap: Slick, Violent, Nasty, and, Maybe, Hopeful," *New York Times,* 17 June 1990, pp. D1, D5. Gates argues that the African American genre of signifying is misunderstood by the court and that such genres ought properly to be recognized as works of literary and cultural value.

a teacher to a student. The effect is, in Matsuda's view, to degrade or demean; according to Charles Lawrence, it "is experienced like a blow."[9] It may undermine the addressee's capacity to work, to study, or, in the public sphere, to exercise his or her constitutionally guaranteed rights and liberties: "the victim becomes a stateless person" ("PR," p. 25). If the speech in question has undermined this capacity of the addressee to participate in a constitutionally protected sphere of action and expression, the injurious utterance may be said to have violated, or to have precipitated the violation of, the equal protection clause that guarantees full and equal access to constitutionally protected rights and liberties. Matsuda's assumption is that calling someone a name or, more generally, addressing someone in a certain way socially establishes that person's subordination and, moreover, deprives the addressee of the capacity to exercise commonly accepted rights and liberties within either a specific context (education or employment) or within the more generalized context of the national public sphere. Although some arguments in favor of the regulation of speech are context specific—restricting the regulation to specific workplaces or educational environments—Matsuda seems prepared to claim that the national public sphere in its totality is a proper frame of reference for hate speech regulation. To the extent that certain groups have been historically subordinated, then hate speech directed towards such groups consists in a ratification and extension of that structural subordination. 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 ("PR," pp. 36, 40).

In the case of the U.S. military, there is some public quarrel over the question of whether stating publically that one is a homosexual is the same as stating an intention to perform the act, and it appears that if the intention is stated, then the statement itself is offensive. Deemed offensive by the military is not the intention to act, but *the statement of the intention.* Here an act of speech in which a sexual intention is stated or implied becomes oddly indissociable from a sexual action. Indeed, the two can be rendered separable, it appears, only by the explicit statement of a further intention, namely, an intention *not* to act on one's desire. As in the example of pornographic "speech," a certain sexualization of speech is at issue, one in which the verbal reference to or depiction of sexuality is considered tantamount to a sexual act. 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? In any case, in the revised guidelines to the policy, still in dispute in the courts, it is now

9. Lawrence, "If He Hollers Let Him Go," p. 68.

possible to say, "I am a homosexual" and to add to that statement, "and I have no intention to act on that desire." The first statement alone constitutes offensive and punishable conduct; the second statement appended to the first effectively deprives the former claim of its status as a kind of action. Indeed, by disclaiming the action, the statement returns to a constative or merely descriptive claim, and we arrive at President Clinton's distinction between a protected status—"I am"—and unprotected conduct—"I do" or "I will do."

I have considered the logic of this policy in another essay, and I propose to return to that figure of efficacious and offensive utterance toward the end of this one.[10] In the interim, however, I propose to consider the construal of hate speech as offensive conduct, the effort to construe pornography as hate speech, and the concomitant effort to seek recourse to the state to remedy the injuries allegedly caused by hate speech. What happens when we seek recourse to the state to regulate such speech? In particular, how is the regulatory power of the state enhanced through such an appeal? This is, perhaps, a familiar argument that I hope to make in a less than familiar way. My concern is not only with the protection of civil liberties against the incursion of the state but with the peculiar *discursive power* given to the state through the process of legal redress.

I would like to suggest a formulation for the problem that might seem paradoxical but that I think, even in its hyperbolic mode, might shed some light on the problem that regulating hate speech poses. That formulation is this: *the state produces hate speech,* and by this I do not mean that the state is accountable for the various slurs, epithets, and forms of invective that currently circulate throughout the population; I mean only that the category cannot exist without the state's ratification, and this power of the state's judicial language to establish and maintain the domain of what will be publically speakable suggests that the state plays much more than a limiting function in such decisions; in fact, the state actively produces the domain of publically acceptable speech, demarcating the line between the domains of the speakable and the unspeakable, and retaining the power to make and sustain that consequential line of demarcation. The inflated and efficacious utterance attributed to hate speech in some of the politicized contexts discussed above is itself modeled on the speech of a sovereign state, understood as a sovereign speech act, a speech act with the power to do what it says. This sovereign power is attributed to hate speech when it is said to deprive us of rights and liberties. The power attributed to hate speech is a power of absolute and efficacious agency—performativity and transitivity at once (it does what it says and it does what it says it will do to the one addressed by the

10. See my "States of Paranoia: Homophobia and Citizenship," *Excitable Speech* (New York, 1997).

speech). This power of *legal* language is that to which we refer when we call upon the state to effect the regulation of offensive speech. The problem, then, is not that the force of the sovereign performative is wrong, but when used by citizens it is wrong, and when the state intervenes with its citizens, the force of the performative is, in these contexts, right.

The same kind of force, however, is attributed to the performative in both instances, and that version of performative power is never brought into question by those who pursue heightened regulation. What is this power? And how are we to account for its sustained production within hate speech discourse, as well as its continuing allure?

Before venturing an answer to these questions, it seems worth noting that this invocation of the sovereign performative takes place against the background of a political situation in which power is no longer constrained within the sovereign form of the state. Diffused throughout disparate and competing domains of the state apparatus, and through civil society in diffuse forms as well, power cannot be easily or definitively traced to a single subject who is its speaker, to a sovereign representative of the state. To the extent that Foucault is right to describe contemporary relations of power as emanating from a number of possible sites, power is no longer constrained by the parameters of sovereignty. The difficulty of describing power as a sovereign formation, however, in no way precludes fantasizing or figuring power in precisely that way; to the contrary, the historical loss of the sovereign organization of power appears to occasion the fantasy of its return—a return, I want to argue, that takes place in language, in the figure of the performative. The emphasis on the performative phantasmatically resurrects the performative in language, establishing language as a displaced site of politics and specifying that displacement as driven by a wish to return to a simpler and more reassuring map of power, one in which the assumption of sovereignty remains secure.

