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# BURNING ACTS

## INJURIOUS SPEECH

THE TITLE OF J. L. Austin's *How to Do Things with Words* poses the question of performativity as what it means to say that "things might be done with words." The problem of performativity is thus immediately bound up with a question of transitivity. What does it mean for a word not only to name, but also in some sense to perform and, in particular, to perform what it names? On the one hand, it may seem that the word—for the moment we do not know which word or which kind of word—enacts what it names; where the "what" of "what it names" remains distinct from the name itself and the performance of that "what." After all, Austin's title questions how to do things *with* words, suggesting that words are instrumentalized in getting things done. Austin, of course, distinguishes between illocutionary and perlocutionary acts of speech, between actions that are performed by virtue of words, and those that are performed as a consequence of words. The distinction is tricky, and not always stable. According to the perlocutionary view, words are instrumental to the accomplishment of actions, but they are not themselves the actions which they help to accomplish. This form of the performative suggests that the words and the things done are in no sense the same. But according to his view of the illocutionary speech act, the name performs *itself*,

and in the course of that performing becomes a thing done; the pronouncement is the act of speech at the same time that it is the speaking of an act. Of such an act, one cannot reasonably ask for a "referent," since the effect of the act of speech is not to refer beyond itself, but to perform itself, producing a strange enactment of linguistic immanence.

The title of Austin's manual, *How to Do Things With Words*, suggests that there is a perlocutionary kind of doing, a domain of things done, and then an instrumental field of "words," indeed, that there is also a deliberation that precedes that doing, and that the words will be distinct from the things that they do.

But what happens if we read that title with an emphasis on the illocutionary form of speech, asking instead what it might mean for a word "to do" a thing, where the doing is less instrumental than it is transitive. Indeed, what would it mean for a thing to be "done by" a word or, for that matter, for a thing to be "done in by" a word? When and where, in such a case, would such a thing become disentangled from the word by which it is done or done in, and where and when would that conjunction between word and thing appear indissoluble? If a word in this sense might be said to "do" a thing, then it appears that the word not only signifies a thing, but that this signification will also be an enactment of the thing. It seems here that the meaning of a performative act is to be found in this apparent coincidence of signifying and enacting.

And yet, it seems that this "act-like" quality of the performative is itself an achievement of a different order, and that de Man was clearly on to something when he asked whether a trope is not animated at the moment when we claim that language "acts," that language posits itself in a series of distinct acts, and that its primary function might be understood as this kind of periodic acting. Significantly, I think, the common translation of Nietzsche's account of the metaleptic relation between doer and deed rests on a certain confusion about the status of the "deed." For even there, Nietzsche will claim that certain forms of morality require a subject and institute a subject as the consequence of that requirement. This subject will be installed as prior to the deed in order to assign blame and accountability for the painful effects of a certain action. A being is hurt, and the vocabulary that emerges to moralize that pain is one which isolates a subject as the intentional originator of an injurious deed; Nietzsche understands this, first, as the moralization by which pain and injury are rendered equivalent and, second, as the production of a domain of painful effects suffused with conjectured intention. At such a moment the subject is not only fabricated as the prior and causal origin of a painful effect that is recast as an injury, but the action whose effects are injurious is no longer an action, the continuous present of a doing, but is reduced to a "singular act."



The following citation from *On the Genealogy of Morals* is usually read with an emphasis on the retroactive positing of the doer prior to the deed; but note that simultaneous with this retroactive positing is a moral resolution of a continuous "doing" into a periodic "deed": "there is no 'being' behind doing, effecting, becoming; 'the doer' is merely a fiction added to the deed—the deed is everything." ". . . es gibt kein 'Sein' hinter dem Tun, Wirken, Werden; 'der Täter' ist zum Tun blos hinzugedichtet—das Tun ist alles." In the German, there is no reference to an "act"—*die Tat*—but only to *a doing*, "das Tun," and to the word for a culprit or wrong-doer, "der Tater," which translates merely as a "doer."[2] Here the very terms by which "doing" is retroactively fictionalized (*hinzugedichtet*) as the intentional effect of a "subject," establishes the notion of a "doer" primarily as a wrong-doer. Furthermore, in order to attribute accountability to a subject, an origin of action in that subject is fictively secured. In the place of a "doing" there appears the grammatical and juridical constraint on thought by which a subject is produced first and foremost as the accountable originator of an injurious deed. A moral causality is thus set up between the subject and its act such that both terms are separated off from a more temporally expansive "doing" that appears to be prior and oblivious to these moral requirements.

For Nietzsche, the subject appears only as a consequence of a demand for accountability; a set of painful effects is taken up by a moral framework that seeks to isolate the "cause" of those effects in a singular and intentional agent, a moral framework that operates through a certain economy of paranoid fabrication and efficiency.

*The question, then, of who is accountable for a given injury precedes and initiates the subject, and the subject itself is formed through being nominated to inhabit that grammatical and juridical site.*

In a sense, for Nietzsche, the subject comes to be only within the requirements of a moral discourse of accountability. The requirements of blame figure the subject as the "cause" of an act. In this sense, there can be no subject without a blameworthy act, and there can be no "act" apart from a discourse of accountability and, according to Nietzsche, without an institution of punishment.

But here it seems that Nietzsche's account of subject-formation in *On the Genealogy of Morals* exposes something of its own impossibility. For if the "subject" is first animated through accusation, conjured as the origin of an injurious action, then it would appear that the accusation has to come *from* an interpellating performative that precedes the subject, one that presupposes the prior operation of an efficacious speaking. Who delivers that formative judgment? If there is an institution of punishment within which the subject is formed, is there not also a figure of the law who performatively sentences the subject into being? Is this not, in some sense, the conjecturing by Nietzsche of a prior and more powerful subject? Nietzsche's own language elides this problem by claiming that the "'der Täter' is zum Tun blos hinzugedichtet." This passive verb formation, "hinzugedichtet," poetically or fictively added on to, appended, or applied, leaves unclear who or what executes this fairly consequential formation.

If, on the occasion of pain, a subject is belatedly attributed to the act as its origin, and the act then attributed to the subject as its effect, this double attribution is confounded by a third, namely, the attribution of an injurious consequence to the subject and its act. In order to establish injurious consequence within the domain of accountability, is it necessary not only to install a subject, but also to establish the singularity and discreteness of the act itself as well as the efficacy of the act to produce injury? If the injury can be traced to a specifiable act, it qualifies as an object of prosecution: it can be brought to court and held accountable. But this tracing of the injury to the act of a subject, and this privileging of the juridical domain as the site to



negotiate social injury, does this not unwittingly stall the analysis of how precisely discourse produces injury by taking the subject and its spoken deed as the proper place of departure? And when it is words that wound, to borrow Richard Delgado's phrase, how are we to understand the relation between the word and the wound? If it is not a causal relation, and not the materialization of an intention, is it perhaps a kind of discursive transitivity that needs to be specified in its historicity and its violence? What is the relation between this transitivity and the power to injure?