If power is no longer constrained by models of sovereignty, if it emanates from any number of centers, how are we to find the origin and cause of that act of power by which injury is done? The constraints of legal language emerge to put an end to this particular historical anxiety, for the law requires that we resituate power in the language of injury, that we accord injury the status of an act and trace that act to the specific conduct of a subject. Thus, the law requires and facilitates a conceptualization of injury in relation to a culpable subject, thus resurrecting the subject (which could just as well be a corporate or group entity as an individual) in response to the demand to seek accountability for injury. Is such a location of the subject as the origin and cause of racist structures, much less of racist speech, justified?

Foucault argues that sovereignty, as a dominant mode for thinking power, restricts our view of power to prevailing conceptions of the subject,

making us unable to think about the problem of domination.[11] His view of domination, however, is in marked contrast with Matsuda's: "domination" is not "that solid and global kind of domination that one person exercises over others, or one group over another, but the manifold forms of domination that can be exercised within society," ones that require neither the sovereign representative of the state, that is, the King, nor his subjects as its sole or primary sites of exercise ("TL," p. 96). On the contrary, Foucault writes, "one should try to locate power at the extreme of its exercise, where it is always less legal in character" ("TL," p. 97).[12] The subject, for Foucault, is *not* the extreme of power's exercise. In an antivoluntarist account of power, Foucault writes,

> the analysis [of power] should not attempt to consider power from its internal point of view and . . . should refrain from posing the *labyrinthine and unanswerable question:* "Who then has power and what has he in mind? What is the aim of someone who possesses power?" Instead, it is a case of studying power at the point where its intention, if it has one, is completely invested in its real and effective practices. ["TL," p. 97; emphasis mine]

This shift from the subject of power to a set of practices in which power is actualized in its effects signals, for Foucault, a departure from the conceptual model of sovereignty that he claims dominates thinking on politics, law, and the question of right. Among the very practices that Foucault counters to that of the subject are those that seek to account for the formation of the subject itself:

> Let us ask . . . how things work at the level of on-going subjugation, at the level of those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviours, etc. . . . We should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts, etc. We should try *to grasp subjection in its material instance as a constitution of subjects.* ["TL," p. 97; emphasis mine]

Consider that the utterances of hate speech are part of the continuous and uninterrupted process that "subjects our bodies," the "on-going

11. See Michel Foucault, "Two Lectures," *Power/Knowledge: Selected Interviews and Other Writings 1972–1977,* trans. Colin Gordon et al., ed. Gordon (New York, 1980), pp. 109–33; hereafter abbreviated "TL."

12. Earlier in the same lecture, Foucault offers a slightly more expanded formulation of this view: "the analysis in question . . . should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions. Its paramount concern, in fact, should be with the point where power surmounts the rules of right which organise and delimit it and extends itself beyond them" ("TL," p. 96).

subjugation" that is the very operation of interpellation, that (continually repeated) action of discourse by which subjects are formed in subjugation. Those offensive terms that mark out a discursive place of violation precede and occasion the utterance by which they are spoken; the utterance is the occasion for the renewal of that interpellating operation. Indeed, that operation is only instanced by the verbal conduct that we seek, rather hastily, to prosecute, thus misidentifying the explicit moment of discourse, its spoken emblem, as the cause of its most injurious effects.

When the scene of racism is reduced to a single speaker and his or her audience, the political problem is cast as the tracing of the harm as it travels from the speaker to the psychic/somatic constitution of the one who hears the term or to whom it is directed. The elaborate institutional structures of racism as well as sexism are suddenly reduced to the scene of utterance, and utterance, no longer the sedimentation of prior institution and use, is invested with the power to establish and maintain the subordination of the group addressed. Does this theoretical move not constitute an overdetermination of the scene of utterance, one in which the injuries of racism become reducible to the injuries produced in language?[13] And does this not lead to a view of the power of the subject who speaks and, hence, of his or her culpability, in which the subject is prematurely identified as the cause of the problem of racism?

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. This phantasmatic production of the culpable speaking subject, spawned from the constraints of legal language, casts subjects as the only agents of power. Such a reduction of the agency of power to the actions of the subject may well seek to compensate for the difficulties and anxieties produced in the course of living in a contemporary cultural predicament in which neither the law nor hate speech are uttered exclusively by a singular subject. The racial slur is always cited from elsewhere, and in the speaking of it, one chimes in with a chorus of racists, producing at that moment the linguistic occasion for an imagined relation to a historically transmitted community of racists. In this sense, racist speech does not originate with the subject, even if it requires the subject for its efficacy, as it surely does. 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, and we brace our-

13. This abstraction of the communicative scene of utterance appears to be the effect, in part, of a First Amendment jurisprudence organized in relation to the "Spence test," formulated in *Spence* v. *Washington,* 418 U.S. 405 (1974). For a very interesting effort within First Amendment jurisprudence to counter this move toward abstract communicative events with a situating of speech within social structure, see Robert Post, "Recuperating First Amendment Doctrine," *Stanford Law Review* 47 (July 1995): 1249–81.

selves against its future invocations. The iterability of hate speech is effectively dissimulated by the subject who speaks the speech of hate.

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 as wielding the sovereign power to do what he or she says, one for whom speaking is immediately acting. Examples of illocutionary performatives 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.[14] Hate speech as a performative 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.

But what kind of speech is attributed to the citizen in such a view, and how does such an account draw the line between the performativity that is hate speech and the performativity that is the linguistic condition of citizenship? If hate speech is a kind of speech that no citizen ought to exercise, then how might its power be specified, if it can? And how are both the proper speech of citizens and the improper hate speech of citizens to be distinguished from yet a third level of performative power, that which belongs to the state?