In Robert Cover's impressive essay, "Violence and the Word," he elaborates the violence of legal interpretation as "the violence that *judges* deploy as instruments of a modern nation-state."[3] "Judges," he contends, "deal pain and death," "for as the judge interprets, using the concept of punishment, she also acts—through others—to restrain, hurt, render helpless, even kill the prisoner" [note the unfortunate implication of liberal feminism when it decides to legislate the feminine as the universal]. Cover's analysis is relevant to the question of prosecuting hate speech precisely because it underscores the power of the *judiciary* to enact violence through speech. Defenders of hate speech prosecution have had to shift the analysis to acknowledge that agents other than governments and branches of government wield the power to injure through words. Indeed, an analogy is set up between state action and citizen action such that both kinds of actions are understood to have the power to deny rights and liberties protected by the Equal Protection Clause of the Constitution. Consequently, one obstacle to contemporary efforts to legislate against hate speech is that the "state action doctrine" qualifies recourse to the Equal Protection Clause in such instances, presuming as it does that only governments can be the agents of harmful treatment that results in a deprivation of rights and liberties.[4] To argue that citizens can effectively deprive *each other* of such rights and liberties through words that wound requires overcoming the restrictions imposed by the state action doctrine.[5]

Whereas Cover emphasizes the *juridical* power to inflict pain through language, recent jurisprudence has shifted the terms away from the interpretive violence enacted by nation-states and toward

the violence enacted by citizen-subjects toward members of minority groups. In this shift, it is not simply that citizens are said to act like states, but the power of the state is refigured as a power wielded by a citizen-subject. By "suspending" the state action doctrine, proponents of hate speech prosecution may also suspend a critical understanding of state power, relocating that power as the agency and effect of the citizen-subject. Indeed, if hate speech prosecution will be adjudicated by the state, in the form of the judiciary, the state is tacitly figured as a neutral instrument of legal enforcement. Hence, the "suspension" of the state action doctrine may involve both a suspension of critical insight into state power and state violence in Cover's sense, but also a displacement of that power onto the citizen, figured as a kind of sovereign, and the citizenry, figured as sovereigns whose speech now carries a power that operates like state power to deprive other "sovereigns" of fundamental rights and liberties.[6]

In shifting the emphasis from the harm done by the state to the harm done by citizens and non-state institutions against citizens, a reassessment of how power operates in and through discourse is also at work. When the words that wound are not the actions of the nation-state—indeed, when the nation-state and its judiciary are appealed to as the arbiter of such claims made by citizens against one another—how does the analysis of the violence of the word change? Is the violence perpetrated by the courts unwittingly backgrounded in favor of a politics that presumes the fairness and efficacy of the courts in adjudicating matters of hate speech? And to what extent does the potential for state violence become greater to the degree that the state action doctrine is suspended?

The subject as sovereign is presumed in the Austinian account of performativity; the figure for the one who speaks and, in speaking, performs what she/he speaks, is the judge or some other representative of the law. A judge pronounces a sentence and the pronouncement is the act by which the sentence first becomes binding, as long as the judge is a legitimate judge and the conditions of felicity are properly met. The performative in Austin maintains certain commonalities with the Althusserian notion of interpellation, although interpellation is



never quite as "happy" or "effective" as the performative is sometimes figured in Austin. In Althusser, it is the police who hail the trespasser on the street: "Hey you there!" brings the subject into sociality through a life-imbueing reprimand. The doctor who receives the child and pronounces—"It's a girl"—begins that long string of interpellations by which the girl is transitively girled; gender is ritualistically repeated, whereby the repetition occasions both the risk of failure and the congealed effect of sedimentation. Kendall Thomas makes a similar argument that the subject is always "raced," transitively racialized by regulatory agencies from its inception.[7]

If performativity requires a power to effect or enact what one names, then who will be the "one" with such a power, and how will such a power be thought? How might we account for *the injurious word* within such a framework, the word that not only names a social subject, but constructs that subject in the naming, and constructs that subject through a violating interpellation? Is it the power of a "one" to effect such an injury through the wielding of the injurious name, or is that a power accrued through time which is concealed at the moment that a single subject utters its injurious terms? Does the "one" who speaks the term *cite* the term, thereby establishing his or herself as the author while at the same time establishing the derivative status of that authorship? Is a community and history of such speakers not magically invoked at the moment in which that utterance is spoken? And if and when that utterance brings injury, is it the utterance or the utterer who is the cause of the injury, or does that utterance perform its injury through a transitivity that cannot be reduced to a causal or intentional process originating in a singular subject?

Indeed, is iterability or citationality not precisely this: *the operation of that metalepsis by which the subject who "cites" the performative is temporarily produced as the belated and fictive origin of the performative itself*? The subject who utters the socially injurious words is mobilized by that long string of injurious interpellations: the subject achieves a temporary status in the citing of that utterance, in performing itself as the origin of that utterance. That subject-effect, however, is the consequence of that very citation; it is derivative, the effect of a belated metalepsis by

which that invoked legacy of interpellations is dissimulated as the subject as "origin" of its utterance. If the utterance is to be prosecuted, where and when would that prosecution begin, and where and when would it end? Would this not be something like the effort to prosecute a history that, by its very temporality, cannot be called to trial? If the function of the subject as fictive origin is to occlude the genealogy by which that subject is formed, the subject is also installed in order to assume the burden of responsibility for the very history that subject dissimulates; the juridicalization of history, then, is achieved precisely through the search for subjects to prosecute who might be held accountable and, hence, temporarily resolve the problem of a fundamentally unprosecutable history.

This is not to say that subjects ought not to be prosecuted for their injurious speech; I think that there are probably occasions when they should. But what is precisely being prosecuted when the injurious word comes to trial and is it finally or fully prosecutable?

That words wound seems incontestably true, and that hateful, racist, misogynist, homophobic speech should be vehemently countered seems incontrovertibly right. But does understanding from where speech derives its power to wound alter our conception of what it might mean to counter that wounding power? Do we accept the notion that injurious speech is attributable to a singular subject and act? If we accept such a juridical constraint on thought—the grammatical requirements of accountability—as a point of departure, what is lost from the political analysis of injury when the discourse of politics becomes fully reduced to juridical requirements? Indeed, when political discourse is fully collapsed into juridical discourse, the meaning of political opposition runs the risk of being reduced to the act of prosecution.

How is the analysis of the discursive historicity of power unwittingly restricted when the subject is presumed as the point of departure for such an analysis? A clearly theological construction, the postulation of the subject as the causal origin of the performative act is understood to generate that which it names; indeed, this divinely empowered subject is one for whom the name itself is generative.