This last seems crucial to interrogate if only because hate speech is itself described through the sovereign trope derived from state discourse (and discourse on the state). Figuring hate speech as an exercise of sovereign power implicitly performs a catachresis by which the one who is charged with breaking the law is nevertheless invested with the sovereign power of law. What the law says, it does, but so, too, the speaker of hate. Thus the contest between hate speech and the law becomes staged, paradoxically, as a battle between two sovereign powers.

Does the one who utters hate speech act like the law in the sense that one has the power to make happen what one says (as a judge backed by law in a relatively stable political order has the power to do); and do we attribute to the illocutionary force of that utterance imaginary state

14. J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmson and Marina Sbisà (Cambridge, Mass., 1975), p. 4. A performative does not have to assume an explicit grammatical form in order to operate as a performative. Indeed, a command might be as efficaciously enacted through silence as it is through its explicit verbal formulation. I gather that even a silent bearing would qualify as a linguistic performative to the extent that we understand silence as a constitutive dimension of speech.

power, backed by the police? Similarly, for the one who claims that one's own performative power is cut short through being addressed by hate speech, is his or her performative power significantly different from the one who is said to utter the speech at all?

This idealization of the speech act as sovereign action (whether positive or negative) appears linked with the idealization of sovereign state power or, rather, with the imagined and forceful voice of that power. It is as if the proper power of the state has been expropriated, delegated to its citizens, and the state then reemerges as a neutral instrument to which we seek recourse to protect us from other citizens, who have become revived emblems of a (lost) sovereign power.

MacKinnon and the Logic of the Pornographic Utterance

MacKinnon's recent arguments are as compelling as they are problematic. The class of people, mainly women, who are subordinated and degraded through their depiction in pornography, the class to whom pornography addresses its imperative of subordination, are the ones who lose their voice, as it were, as the consequence of having been addressed and discredited by the voice of pornography. 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 is expected to mean.[15]

MacKinnon invokes Anita Hill to illustrate this expropriation and deformation of speech performed by pornography. The very act by which Hill gave testimony, one intended to establish that an injury was done to her, was taken up by the Senate hearings—itself a pornographic scene—as a confession of her shame and, hence, her guilt. 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. After all, in speaking it, she assumes it, furthers it, produces it; her speaking appears as an active appropriation of the sexualization she seeks to

15. Important to note here is that Austin understood all performatives to be subject to misuse and misfire, a "failure" of felicity that is generalized into a condition of performativity itself for Jacques Derrida, Shoshana Felman, and others.

counter. Within pornography, there is no countering this sexualization without having that very countering become a sexualized act. The pornographic is marked by this power of sexual appropriation.

Yet MacKinnon uses Hill as the example of such sexualization without considering the relation between racialization and exemplification. In other words, it is not only that Anita Hill is doubly oppressed, as African American and as a woman, but that race becomes a way to represent sexuality pornographically. Just as the racialized scene of Thomas and Hill allows for the externalization of sexual degradation, so it permits a purification in prurience for the white imaginary. Displaying African American status permits sexuality to become a spectacle and whites to be recast outside the fray, as witnesses and watchers who have circuited their own sexual anxieties through the publicized bodies of blacks.

Pornography almost always works through inversions of various sorts, but these inversions have a life and power that exceeds the domain of the pornographic. Consider, then, that in the account I have just rendered—which I hope is a fair one—the problem with pornography is precisely that it *recontextualizes* the intended meaning of an act of speech, where that act of speech intends a no—or is figured as intending a no—and that recontextualization takes the specific form of a *reversal* in which the no is taken as, read as, a yes. The resistance to sexuality is thus refigured as the peculiar venue for its affirmation and recirculation.

This very sexualization takes place in and as the act of speech. In speaking, she displays her agency; in speaking of sexuality, she displays her sexual agency; hence, any claim made against the sexualization of discourse from that position of the active sexualization of discourse is rhetorically refuted by the act of speech itself or, rather, by the actlike character of speech and the fictive agency presumed at work in the act of speaking. 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. 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 pornography is that it sets her words 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.

This pornographic recontextualization of Hill's act of speech is taken by MacKinnon to be paradigmatic of the kind of reversal of meanings that pornography systematically performs. And, for MacKinnon, this power of pornographic recontextualization means that whenever a woman says no within a pornographic context, that no is taken as a yes.

Pornography, like the Freudian unconscious, knows no negation. This structuring of pornography, however, cannot account for the context of Hill's speech act; it is not regarded as communicative, but as orchestrated as sexual spectacle through its implicit and thorough racialization. Hill is the example of pornography because, as black, she becomes the spectacle for the projection and living out of white sexual anxiety.

But MacKinnon's concern is of another order. She presupposes that one ought to be in a position to utter words in such a way that the meaning of those words coincides with the intention with which they are uttered, and that the performative dimension of that uttering works to support and further that intended meaning. Hence, one of the problems with pornography is that it creates a scene in which the performative dimension of discourse runs counter to its semantic or communicative functioning. MacKinnon's presupposition is elaborated by the philosopher Rae Langton, who seeks to give logical force to MacKinnon's largely rhetorical claims.[16] This power to exercise speech such that the performance and the reception are governed and reconciled by a single and controlling intention is conceived by Langton as essential to the operation and agency of a rights-bearing person, one who is socially capable of exercising fundamental rights and liberties guaranteed by the equal protection clause of the Fourteenth Amendment.

Significantly, the argument against pornography seeks not only to limit the First Amendment rights of pornographers but also to expand the sphere of First Amendment protection for those depicted and (hence) addressed by pornography. Pornographic representation discredits and degrades those whom it depicts—those being mainly women—such that the effect of that degradation is to cast doubt on whether the speech uttered by those depicted can ever be taken to mean what it says. In other words, just 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. 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, 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 pornography on this model also exploits a certain notion of liberal sovereignty to further its

16. See Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 22 (Fall 1993): 293–330.

own aims, insisting that consent always and only constitutes the subject.

This critique of the effect of pornography on speech, of how, in particular, it may be said to *silence* speech, is motivated by an effort to reverse the threat to the sovereign performed by the pornographic depiction. As an effort to retether the utterance to the sovereign intention, the antipornography stance opposes the state of disarray into which the utterance has apparently fallen. The utterance risks meaning in ways that are not intended or never intended; it becomes a sexualized act, evidencing itself as seduction (hence, as perlocutionary) rather than as truth based (hence, as constative). Pornography debases the utterance to the status of rhetoric and exposes its limits as philosophy.

Contestations of Universality

If pornography performs a deformation of speech, what is presumed to be its proper form? What is the notion of nonpornographic speech that conditions this critique of pornography? Langton writes that "the ability to perform speech acts can be a measure of political power" and of "authority," and "one mark of powerlessness is an inability to perform speech acts that one might otherwise like to perform."[17] In having a speech act silenced, one cannot effectively use the performative. When the no is taken as yes, the capacity to make use of the speech act is undermined. But what might guarantee a communicative situation in which no one's speech disables or silences another's speech in this way? This seems to be the very project in which Habermas and others are engaged—an effort to devise a communicative speech situation in which speech acts are grounded in consensus and in which no speech act is permissible that performatively refutes another's ability to consent through speech. Indeed, although neither Langton nor MacKinnon consult Habermas, their projects seem to be structured by similar cultural desires. The reversal or deformation of speech by pornography—as described by MacKinnon and Langton—would seem to be an example of precisely the kind of degraded speech situation that the Habermasian theory of speech seeks to criticize and invalidate.

The ideal of consent, however, makes sense only to the degree that the meaning of the terms in question submits to a consensually established meaning. Terms that mean in equivocal ways are thus a threat to the ideal of consensus. Thus, Habermas insists that reaching consensus requires that words be correlated with univocal meanings: "the productivity of the process of understanding remains unproblematic only so long as all participants stick to the reference point of possibly achieving a mutual understanding in which the *same* utterances are assigned the same

17. Ibid., pp. 314, 315, 314.

meaning."[18] One might well wonder who stands above the interpretive fray in order to assign the same utterances the same meanings, but clearly the threat posed by such an authority is deemed less serious than the one posed by equivocal interpretation left unconstrained. And, yet, if utterances can be the bearers of equivocal meanings, then their power is, in principle, less unilateral and sure than it appears. Indeed, the equivocality of the utterance means that it might not always mean in the same way, that its meaning might be turned or derailed in some significant way, and that words that seek to injure might well miss their mark and produce an effect counter to the one that is intended. The disjuncture between utterance and meaning is the condition of possibility for revising the performative, of the performative as the repetition of its prior instance, a repetition that is at once a reformulation. Indeed, testimony would not be possible without citing the injury for which one seeks compensation. And Anita Hill's speech must recite the words spoken to her in order to display their injurious power. They are not originally her words, as it were, but their citation constitutes the condition of possibility for her agency in the law, even as, as we all saw, they were taken up precisely to discount her agency in this case. The performative's citation produces that possibility for agency and expropriation at the same time.

The political advantages to be derived from insisting on such a disjuncture are starkly different from those supposedly gained following Habermas's notion of consensus. 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. This risk and vulnerability are proper to the democratic process in the sense that one cannot know in advance the meaning that the other will assign to one's utterance, what conflict of interpretation may well arise, and how best to adjudicate that difference. The effort to come to terms is not one that can be resolved in anticipation but only through a concrete struggle of translation, one whose success has no guarantees.

Habermas, however, insists that a guarantee might be found in the anticipation of consensus, that there are "idealizing suppositions" that constrain in advance the kinds of interpretations to which utterances are subject: "language games only work because they presuppose idealizations that transcend any particular language game; as a necessary condition of possibly reaching understanding, these idealizations give rise to the perspective of an agreement that is open to criticism on the basis of validity claims."[19] Matsuda's arguments appear to coincide with this view as well, since one of the arguments she makes against racist speech is that

18. Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. Frederick Lawrence (Cambridge, Mass., 1987), p. 198.

19. Ibid., pp. 198, 199.

it implicitly makes a claim for racial inferiority that is rejected by the international community. There is no reason for the Constitution to protect such speech given that such speech conflicts with the commitments to universal equality that are fundamental to the Constitution. In arguing to protect such expressions, the judicial representatives of the Constitution would be working against one of the fundamental tenets of that founding text.

This last claim is significant, for more is at stake than might appear. According to this view, not only does racist speech contradict the universalist premise of the Constitution, but any speech that actively contests the founding premise of the Constitution ought not for that reason to be protected by the Constitution. To protect such speech would be to engage in a performative contradiction. Implicit to this argument is the claim that the only speech that ought to be protected by the Constitution is speech grounded in its universalist premises.

Taken as a positive criterion for establishing protected speech, this last is a controversial and ambitious claim. The domain of the speakable is to be governed by prevailing and accepted versions of universality. We are no longer considering what constitutes hate speech but, rather, the broader category of what constitutes reasonable criteria by which to protect speech. Moreover, at stake in the delineation of protected speech is the question, What will constitute the domain of the legally and legitimately speakable? The invocation of the universal premise is discussed in a cursory way by Matsuda, but it seems worth pursuing in some detail in order to consider the following question: Is the normative notion of legitimate speech presupposed by Matsuda's analysis one in which any speaker is constrained by *existing* notions of universality? How would we reconcile such a view with that of Etienne Balibar, for instance, who argues that racism informs our current notions of universality?[20] How might we continue to insist upon more expansive reformulations of universality, if we commit ourselves to honoring only the provisional and parochial versions of universality currently encoded in international law? Clearly, such precedents are enormously useful for political arguments in international contexts, but it would be a mistake to think that such conventional formulations exhaust the possibilities of what might be meant by the universal. Are we to expect that we will know in advance the meaning to be assigned to the utterance of universality, or is this utterance the occasion for a meaning that is not to be fully or concretely anticipated?