According to the biblical rendition of the performative, "Let there be light!," it appears that by virtue of *the power of a subject or its will* a phenomenon is named into being. Although the sentence is delivered in the subjunctive, it qualifies as a 'masquerading' performative in the Austinian sense. In a critical reformulation of the performative, Derrida makes clear in relation to Austin that this power is not the function of an originating will but is always derivative:

> Could a performative utterance succeed if its formulation did not repeat a "coded" or iterable utterance, or in other words, if the formula I pronounce in order to open a meeting, launch a ship or a marriage were not identifiable as *conforming* with an iterable model, if it were not then identifiable in some way as a "citation"? . . . [i]n such a typology, the category of intention will not disappear; it will have its place, but from that place it will no longer be able to govern the entire scene and system of utterance [*l'énonciation*].[8]

To what extent does discourse gain the authority to bring about what it names through citing the linguistic conventions of authority, conventions that are themselves legacies of citation? Does a subject appear as the author of its discursive effects to the extent that the citational practice by which he/she is conditioned and mobilized remains unmarked? Indeed, could it be that the production of the subject as originator of his/her effects is precisely a consequence of this dissimulated citationality?

If a performative provisionally succeeds (and I will suggest that "success" is always and only provisional), then it is not because an intention successfully governs the action of speech, but only because that action echoes prior actions, and *accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices*. It is not simply that the speech act takes place *within* a practice, but that the act is itself a ritualized practice. What this means, then, is that a performative "works" to the extent that *it draws on and covers over* the constitutive conventions by which it is mobilized. In this sense, no term or statement can function performatively without the accumulating and dissimulating historicity of force.

When the injurious term injures (and let me make clear that I think it does), it works its injury precisely through the accumulation and dissimulation of its force. The speaker who utters the racial slur is thus citing that slur, making linguistic community with a history of speakers. What this might mean, then, is that precisely the iterability by which a performative enacts its injury establishes a permanent difficulty in locating accountability for that injury in a singular subject and its act.

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In two recent cases, the Supreme Court has reconsidered the distinction between protected and unprotected speech in relation to the phenomenon of "hate speech." Are certain forms of invidious speech to be construed as "fighting words," and if so, are they appropriately considered to be a kind of speech unprotected by the First Amendment? In the first case, *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), the ordinance in question was one passed by the St. Paul City Council in 1990, and read in part as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[9]

A white teenager was charged under this ordinance after burning a cross in front of a black family's house. The charge was dismissed by the trial court but reinstated by the Minnesota State Supreme Court; at stake was the question whether the ordinance itself was "substantially overbroad and impermissably content based." The defense contended that the burning of the cross in front of the black family's house was to be construed as an example of protected speech. The State Supreme Court overturned the decision of the trial court, arguing first that the burning of the cross could not be construed as



protected speech because it constituted "fighting words" as defined in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and second, that the reach of the ordinance was permissible considering the "compelling government interest in protecting the community against bias-motivated threats to public safety and order." *In Re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

The United States Supreme Court reversed the State Supreme Court decision, reasoning first that the burning cross was not an instance of "fighting words," but an instance of a "viewpoint" within the "free marketplace of ideas" and that such "viewpoints" are categorically protected by the First Amendment.[10] The majority on the High Court (Scalia, Rehnquist, Kennedy, Souter, Thomas) then offered a *second* reason for declaring the ordinance unconstitutional, a judicially activist contribution which took many jurists by surprise: the justices severely restricted the doctrinal scope of "fighting words" by claiming it unconstitutional to impose prohibitions on speech solely on the basis of the "content" or "subjects addressed" in that speech. In order to determine whether words are fighting words, there can be no decisive recourse to the content and the subject matter of what is said.

One conclusion on which the justices appear to concur is that the ordinance imposed overbroad restrictions on speech, given that forms of speech *not* considered to fall within the parameters of fighting words would nonetheless be banned by the ordinance. But while the Minnesota ordinance proved too broad for all the justices, Scalia, Thomas, Rehnquist, Kennedy, and Souter took the opportunity of this review to severely restrict any future application of the fighting words doctrine. At stake in the majority opinion is not only when and where "speech" constitutes some component of an injurious act such that it loses its protected status under the First Amendment, but what constitutes the domain of "speech" itself.

According to a rhetorical reading of this decision—distinguished from a reading that follows established conventions of legal interpretation—the court might be understood as asserting its state-sanctioned linguistic power to determine what will and will not count as "speech"

and, in the process, enacting a potentially injurious form of juridical speech. What follows, then, is a reading which considers not only the account that the court gives of how and when speech becomes injurious, but considers as well the injurious potential of the account itself as "speech" considered in a broad sense. Recalling Cover's claim that legal decisions can engage the nexus of language and violence, consider that the adjudication of what will and will not count as protected speech will itself be a kind of speech, one which implicates the state in the very problem of discursive power that it is vested within the authority to regulate, sanction, and restrict such speech.

In the following, then, I will read the "speech" in which the decision is articulated against the version of "speech" officially circumscribed as protected content in the decision. The point of this kind of reading is not only to expose a contradictory set of rhetorical strategies at work in the decision, but to consider the power of that discursive domain which not only produces what will and will not count as "speech," but which regulates the political field of contestation through the tactical manipulation of that very distinction. Furthermore, I want to argue that the very reasons that account for the injuriousness of such acts, construed as speech in a broad sense, are precisely what render difficult the prosecution of such acts. Lastly, I want to suggest that the court's speech carries with it its *own* violence, and that the very institution that is invested with the authority to adjudicate the problem of hate speech recirculates and redirects that hatred in and as its own highly consequential speech, often by coopting the very language that it seeks to adjudicate.

The majority opinion, written by Scalia, begins with the construction of the act, the burning of the cross; and one question at issue is whether or not this act constitutes an injury, whether it can be construed as "fighting words" or whether it communicates a content which is, for better or worse, protected by first amendment precedents. The figure of burning will be repeated throughout the opinion, first in the context in which the burning cross is construed as the free expression of a viewpoint within the marketplace of ideas, and second, in the example of the burning of the flag, which could be held illegal were it to violate an ordinance prohibiting outside fires, but which could not be held to be illegal if it were the expression of an idea. Later Scalia will close the argument through recourse to yet another fire: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible." "But," Scalia continues, "St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v St. Paul*, 112 S. Ct. at 2550, 120 L. Ed. 2d at 326.

Significantly, Scalia here aligns the act of cross-burning with those who defend the ordinance, since both are producing fires, but whereas the cross-burner's fire is constitutionally protected speech, the ordinance maker's language is figured as the incineration of free speech. The analogy suggests that the ordinance itself is a kind of cross-burning, and Scalia then draws on the very destructive implications of cross-burning to underscore his point that the ordinance itself is destructive. The figure thus affirms the destructiveness of the cross-burning that the decision itself effectively denies, the destructiveness of the act that it has just elevated to the status of protected verbal currency within the marketplace of ideas.