Indeed, it seems important to consider that standards of universality are historically articulated and that exposing the parochial and exclusionary character of a given historical articulation of universality is part

20. See Etienne Balibar, "Racism as Universalism," *Masses, Classes, Ideas: Studies on Politics and Philosophy before and after Marx*, trans. James Swenson (New York, 1994), pp. 191–204.

of the project of extending and rendering substantive the notion of universality itself. Racist speech, to be sure, contests current standards governing the universal reach of political enfranchisement. But there are other sorts of speech that constitute valuable contestations crucial to the continuing elaboration of the universal itself, and it would be a mistake to foreclose them. Consider, for example, that situation in which subjects who have been excluded from enfranchisement by existing conventions governing the exclusionary definition of the universal seize the language of enfranchisement and set into motion a performative contradiction, claiming to be covered by that universal, thereby exposing the contradictory character of previous conventional formulations of the universal. This kind of speech appears at first to be impossible or contradictory, but it constitutes one way to expose the limits of current notions of universality and to constitute a challenge to those existing standards to become more expansive and inclusive. In this sense, being able to utter the performative contradiction is hardly a self-defeating enterprise; on the contrary, it is crucial to the continuing revision and elaboration of historical standards of universality proper to the futural movement of democracy itself. To claim that the universal has not yet been articulated is to insist that the "not yet" is proper to an understanding of the universal itself: that which remains unrealized by the universal constitutes it essentially. The universal begins to become articulated precisely through challenges to its *existing* formulation, and this challenge emerges from those who are not covered by it, who have no entitlement to occupy the place of the "who," but who, nevertheless, demand that the universal as such ought to be inclusive of them. The excluded, in this sense, constitute the contingent limit of universalization. And the universal, far from being commensurate with its conventional formulation, emerges as a postulated and open-ended *ideal* that has not been adequately encoded by any given set of legal conventions.[21] If existing and accepted conventions of universality *constrain* the domain of the speakable, this constraint produces the speakable, marking a border of demarcation between the speakable and the unspeakable.

The border that produces the speakable by excluding certain forms of speech becomes an operation of censorship exercised through the very postulation of the universal. Does every postulation of the universal as an existent, as a given, not codify the exclusions by which that postulation of universality proceeds? In this instance and through this strategy of relying on *established conventions of universality,* do we unwittingly stall the process of universalization within the bounds of established convention, naturalizing its exclusions and preempting the possibility of its radicaliza-

21. See the comparable views of ideals and idealization in Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography, and Sexual Harassment* (New York, 1995), and Owen Fiss, *The Irony of Free Speech* (Cambridge, Mass., 1996).

tion? The universal can only be articulated in response to a challenge from (its own) outside. As we call for the regulation of injurious speech on the basis of "universally" accepted presuppositions, do we reiterate practices of exclusion and abjection? What constitutes the community that might qualify as a legitimate community that debates and agrees upon this universality? If that very community is constituted through racist exclusions, how shall we trust it to deliberate on the question of racist speech?

At stake in this definition of universality is the distinction between an idealizing supposition of consensus that is in some ways already there and one that is yet to be articulated, defying the conventions that govern our anticipatory imaginings. This last is something other than a nonconventional idealization (Habermas) conceived as always already there, or as one encoded in given international law (Matsuda) and thus equating present and ultimate accomplishments. The anticipated universality, one for which we have no ready concept, is one whose articulations will only follow, if they do, from a contestation of universality at its already imagined borders.

The notion of consensus presupposed by either of the first two views proves to be a prelapsarian contention, one that short-circuits the necessarily difficult task of forging a universal consensus from various locations of culture, to borrow Homi Bhabha's title and phrase, and the difficult practice of translation among the various languages in which universality makes its varied and contending appearances. The task of cultural translation is one that is necessitated precisely by that performative contradiction that takes place when one with no authorization to speak within and as the universal nevertheless lays claims to the term. Or, perhaps more appropriately phrased, one who is excluded from the universal, and yet belongs to it nevertheless, speaks from a split situation of being at once authorized and de-authorized (so much for delineating a neat site of enunciation). That speaking is not a simple assimilation to an existing norm, for that norm is predicated on the exclusion of the one who speaks, and whose speech calls into question the foundation of the universal itself. Speaking and exposing the alterity within the norm (the alterity without which the norm would not know itself) exposes the failure of the norm to effect the universal reach for which it stands, exposes what we might underscore as the promising ambivalence of the norm.

The failure of the norm is exposed by the performative contradiction enacted by one who speaks in its name even as the name is not yet said to designate the one who nevertheless insinuates his or her way into the name enough to speak in it all the same. Such double-speaking is precisely the temporalized map of universality's future, the task of a postlapsarian translation whose future remains unpredictable. The contemporary scene of cultural translation emerges with the presupposition that the

utterance does not have the same meaning everywhere, indeed, that the utterance has become a scene of conflict (to such a degree, in fact, that we seek to prosecute the utterance in order, finally, to fix its meaning). The translation that takes place at this scene of conflict is one in which the meaning intended is no more determinative of a "final" reading than the one that is received, and no final adjudication of conflicting positions can emerge. That lack of finality is precisely the interpretive dilemma to be valued, for it suspends the need for final judgement in favor of an affirmation of a certain linguistic vulnerability to reappropriation. This vulnerability marks the way that a postsovereign democratic demand makes itself felt in the contemporary scene of utterance.[22]

The argument that seeks to regulate hate speech on the grounds that it contradicts both the *sovereign* status of the speaker (MacKinnon's argument concerning the effect of pornography) or the *universal* basis for its speech (Matsuda's argument) attempts to revitalize the ideal of a sovereign speaker who not only says what he or she means but whose utterance constitutes an illocutionary kind of doing. How are we to understand, within this political discourse, the resurrection of the sovereign speaker in relation to the crisis of the sovereign speaker registered within recent critical theory? The normative conception of the political speaker, as outlined in Langton's essay, and the objection to the silencing effects of hate speech and pornography, as argued by MacKinnon and Matsuda, both contend that political participation requires the ability not only to represent one's intention in speech but to actualize one's intention through the act of speech.