The Court thus transposes the place of the ordinance and the place of the cross-burning, but also figures the First Amendment in an analogous relation to the black family and its home which in the course of the writing has become reduced to "someone's front yard." The stripping of blackness and family from the figure of the complainant is significant, for it refuses the dimension of social power that constructs the so-called speaker and the addressee of the speech act in question, the burning cross. And it refuses as well the racist history of the convention of cross-burning by the Ku Klux Klan which marked, targeted, and, hence, portended a further violence against a given addressee. Scalia thus figures himself as quenching the fire which the ordinance has lit, and which is being stoked with the First Amendment, apparently in its totality. Indeed, compared with the admittedly "reprehensible" act of burning a cross in "someone's" front yard, the ordinance itself appears to conflagrate in much greater dimensions, threatening to burn the book which it is Scalia's duty to uphold; Scalia

thus champions himself as an opponent of those who would set the constitution on fire, cross-burners of a more dangerous order.[11]

The lawyers arguing for the legality of the ordinance based their appeal on the fighting words doctrine. This doctrine, formulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), argued that speech acts unprotected by the constitution are those which are not essential to the communication of ideas: "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Scalia takes this phrasing to legitimate the following claim: "the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication." *R.A.V. v. St. Paul*, 112 S. Ct. at 2545, 120 L. Ed. 2d at 319. In his effort to protect all contents of communication from proscription, Scalia establishes a distinction between the content and the vehicle of that expression; it is the latter which is proscribable, and, the former which is not: he continues, "Fighting words are thus analogous to a noisy sound truck." *Id.* What is injurious, then, is the sound, but not the message; indeed, "the government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *Id.*

The connection between the signifying power of the burning cross and Scalia's regressive new critical distinction between what is and is not a speech element in communication is nowhere marked in the text.[12] Scalia assumes that the burning cross is a message, an expression of a viewpoint, a discussion of a "subject" or "content"; in short, that the act of burning the cross is fully and exhaustively translatable into a *constative* act of speech; the burning of the cross which is, after all, on the black family's lawn, is thus made strictly analogous—and morally equivalent—to an individual speaking in public on whether or not there ought to be a 50 cent tax on gasoline. Significantly, Scalia does not tell us what the cross would say if the cross could speak, but he does insist that what the burning cross is doing is expressing a viewpoint, discoursing on a content which is, admittedly, controversial, but for that very reason, ought not to be proscribed. Thus the defense of



cross-burning as free speech rests on an unarticulated analogy between that act and a public constation. This speech is not a doing, an action or an injury, even as it is the enunciation of a set of "contents" that might offend.[13] The injury is thus construed as one that is registered at the level of sensibility, which is to say that it is an offense that is one of the risks of free speech.

That the cross burns and thus constitutes an incendiary destruction is not considered as a sign of the intention to reproduce that incendiary destruction at the site of the house or the family; the historical correlation between cross-burning and marking a community, a family, or an individual for further violence is also ignored. How much of that burning is translatable into a declarative or constative proposition? And how would one know exactly what constative claim is being made by the burning cross? If the cross is the expression of a viewpoint, is it a declaration as in, "I am of the opinion that black people ought not to live in this neighborhood" or even, "I am of the opinion that violence ought to be perpetrated against black people," or is it a perlocutionary performative as in imperatives and commands which take the form of "Burn!" or "Die!"? Is it an injunction that works its power metonymically not only in the sense that the fire recalls prior burnings which have served to mark black people as targets for violence, but also in the sense that the fire is understood to be transferable from the cross to the target that is marked by the cross? The relation between cross-burning and torchings of both persons and properties is historically established. Hence, from this perspective, the burning cross assumes the status of a direct address and a *threat* and, as such, is construed either as the incipient moment of injurious action *or* as the statement of an intention to injure.[14]

Although Justice Stevens agreed with the decision to strike down the Minnesota ordinance, he takes the occasion to rebuke Scalia for restricting the fighting words doctrine. Stevens reviews special cases in which conduct may be prohibited by special rules. Note in the following quotation how the cross burning is nowhere mentioned, but the displacements of the figure of fire appear in a series of examples which effectively transfer the need for protection *from racist speech*, to

the need for protection *from public protest against racism*. Even within Steven's defense of proscribing conduct, a phantasmatic figure of a menacing riot emerges:

> Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. *R.A.V. v. St. Paul*, 112 S. Ct. at 2561, 120 L. Ed. 2d at 340.

Absent from the list of fires above is the burning of the cross in question. In the place of that prior scene, we are asked first to imagine someone who would light a fire near a gas tank, and then to imagine a more innocuous fire in a vacant lot. But with the vacant lot, we enter the metaphor of poverty and property, which appears to effect the unstated transition to the matter of blackness[15] introduced by the next line, "threatening someone because of her race or religious beliefs . . .": *because* of her race is not the same as "on the basis of" her race and leaves open the possibility that the race causally induces the threat. The threat appears to shift mid-sentence as Stevens continues to elaborate a second causality: this threat "may cause particularly severe trauma or touch off a riot" at which point it is no longer clear whether the threat which warrants the prohibition on conduct refers to the "threatening someone because of her race or religious belief" or to the riot that might result therefrom. What immediately follows suggests that the limitations on rioters has suddenly become more urgent to authorize than the limitation on those who would threaten this "her" "because of her race . . ." After "or touch off a riot," the sentence continues, "and threatening a high official may cause substantial social disruption . . . ," as if the racially marked trauma had already led to a riot and an attack on high officials.

This sudden implication of the justices themselves might be construed as a paranoid inversion of the original cross-burning narrative.