The problem is not simply that, from a theoretical point of view, it makes no sense to assume that intentions are always properly materialized in utterances, and utterances materialized in deeds, but that the insight into those sometimes disjunctive relations constitutes an alternative view of the linguistic field of politics. Does the assertion of a potential incommensurability between intention and utterance (not saying what one means), utterance and action (not doing what one says), and intention and action (not doing what one meant) threaten the very linguistic condition for political participation, or do such disjunctures produce the possibility for a politically consequential *re*negotiation of language that exploits the undetermined character of these relations? Could the concept of universality be exposed to revision without the presumption of such a disjuncture? Consider the situation in which racist speech is contested to the point that it does not have the power to effect the subordination that it espouses and recommends; the undetermined relation

22. On the paradoxical efforts to invoke universal rights by French feminists both included and excluded from its domain, see Joan Wallach Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, Mass., 1996).

between saying and doing is successfully exploited in depriving the saying of its projected performative power. And if that same speech is taken up by the one to whom it is addressed, and turned, becoming the occasion of a speaking back and a speaking through, is that racist speech, to some extent, unmoored from its racist origins? The effort to guarantee a kind of efficacious speaking in which intentions materialize in the deeds they have in mind, and interpretations are controlled in advance by intention itself, constitutes a wishful effort to return to a sovereign picture of language that is no longer true and that might never have been true, one that, for political reasons, one might rejoice over not being true. That the utterance can be turned, untethered from its origin, is one way to shift the locus of authority in relation to the utterance. And though we might lament that others have this power with our language, consider the perils of not having that power of interruption and redirection with respect to others.

I am not arguing that one always says what one does not mean, that saying defeats meaning, or that words never perform what they claim to perform. Rendering such a disjuncture necessary to all speech is as suspect as legislating lines of necessary continuity among intention, utterance, and deed. Although Langton casts political agency, and citizenship in particular, as presupposing such a continuity, contemporary forms of political agency, especially those unauthorized by prior conventions or by reigning prerogatives of citizenship, tend to derive political agency from the failures in the performative apparatus of power, turning the universal against itself, redeploying equality against its existing formulations, retrieving freedom from its contemporary conservative valence.[23]

Is this political possibility for reappropriation distinguishable from appropriation-as-pornography, opposed by MacKinnon? Or is the risk of appropriation one that accompanies all performative acts, marking the limits of the putative sovereignty of such acts? The Foucauldian argument is familiar: the more one insists that sexuality is repressed, the more one speaks about sexuality, the more sexuality becomes a confessional sort of speech. The repressive no traced by psychoanalytic doctrine is converted to a strange sort of yes (a thesis that is not inconsistent with psychoanalysis and with its insistence that there is no negation in the unconscious). On the surface, his account appears paradoxically similar to MacKinnon's, but where the no in her view is issued as a refusal to consent, for Foucault it is performed by the repressive law against the sexual subject who, we are left to surmise, might otherwise say yes. For Foucault, as for pornography, the very terms by which sexuality is said to be negated become, inadvertently but inexorably, the site and instrument of a new sexualiza-

23. For an effort to retrieve freedom from conservative political discourse, see the introductory chapter of Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, N.J., 1995).

tion. The putative repression of sexuality becomes the sexualization of repression.[24]

Through recontextualization, the law—prohibition, in this case—allows the reversal in which the sexuality prohibited becomes the sexuality produced. The discursive occasions for a prohibition—renunciation, interdiction, confession—become precisely the new incitements to sexuality, an incitement to discourse as well. That discourse itself proliferates as the repeated enunciation of the prohibitive law suggests that its productive power depends upon its break with an originating context and intention, and that its recirculation is not within the control of any given subject.

MacKinnon and Langton have both argued that the recontextualization of an utterance, or, more specifically, a sexualized recontextualization in which an original no is reversed into a derivative yes, constitutes the very silencing effects of pornography; the performance of an utterance within the pornographic context necessarily reverses in the direction of sexualization the very meaning that the utterance is said to communicate: this is the measure of the pornographic. Indeed, one might consider the uncontrollable effects of resignification and recontextualization, understood as the mundane appropriative work of sexuality, as continually inciting antipornographic agitation. For MacKinnon, the recontextualization takes the form of attributing falsely an assent to becoming sexualized to the one sexualized by a given depiction, the turning of a no into a yes. The disjunctive relation between affirmation and negation discounts the erotic logic of ambivalence in which the yes can accompany the no without exactly negating it. The domain of the phantasmatic is precisely *suspended* action, neither fully affirmed nor fully denied, and most often structured in some form of ambivalent pleasure (yes and no at once).

MacKinnon insists that a woman's "consent" is depicted by the pornographic text and that depiction at once overrides her consent. This thesis is necessary to sustain and extend the analogy between the pornographic text and acts of harassment and rape. If, on the other hand, questions of consent and action are suspended through the pornographic text, then the text does not override consent but produces a visual field of sexuality that is in some sense prior to consent and, indeed, prior to the constitution of the willing subject itself. As a cultural reserve of a sexually overdetermined visual field, the pornographic is precisely what circulates without our consent, but not for that reason against it. The insistence that consent precedes sexuality in all instances signals a return to a pre-

24. Although he makes this argument against psychoanalysis, it is, I would insist, a psychoanalytic argument all the same, and one can see this in a variety of texts in which Freud articulates the erotic economy of "conscience," for instance, or in which the superego is understood to be, at least in part, wrought from the sexualization of a prohibition and only secondarily becomes the prohibition of sexuality.

Freudian notion of liberal individualism in which consent is constitutive of personhood.

For Hill to make her claim against Thomas and against the Senate hearings, she will have to testify again, and that testimony will have to repeat the injury, record it, say it again, and thus open itself to a misappropriation. To distinguish the testimony from the events it records, one would have to mark off the repetition of injury that testimony performs from the performance of injury to which it refers. But if testimony must repeat the injury to make its claim, and that repetition is taken as a sign of agency, then the misconstrual of testimony as a confession of complicity appears to be a risk against which no amount of marking off can safeguard.

More generally, the circulation of the pornographic resists the possibility of being effectively patrolled, and if it could be, the mechanism of patrol would simply become incorporated into its thematic as one of its more savory plots concerning the law and its transgression. The effort to stop such a circulation is an effort to stop the sexualized field of discourse and to reassert the capacity of the intentional subject over and against this field.

State Speech/Hate Speech

Hate speech is a kind of speech that acts, but it is also a kind of speech that is referred to as that which acts and, hence, is an item and object of discourse. Although hate speech may be a saying that is a kind of doing or a kind of conduct, it can be established as such only through a language that authoritatively describes this doing for us; thus, the speech act is always delivered twice removed, that is, through *a theory of the speech act* that has its own performative power (and that is, by definition, in the business of *producing* speech acts, thus redoubling the performativity it seeks to analyze). The description of this act of speech is a doing or a kind of conduct of an equally discursive and equally consequential kind. This is, I think, made nowhere more clearly than in the consideration of how the judgement as legal utterance determines hate speech in highly specific ways.

Considered as discriminatory action, hate speech is a matter for the courts to decide, and so hate speech is not deemed hateful or discriminatory until the courts decide that it is. There is no hate speech in the full sense of that term until and unless there is a court that decides that there is. Indeed, the petition to call something hate speech and to argue that it is also conduct, efficacious in its effects, consequentially and significantly privative of rights and liberties, is not yet to have made the case. The case is made only when it is decided. In this sense, it is the decision of the state, the sanctioned utterance of the state, which produces the act of hate

speech—produces, but does not cause. Here the temporal relation in which the utterance of hate speech precedes the utterance of the court is the reverse of the logical relation in which there is no hate speech prior to the decision of the court. The adjudication of hate speech is thus a matter for the state or, more particularly, its judiciary branch. A determination made by the state, hate speech becomes a determination made by yet another act of speech—the speech of the law. This odd dependency of the very existence of the hateful utterance on the voice-over of the court means that the hateful utterance is not finally distinguishable from the speech of the state by which it is decided.

I am *not* trying to claim that the speech of the state in the moment of decision is *the same as* the racial or sexual slur it seeks to adjudicate. But I am suggesting that they are indissociable in a specific and consequential way. The claim that an instance of hate speech is submitted to the court for adjudication perpetuates a misnomer, since what is at stake in such an adjudication is whether or not the speech in question is hateful. And here I don't mean hateful in any sense, but in the legally precise senses that Matsuda, Delgado, and Lawrence explicate. The process of adjudication—which presumes that the injury precedes the judgement of the court—is an effect of that judgement, a production of that judgement. Thus hate speech is produced by the law, and constitutes one of its most savory productions; it becomes the legal instrument through which to produce and further a discourse on race and sexuality under the rubric of combatting racism and sexism. By such a formulation, I do not mean to suggest that the law causes or incites hate speech but only that 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. The rubric is a legal norm to be augmented or restricted by the judiciary in the ways that it deems fit.

This last impresses me as particularly important considering that hate speech arguments have been invoked against minority groups, that is, in those contexts in which homosexuality is rendered graphic (Mapplethorpe) or verbally explicit (the U.S. military) and those in which African American vernacular, especially in rap music, recirculates the terms of social injury and is thereby held responsible for such terms. Those efforts at regulation are inadvertently strengthened by the enhanced power of the state to enforce the distinction between publically protected and unprotected speech. Antonin Scalia thus asks in *R.A.V.* v. *City of St. Paul* whether a burning cross, though "reprehensible," may not be communicating a message that is protected within the free marketplace of ideas.[25] In each of these cases, the state not only constrains speech but, in the very act of constraining, produces legally consequential speech.

25. *R.A.V.* v. *City of St. Paul,* 112 S.Ct. 326 (1992). For a further discussion of this case in relation to the issues discussed here, see my "Burning Acts."

Not only does the state curb homosexual speech, but it produces as well—through its decisions—a public notion of the self-censoring homosexual; similarly, it produces a public picture of an obscene black sexuality, even as it claims to be curbing obscenity; and it produces the burning cross as an emblem of intelligible and protected speech.

The writings in favor of hate speech legislation minimize the state's exercise of this productive discursive function. Indeed, they minimize the possibility of a misappropriation by the law in favor of a view of the law as politically neutral and malleable. Matsuda argues that law, though formed in racism, can be redirected against racism. She figures the law as a set of ratchet tools, describing it in purely instrumental terms and discounting the productive misappropriations by which it proceeds. This view (which once again invests all power and agency in the subject who would use such an instrument) can be put in the service of a progressive vision, thus "defying the habit of neutral principles to entrench existing power." Later she writes, "nothing inherent in law ties our hands" ("PR," p. 50), and she announces her approval of a method of doctrinal *reconstruction.* In other words, legal language is precisely the kind of language that can be reversed; a law with a reactionary history becomes a law with a progressive aim.