That original narrative is nowhere mentioned, but its elements have been redistributed throughout the examples; the fire which was the original "threat" against the black family is relocated first as a incendiary move against industry, then as a location in a vacant lot, and then reappears tacitly in the riot which now appears to follow from the trauma and threaten public officials. The fire which initially constituted the threat against the black family becomes metaphorically transfigured as the threat that blacks in trauma now wield against high officials. And though Stevens is on record as endorsing a construction of "fighting words" that would include cross-burning as *un*protected speech, the language in which he articulates this view deflects the question to that of the state's right to circumscribe conduct to protect itself against a racially motivated riot.[16]

The circumscription of content explicitly discussed in the decision appears to emerge through a production of semantic excess in and through the metonymic chain of anxious figuration. The separability of content from sound, for instance, or of content from context, is exemplified and illustrated through figures which signify in excess of the thesis which they are meant to support. Indeed, to the extent that, in the Scalia analysis, "content" is circumscribed and purified to establish its protected status, that content is secured through the production and proliferation of "dangers" from which it calls to be protected. Hence, the question of whether or not the black family in Minnesota is entitled to protection from public displays such as cross-burnings is displaced onto the question of whether or not the "content" of free speech is to be protected from those who would burn it. The fire is thus displaced from the cross to the legal instrument wielded by those who would protect the family from the fire, but then to the black family itself, to blackness, to the vacant lot, to rioters in Los Angeles who explicitly oppose the decision of a court and who now represent the incendiary power of the traumatized rage of black people who would burn the judiciary itself. But of course, that construal is already a reversal of the narrative in which a court delivers a decision of acquittal for the four policemen indicted for the brutal beating of Rodney King, a decision that might be said to "spark" a riot which calls into

question whether the claim of having been injured can be heard and countenanced by a jury and a judge who are extremely susceptible to the suggestion that a black person is always and only endangering, but never endangered. And so the High Court might be understood in its decision of June 22, 1992, to be taking its revenge on Rodney King, protecting itself against the riots in Los Angeles and elsewhere which appeared to be attacking the system of justice itself. Hence, the justices identify with the black family who sees the cross burning and takes it as a threat, but they substitute themselves for that family, and reposition blackness as the agency behind the threat itself.[17]

The decision enacts a set of metonymic displacements which might well be read as anxious deflections and reversals of the injurious action at hand; indeed, the original scene is successively reversed in the metonymic relation between figures such that the fire is lit by the ordinance, carried out by traumatized rioters on the streets of Los Angeles and threatens to engulf the justices themselves.

Mari Matsuda and Charles Lawrence also write of this text as enacting a rhetorical reversal of crime and punishment: "The cross burners are portrayed as an unpopular minority that the Supreme Court must defend against the power of the state. The injury to the Jones family is appropriated and the cross burner is cast as the injured victim. The reality of ongoing racism and exclusion is erased and bigotry is redefined as majoritarian condemnation of racist views."[18]

Significantly, the Justices revisited *R.A.V. v. St. Paul* in a more recent decision, *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 14 L. Ed. 2d 436 (1993), in which the court unanimously decided that racist speech could be included as evidence that a victim of a crime was intentionally selected because of his/her race and could constitute one of the factors that come into play in determining whether an enhanced penalty for the crime is in order. *Wisconsin v. Mitchell* did not address whether racist speech is injurious, but only whether speech that indicates that the victim was selected on the basis of race could be brought to bear in determining penalty enhancement for a crime which is itself not a crime of speech, as it were. Oddly, the case at hand involved a group of young black men, including Todd Mitchell, who had just left the



film, "Mississippi Burning." They decided to "move on" some white people, and proceeded to beat a young white man who had approached them on the street. Rehnquist is quick to note that these young men were discussing a scene from the film, one in which "a white man beat a young black boy who was praying." Rehnquist then goes on to quote Mitchell whose speech will become consequential in the decision: "Do you all feel hyped up to move on some white people?" and later, "You all want to fuck somebody up? There goes a white boy: go get him." *Wisconsin v. Mitchell*, 113 S. Ct. at 2196–7, 120 L. Ed. 2d at 442 (citing Brief for Petitioner). Now, the irony of this event, it seems, is that the film narrates the story of three civil rights workers (two white and one black) who are murdered by Klansmen who regularly threaten with burning crosses and firebombs any townspeople who appear to help the Justice Department in their search for the bodies of the slain civil rights activists and then their murderers. The court system is first figured within the film as sympathetic to the Klan, refusing to imprison the murdering Klansmen, and then as setting improper restraints on the interrogation. Indeed, the Justice Department official is able to entrap the Klansman only by acting against the law, freely brutalizing those he interrogates. This official is largely regarded as rehabilitating masculinity on the side of what is right over and against a liberal "effeminization" represented by judicial due process. But perhaps most important, while the effective official acts in the name of the law, he also acts against the law, and purports to show that his unlawfulness is the only efficacious way to fight racism. The film thus appeals to a widespread lack of faith in the law and its proceduralism, reconstructing a lawless white masculinity even as it purports to curb its excesses.

In some ways, the film shows that violence is the consequence of the law's failure to protect its citizens, and in this way allegorizes the reception of the judicial decisions. For if the film shows that the court will fail to guarantee the rights and liberties of its citizens, and only violence can counter racism, then the street violence that literally follows the film reverses the order of that allegory. The black men who leave the film and embark upon violence in the street find themselves in a court that not only goes out of its way to indict the film—which

is, after all, an indictment of the courts—but implicitly goes on to link the street violence to the offending representation, and effectively to link the one through the other.

The court seeks to decide whether or not the selection of the target of violence is a racially motivated one by quoting Todd Mitchell's speech. This speech is then taken to be the consequence of having watched the film, indeed, to be the very extension of the speech that constitutes the text of the film. But the court itself is implicated in the extended text of the film, "indicted" by the film as complicit with racial violence. Hence, the punishment of Mitchell and his friends—and the attribution of racially selective motives to them—reverses the "charges" that the film makes against the court. In *R.A.V. v. St. Paul*, the court makes a cameo appearance in the decision as well, reversing the agency of the action, substituting the injured for the injurer, and figuring itself as a site of vulnerability.

In each of these cases, the court's speech exercises the power to injure precisely by virtue of being invested with the authority to adjudicate the injurious power of speech. The reversal and displacement of injury in the name of "adjudication" underscores the particular violence of the "decision," one which becomes both dissimulated and enshrined once it becomes word of law. It may be said that all legal language engages this potential power to injure, but that insight supports only the argument that it will be all the more important to gain a reflective understanding of the specificities of that violence. It will be necessary to distinguish between those kinds of violence that are the necessary conditions of the binding character of legal language, and those kinds which exploit that very necessity in order to redouble that injury in the service of injustice.

The arbitrary use of this power is evidenced in the contrary use of precedents on hate speech to promote conservative political goals and thwart progressive efforts. Here it is clear that what is needed is not a better understanding of speech acts or the injurious power of speech, but the strategic and contradictory uses to which the court puts these various formulations. For instance, this same court has been willing to countenance the expansion of definitions of obscenity, and to use the very rationale proposed by some arguments in favor of hate crime legislation to augment its case to exclude obscenity from protected speech.[19] Scalia refers to *Miller v. California* (1973) as the case which installs obscenity as an exception to the categorical protection of content through recourse to what is "patently offensive," and then remarks that in a later case, *New York v. Ferber*, 458 U.S. 747 (1982), in exempting child pornography from protection, there was no "question here of censoring a particular literary theme." *R.A.V. v. St. Paul*, 112 S. Ct. at 2543, 120 L. Ed. 2d at 318. What constitutes the "literary" is thus circumscribed in such a way that child pornography is excluded from both the literary and the thematic. Although it seems that one must be able to recognize the genre of child pornography, to identify and delimit it in order to exempt it from the categorical protection of content, the identifying marks of such a product can be neither literary nor thematic. Indeed, the court appears in one part of its discussion to accept the controversial position of Catharine MacKinnon, which claims that certain verbal expressions constitute sex discrimination, when it says "sexually derogatory 'fighting words' . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" *Id.* at 2546, 120 L. Ed. 2d at 321. But here the court is clear that it does not prohibit such expressions on the basis of their content, but only on the basis of the effects that such expressions entail. Indeed, I would suggest that the contemporary conservative sensibility exemplified by the court and right-wing members of Congress is also exemplified in the willingness to expand the domain of obscenity and, to that end, to enlarge the category of the pornographic and to claim the unprotected status of both, and so, potentially, to position obscenity to become a species of "fighting words," that is, to accept that graphic sexual representation is injurious. This is underscored by the rationale used in *Miller v. California* in which the notion of "appealing to prurience" is counterposed to the notion of "literary, artistic, political, or scientific value." Here the representation that is deemed immediately and unobjectionably injurious is excluded from the thematic and the valuable and, hence, from protected status. This same rationale has been taken

up by Jesse Helms and others to argue that the National Endowment for the Arts is under no obligation to fund obscene materials, and then to argue that various lesbian performers and gay male photographers produce work that is obscene and lacking in literary value. Significantly, it seems, the willingness to accept the nonthematic and unobjectionably injurious quality of graphic sexual representations, when these representations cannot be said to leave the page or to "act" in some obvious way, must be read against the unwillingness to countenance the injuriousness of the burning cross in front of the black family's house. That the graphic depiction of homosexuality, say, can be construed as nonthematic or simply prurient, figured as a sensuousness void of meaning, whereas the burning of the cross, to the extent that it communicates a message of racial hatred, might be construed as a sanctioned point in a public debate over admittedly controversial issues, suggests that the rationale for expanding the fighting words doctrine to include unconventional depictions of sexuality within its purview has been strengthened, but that the rationale for invoking fighting words to outlaw racist threats is accordingly weakened. This is perhaps a way in which a heightened sexual conservatism works in tandem with an increasing governmental sanction for racist violence, but in such a way that whereas the "injury" claimed by the viewer of graphic sexual representation is honored as fighting words, the injury sustained by the black family with the burning cross out front, not unlike the injury of Rodney King, proves too ambiguous, too hypothetical to abrogate the ostensible sanctity of the First Amendment.[20] And it is not simply that prohibitions against graphic sexual representation will be supported by this kind of legal reasoning, whereas racist injury will be dignified as protected speech, but that racially marked depictions of sexuality will be most susceptible to prosecution, and those representations that threaten the pieties and purities of race and sexuality will become most vulnerable.

Two remarks of qualification: first, some critical race theorists such as Charles Lawrence will argue that cross burning is speech, but that not all speech is to be protected, indeed, not all speech is protected, and that racist speech conflicts with the Equal Protection Clause because



it hinders the addressed subject from exercising his/her rights and liberties. Other legal scholars in critical race studies, such as Richard Delgado, will argue for expanding the domain of the "fighting words" restriction on First Amendment rights. Matsuda and MacKinnon, following the example of sex discrimination jurisprudence, will argue that it is impossible to distinguish between conduct and speech, that hateful remarks are injurious actions. Oddly enough, this last kind of reasoning has reappeared in the recent policy issued on gays in the military, where the statement "I am a homosexual" is considered to be a "homosexual act." The word and the deed are one, and the claim "I am a homosexual" is considered to be not only a homosexual act, but a homosexual offense.[21] According to this policy, the act of coming out is effectively construed as fighting words. Here it seems that one must be reminded that the prosecution of hate speech in a court runs the risk of giving that court the opportunity to impose a further violence of its own. And if the court begins to decide what is and is not violating speech, that decision runs the risk of constituting the most binding of violations.

For, as in the case with the burning cross, it was not merely a question of whether the court knows how to read the threat contained in the burning cross, but whether the court itself signifies along a parallel logic. For this has been a court that can only imagine the fire engulfing the First Amendment, sparking the riot which will fray its own authority. And so it protects itself against the imagined threat of that fire by protecting the burning cross, allying itself with those who would seek legal protection from a spectre wrought from their own fantasy. Thus the court protects the burning cross as free speech, figuring those it injures as the site of the true threat, elevating the burning cross as a deputy for the court, the local protector and token of free speech: with so much protection, what do we have to fear?

## POSTSCRIPT

MacKinnon herself understands this risk of invoking state power, but in her recent book, *Only Words* (1993), she argues that state power is

on the side of the pornographic industry, and that the construction of women within pornography in subordinate positions is, effectively, a state-sanctioned construction.

MacKinnon has argued that pornography is a kind of hate speech, and that the argument in favor of restricting hate speech ought to be based on the argument in favor of restricting pornography. This analogy rests upon the assumption that the visual image in pornography operates as an imperative, and that this imperative has the power to realize that which it dictates. The problem, for MacKinnon, is *not* that pornography reflects or expresses a social structure of misogyny, but that it is an institution with the performative power to bring about that which it depicts. She writes that pornography not only substitutes for social reality, but that that substitution is one which creates a social reality of its own, the social reality of pornography. This self-fulfilling capacity of pornography is, for her, what gives sense to the claim that pornography *is* its own social context. She writes,

> Pornography does not simply express or interpret experience; it substitutes for it. Beyond bringing a message from reality, it stands in for reality. . . . To make visual pornography, and to live up to its imperatives, the world, namely women, must do what the pornographers want to 'say.' Pornography brings its conditions of production to the consumer. . . . Pornography makes the world a pornographic place through its making and use, establishing what women are said to exist as, are seen as, are treated as, constructing the social reality of what a woman is and can be in terms of what can be done to her, and what a man is in terms of doing it.

In the first instance, pornography substitutes for experience, implying that there is an experience which is supplanted, and supplanted thoroughly, through pornography. Hence, pornography takes the place of an experience and thoroughly constitutes a new experience, understood as a totality; by the second line, this second-order experience is rendered synonymous with a second order "reality," which suggests that in this universe of pornography there is no distinction between an experience of reality and reality, although MacKinnon herself makes clear that this systemic conflation of the two takes place within a reality which is itself



a mere substitution for another reality, one which is figured as more original, perhaps one which furnishes the normative or utopian measure by which she judges the pornographic reality that has taken its place. This visual field is then figured as speaking, indeed, as delivering imperatives, at which point the visual field operates as a subject with the power to bring into being what it names, to wield an efficacious power analogous to the divine performative. The reduction of that visual field to a speaking figure, an authoritarian speaker, rhetorically effects a different substitution than the one that MacKinnon describes. She substitutes a set of linguistic imperatives for the visual field, implying not only a full transposition of the visual into the linguistic, but a full transposition of visual depiction into an efficacious performative.