There are, at least, two remarks to be made about this faith in the resignifying capacities of legal discourse. First, the kind of citational reversal that the law is said to perform is exactly the opposite of the citational reversal attributed to pornography. The reconstructive doctrine allows the once reactionary legal apparatus to become progressive, regardless of the originating intentions that animate the law. Pornography's insistence on recontextualizing the original or intended meaning of an utterance is precisely its pernicious power. And, yet, even MacKinnon's advocative representation of a woman's yes and no depends upon a recontextualization and a textual violence of sorts that Matsuda, in the case of law, elevates to the level of legal method under the rubric of doctrinal reconstruction. In both cases, the utterance is uncontrollable, appropriable, and able to signify otherwise and in excess of its animating intentions.

The second point is this: although the law, however reactionary its formation, is understood as a resignifying practice, hate speech, however reactionary its formation, is not deemed susceptible to a significant resignification in the same way. This is the unlucky moment in which the willingness of the courts to discount the literary value of signifying as it operates in rap converges with the claim made by the proponents of hate speech regulation that hate speech *cannot* be resignified. Although Matsuda makes an exception for "satire and stereotyping," this exception holds only to the extent that such utterances do not make use of "persecutory language" ("PR," p. 36). It would be difficult to understand how satire works if it did not recontextualize persecutory language.

The defusing power of this kind of resignification of hate speech,

however, appears to have no place within Matsuda's view. And, yet, the speech of the law is considered to be resignifiable beyond any limit: the law has no single or essential meaning; it can be redirected, reserviced, and reconstructed; its language, though harmful in some contexts, is not necessarily harmful and can be turned and redirected in the service of progressive politics. Hate speech, however, is not recontextualizable or open to a resignification. Indeed, although all sorts of historically and potentially injurious words are recirculated in rap, in film, even as calligrams in photography and painting, it seems that such recontextualizations are not to be construed as aesthetic reenactments worthy of legal protection.

An aesthetic enactment of an injurious word may both *use* the word and *mention* it, that is, make use of it to produce certain effects but also at the same time make reference to that very use, calling attention to it as a citation, situating that use within a citational legacy, making that use into an explicit discursive item to be reflected on rather than a taken-for-granted operation of ordinary language. Or, it may be that an aesthetic reenactment *uses* that word but also *displays* it, points to it, outlines it as the arbitrary material instance of language that is exploited to produce certain kinds of effects. In this sense, the word as a material signifier is foregrounded as semantically empty in itself, but as that empty moment in language that can become the site of semantically a compounded legacy and effect. This is not to say that the word loses its power to injure but that we are given the word in such a way that we can begin to ask, How is it that a word becomes the site for the power to injure? Such use renders the term as a textual object to be thought about and read even as it also implicates us in a relation of knowingness about its conventional force and meaning. The aggressive reappropriation of injurious speech in the rap of, say, Ice-T becomes a site for a traumatic reenactment of injury, but the terms not only mean or communicate in a conventional way but are themselves set forth as discursive items, in their very linguistic conventionality and, hence, as both forceful and arbitrary, recalcitrant and open to reusage.

This view, however, would be strongly countered, I think, by some who favor hate speech regulation and argue that recontextualization and the reversal of meaning are limited when it comes to certain words. Delgado writes, "Words such as 'nigger' and 'spick' are badges of degradation even when used between friends: *these words have no other connotation.*"[26] And, yet, this very statement, whether written in his text or cited here, has another connotation; he has just used the word in a significantly different way. Even if we concede—as I think we must—that the injurious connotation is inevitably *retained* in Delgado's use, indeed, that it is diffi-

26. Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," in Matsuda et al., *Words That Wound*, p. 107; emphasis mine.

cult to utter those words or to write them here, precisely because they unwittingly recirculate that degradation, it does not follow that such words can have *no other connotation.* Their repetition is necessary (in court, as testimony; in psychoanalysis, as traumatic emblems) in order to enter them as objects of another discourse. Paradoxically, their status as act is precisely what undermines the claim that they evidence and actualize the degradation that they intend. As acts, these words become phenomenal; they 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. 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. Such words do wound, and, yet, as Derrick Bell has remarked, racist structures are vulnerable.[27] I take this to apply to racist linguistic structures as well.

When the task of reappropriation is taken up within the domain of protected public discourse, the results seem to me to be more promising and more democratic than when the task of adjudicating the injury of speech is given over to the state. The state always resignifies only its own law, and that resignification constitutes an extension of its jurisdiction and its discourse. Consider that hate speech is not only a production of the state, as I have tried to argue, but that the very intentions that animate the legislation are inevitably misappropriated by the state. To give the task of adjudicating hate speech to the state is to give that task of misappropriation to the state. It will not simply engage in a legal discourse on racial and sexual slurring, but it will also reiterate and restage those slurs, this time as state-sanctioned speech. Given that the state retains the power to create and maintain certain forms of injurious speech as its own, the political neutrality of legal language is highly doubtful.

Hate speech is repeatable speech, and it will continue to repeat itself as long as it is hateful. Its hate is a function of its repeatability. Given that the slur is always cited from elsewhere, that it is taken up from already established linguistic conventions and reiterated and furthered in its contemporary invocations, the question will be whether the state or public discourse will take up that practice of reenactment. We are beginning to see how the state produces and reproduces hate speech, finding it in the homosexual utterance of identity and desire, in the graphic representation of sexuality, of bodily fluids, in the various graphic efforts to repeat and overcome the forces of sexual shame and racial degradation. That speech is a kind of act does not necessarily mean that it does what it says;

27. See Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York, 1992).

it can mean that it displays or enacts what it says at the same time that it says it or, indeed, rather than saying it at all. The public display of injury is also a repetition, but it is not simply that, for what is displayed is never quite the same as what is meant, and in that lucky incommensurability resides the linguistic occasion for change. No one has ever worked through an injury without repeating it: its repetition is both the continuation of the trauma and that which marks a self-distance within the very structure of trauma, its constitutive possibility of being otherwise. 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?