When pornography is then described as "constructing the social reality of what a woman is," the sense of "construction" needs to be read in light of the above two transpositions: for that construction can be said to work, that is, "to produce the social reality of what a woman is," only if the visual can be transposed into the linguistically efficacious in the way that she suggests. Similarly, the analogy between pornography and hate speech works to the extent that the pornographic image can be transposed into a set of efficacious spoken imperatives. In MacKinnon's paraphrase of how the pornographic image speaks, she insists that that image says, "do this," where the commanded act is an act of sexual subordination, and where, in the doing of that act, the social reality of woman is constructed precisely as the position of the sexually subordinate. Here "construction" is not simply the doing of the act—which remains, of course, highly ambiguous in order perhaps to ward off the question of an equivocal set of readings—but *the depiction* of that doing, where the depiction is understood as the dissimulation and fulfillment of the verbal imperative, "do this." For MacKinnon, no one needs to speak such words because the speaking of such words already functions as the frame and the compulsory scripting of the act; in a sense, to the extent that the frame orchestrates the act, it wields a performative power; it is conceived by MacKinnon as encoding the will of a masculine authority, and compelling a compliance with its command.

But does the frame impart the will of a preexisting subject, or is the frame something like the derealization of will, the production and orchestration of a phantasmatic scene of willfulness and submission? I don't mean to suggest a strict distinction between the phantasmatic and the domain of reality, but I do mean to ask, to what extent does the operation of the phantasmatic within the construction of social reality render that construction more frail and less determinative than MacKinnon would suggest? In fact, although one might well agree that a good deal of pornography is offensive, it does not follow that its offensiveness consists in its putative power to construct (unilaterally, exhaustively) the social reality of what a woman is. To return for a moment to MacKinnon's own language, consider the way in which the hypothetical insists itself into the formulation of the imperative, as if the force of her own assertions about the force of pornographic representation tends toward its own undoing: "pornography establish[es] . . . what women are said to exist *as*, are seen *as*, are treated *as* . . . " Then, the sentence continues: "constructing the social reality of what a woman is"; here to be treated as a sexual subordinate is to be constructed as one, and to have a social reality constituted in which that is precisely and only what one is. But if the "as" is read as the assertion of a likeness, it is not for that reason the assertion of a metaphorical collapse into identity. Through what means does the "as" turn into an "is," and is this the doing of pornography, or is it the doing of the very *depiction* of pornography that MacKinnon provides? For the "as" could also be read as "as if," "as if one were," which suggests that pornography neither represents nor constitutes what women are, but offers an allegory of masculine willfulness and feminine submission (although these are clearly not its only themes), one which repeatedly and anxiously rehearses its own *un*realizability. Indeed, one might argue that pornography depicts impossible and uninhabitable positions, compensatory fantasies that continually reproduce a rift between those positions and the ones that belong to the domain of social reality. Indeed, one might suggest that pornography is the text of gender's unreality, the impossible norms by which it is compelled, and in the face of which it perpetually fails. The imperative "do this" is less delivered than "depicted," and if what is depicted is a set of compensatory ideals, hyperbolic gender norms, then pornography charts a domain of unrealizable positions that hold sway over the social reality of gender positions, but do not, strictly speaking, constitute that reality; indeed, it is their failure to constitute it that gives the pornographic image the phantasmatic power that it has. In this sense, to the extent that an imperative is "depicted" and not "delivered," it fails to wield the power to construct the social reality of what a woman is. This failure, however, is the occasion for an allegory of such an imperative, one that concedes the unrealizability of that imperative from the start, and which, finally, cannot overcome the unreality that is its condition and its lure. My call, as it were, is for a feminist reading of pornography that resists the literalization of this imaginary scene, one which reads it instead for the incommensurabilities between gender norms and practices that it seems compelled to repeat without resolution.



In this sense, it makes little sense to figure the visual field of pornography as a subject who speaks and, in speaking, brings about what it names; its authority is decidedly less divine; its power, less efficacious. It only makes sense to figure the pornographic text as the injurious act of a speaker if we seek to locate accountability at the prosecutable site of the subject. Otherwise our work is more difficult, for what pornography delivers is what it recites and exaggerates from the resources of compensatory gender norms, a text of insistent and faulty imaginary relations that will not disappear with the abolition of the offending text, the text that remains for feminist criticism relentlessly to read.

## NOTES

1. I greatly appreciate the thoughtful readings given to this paper in an earlier form by Wendy Brown, Robert Gooding-Williams, Morris Kaplan, Robert Post, and Hayden White. Any inaccuracies and all misreadings are, of course, my responsibility alone. I thank Jane Malmo for help with preparing the manuscript.
2. This criminal sense of an actor is to be distinguished both from the commercial and theatrical terms (*Händlerin* and *Schauspielerin*, respectively).

3. Robert M. Cover, "Violence and the Word," 95 *Yale Law Journal* 1595, 1601 n I (1986).
4. "The [state action] doctrine holds that although someone may have suffered harmful treatment of a kind that one might ordinarily describe as a deprivation of liberty or a denial of equal protection of the laws, that occurrence excites no constitutional concern unless the proximate active perpetrators of the harm include persons exercising the special authority or power of the government of a state." Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," 56 *Tennessee Law Review* 291, 306 (1989).
5. Charles Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, ed. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw (Boulder, 1993), p. 65.
6. I thank Robert Post for this last analogy, suggested to me in conversation.
7. Kendall Thomas, University of Virginia Law Review, forthcoming.
8. Jacques Derrida, "Signature, Event, Context," in *Limited Inc.*, ed. Gerald Graff, tr. Samuel Weber and Jeffrey Mehlman (Evanston, 1988), p. 18.
9. St. Paul Bias Motivated Crime Ordinance, Section 292.02 Minn. Legis. Code (1990).
10. Charles R. Lawrence III argues that "it is not just the prevalence and strength of the idea of racism that make the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The real problem is that the idea of the racial inferiority of nonwhites infects, skews, and disables the operation of a market" in "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in *Words that Wound*, p. 77.
11. The lawyers defending the application of the ordinance to the cross burning episode made the following argument:

> . . . we ask the Court to reflect on the 'content' of the 'expressive conduct' represented by a 'burning cross.' It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim['s] head. It is perhaps the ultimate expression of 'fighting words.'

*R.A.V. v. St. Paul*, 112 S. Ct. at 2569–70, fn. 8, 120 L. Ed. 2d at 320 (App. to Brief for Petitioner).



12. The new critical assumption to which I refer is that of the separable and fully formal unity that is said to characterize a given text.
13. All of the justices concur that the St. Paul ordinance is overbroad because it isolates "subject-matters" as offensive, and (a) potentially prohibits discussion of such subject-matters even by those whose political sympathies are with the ordinance, and (b) fails to distinguish between the subject-matter's injuriousness and the context in which it is enunciated.
14. Justice Stevens, in a decision offered separately from the argument offered by the majority, suggests that the burning cross is precisely a threat, and that whether a given "expression" is a threat can only be determined *contextually*. Stevens bases his conclusion on *Chaplinsky*, which argued that "one of the characteristics that justifies" the constitutional status of fighting words is that such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Here Stevens argues, first, that certain kinds of contents have always been proscribable, and, second, that the fighting words doctrine has depended for its very implementation on the capacity to discriminate among kinds of contents (i.e., political speech is more fully protected than obscene speech, etc.), but also, third, that fighting words that are construed as a threat are in themselves injurious, and that it is this injurious character of speech, and not a separable "content" that is at issue. As he continues, however, Stevens is quick to point out that whether or not an expression is injurious is a matter of determining the force of an expression within a given context. This determination will never be fully predictable, precisely because, one assumes, contexts are also not firmly delimitable. Indeed, if one considers not only historical circumstance, but the historicity of the utterance itself, it follows that the demarcation of relevant context will be as fraught as the demarcation of injurious content.

Stevens links content, injurious performativity, and context together when he claims, objecting to both Scalia and White, that there can be no categorical approach to the question of proscribablity: "few dividing lines in First Amendment laws are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries . . . the quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail." *R.A.V. v. St. Paul*, 112 S. Ct. at 2561, 120 L. Ed. 2d, at 346. Furthermore, he argues, "the meaning of any expression and the legitimacy of its regulation can only be determined in context." *Id.*

At this point in his analysis, Stevens cites a metaphoric description of "the word" by Justice Holmes, a term which stands synecdochally for "expression" as it is broadly construed within First Amendment jurisprudence: the citation from Holmes runs as follows: "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances

and the time in which it is used" (11–12). We might consider this figure not only as a racial metaphor which describes the "word" as a "skin" that varies in "color," but also in terms of the theory of semantics it invokes. Although Stevens believes that he is citing a figure which will affirm the historically changing nature of an "expression's" semantic "content," denoted by a "skin" that changes in color and content according to the historical circumstance of its use, it is equally clear that the epidermal metaphor suggests a living and disembodied thought which remains dephenomenalized, the noumenal quality of life, the living spirit in its skinless form. Skin and its changing color and content thus denote what is historically changing, but they also are, as it were, the signifiers of historical change. The racial signifier comes to stand not only for changing historical circumstances in the abstract, but for the specific historical changes marked by explosive racial relations.

15. Toni Morrison remarks that poverty is often the language in which black people are spoken about.

16. The above reading raises a series of questions about the rhetorical status of the decision itself. Kendall Thomas and others have argued that the figures and examples used in judicial decisions are as central to its semantic content as the explicit propositional claims that are delivered as the conclusions of the argumentation. In a sense, I am raising two kinds of rhetorical questions here, one has to do with the "content" of the decision, and the other with the way in which the majority ruling, written by Scalia, itself delimits what will and will not qualify as the content of a given public expression in light of the new restrictions imposed on fighting words. In asking, then, after the rhetorical status of the decision itself, we are led to ask how the rhetorical action of the decision presupposes a theory of semantics that undermines or works against the explicit theory of semantics argued for and in the decision itself.

Specifically, it seems, the decision itself draws on a distinction between the verbal and non-verbal parts of speech, those which Scalia appears to specify as "message" and "sound." *R.A.V. v. St. Paul*, 120 L. Ed. 2d 305, 319–21. For Scalia, only the sound of speech is proscribable or, analogously, that sensuous aspect of speech deemed inessential to the alleged ideality of semantic content. Although Justice Stevens rejects what he calls this kind of "absolutism," arguing instead that the proscribability of content can only be determined in context, he nevertheless preserves a strict distinction between the semantic properties of an expression and the context, including historical circumstance, but also conditions of address. For both Scalia and Stevens, then, the "content" is understood in its separability from both the non-verbal and the historical, although in the latter case, determined in relation to it.

17. The decision made in the trial of the policemen in Simi Valley relied on a similar kind of reversal of position, whereby the jury came to believe that the policemen, in spite of their graphic beating of King, were themselves the endangered party in the case.



18. Matsuda and Lawrence, "Epilogue," *Words that Wound*, p. 135.

19. *Chaplinsky* makes room for this ambiguity by stipulating that some speech loses its protected status when it constitutes "no essential part of any exposition of ideas." This notion of an inessential part of such an exposition forms the basis of a 1973 ruling, *Miller v. California*, 413 U.S. 15, extending the unprotected status of obscenity. In that ruling the picture of a model sporting a political tattoo, construed by the court as "anti-government speech," is taken as *un*protected precisely because it is said, "taken as a whole to lack serious literary, artistic, political, or scientific value." Such a representation, then, is taken to be "no essential part of any exposition of ideas." But here, you will note that "no essential part" of such an exposition has become "no valuable part." Consider then Scalia's earlier example of what remains unprotected in speech, that is, the noisy sound truck, the semantically void part of speech which, he claims, is the "nonspeech element of communication." Here he claims that only the semantically empty part of speech, its pure sound, is unprotected, but that the "ideas" which are sounded in speech most definitely are protected. This loud street noise, then, forms no essential part of any exposition but, perhaps more poignantly, forms no valuable part. Indeed, we might speculate that whatever form of speech is unprotected will be reduced by the justices to the semantically empty sounding title of "pure noise." Hence, the film clip of the ostensibly nude model sporting an anti-government tattoo would be nothing but pure noise, not a message, not an idea, but the valueless soundings of street noise.

20. Kimberlé Crenshaw marks this ambivalence in the law in a different way, suggesting that the courts will discount African-American forms of artistic expression as artistic expression and subject such expression to censorship precisely because of racist presumptions about what counts as artistic. On the other hand, she finds the representation of women in these expressions to be repellent, and so feels herself to be "torn" between the two positions. See "Beyond Racism and Misogyny: Black Feminism and 2 Live Crew," in *Words That Wound*.

21. Note the subsumption of the declaration that one is a homosexual under the rubric of offensive conduct: "Sexual orientation will not be a bar to service unless manifested by homosexual conduct. The military will discharge members who engage in homosexual conduct, which is defined as a homosexual act, a statement that the member is homosexual or bisexual, or a marriage or attempted marriage to someone of the same gender." "The Pentagon's New Policy Guidelines on Homosexuals in the Military," *The New York Times* (July 20, 1993), p. A14.