



**A Politics of the Performative**



"This sober and subtle work draws us into the dark heart of a world where words and images enrage, and speech is haunted by hate. Butler intervenes brilliantly in an arena that tests the limits of both legal claims and linguistic acts. She explores the link between 'reasons' of state and the passions of personhood as she meditates on utterance as a incitement, excitement, and injury. There is a fine urgency here that expands our understanding of the place of the 'affective' in the realm of public events." —Homi Bhabha, University of Chicago

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"Flag burning and cross burning; pornography and coming out; racial taunts and AIDS education; using 'race blind': this book will provide constitutional and legislative debates about regulating these forms of 'injurious speech' with a brilliantly nuanced analysis of language as action. Butler has provided us with a sustained demonstration that we should fill in the moat that separates law schools from the human sciences, and quickly."

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"In this relentlessly intelligent analysis of hate speech, Judith Butler proposes a speech act theory of verbal injury that is not dependent on the grammar of accountability. Cautioning against recourse to state speech to regulate hate speech, Butler argues that, since naming constitutes as well as devastates, injury cannot be cleanly and legalistically separated from recognition. This gives hate speech so much power to wound, but also what opens a space for turning misnaming to new purposes. There is never a slack moment in this brilliant book."

—Barbara Johnson, Harvard University

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*for Maureen*



# */Contents /*

<i>Acknowledgments</i>	vii
<i>Introduction</i>	
On Linguistic Vulnerability	i
1/ Burning Acts, Injurious Speech	43
2/ Sovereign Performatives	71
3/ Contagious Word: Paranoia and “Homosexuality” in the Military	103
4/ Implicit Censorship and Discursive Agency	127
<i>Notes</i>	165
<i>Index</i>	183



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"Infelicity is an ill to which *all* acts are heir which have the general character of ritual or ceremonial, all *conventional* acts."

"There are more ways of outraging speech than contradiction merely."

J.L. AUSTIN

## */Introduction /* ON LINGUISTIC VULNERABILITY

When we claim to have been injured by language, what kind of claim do we make? We ascribe an agency to language, a power to injure, and position ourselves as the objects of its injurious trajectory. We claim that language acts, and acts against us, and the claim we make is a further instance of language, one which seeks to arrest the force of the prior instance. Thus, we exercise the force of language even as we seek to counter its force, caught up in a bind that no act of censorship can undo.

Could language injure us if we were not, in some sense, linguistic beings, beings who require language in



order to be? Is our vulnerability to language a consequence of our being constituted within its terms? If we are formed in language, then that formative power precedes and conditions any decision we might make about it, insulting us from the start, as it were, by its prior power.

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The insult, however, assumes its specific proportion in time. To be called a name is one of the first forms of linguistic injury that one learns. But not all name-calling is injurious. Being called a name is also one of the conditions by which a subject is constituted in language; indeed, it is one of the examples Althusser supplies for an understanding of "interpellation."<sup>1</sup> Does the power of language to injure follow from its interpellative power? And how, if at all, does linguistic agency emerge from this scene of enabling vulnerability?

2/ The problem of injurious speech raises the question of which words wound, which representations offend, suggesting that we focus on those parts of language that are uttered, utterable, and explicit. And yet, linguistic injury appears to be the effect not only of the words by which one is addressed but the mode of address itself, a mode—a disposition or conventional bearing—that interpellates and constitutes a subject.

One is not simply fixed by the name that one is called. In being called an injurious name, one is derogated and demeaned. But the name holds out another possibility as well: by being called a name, one is also, paradoxically, given a certain possibility for social existence, initiated into a temporal life of language that exceeds the prior purposes that animate that call. Thus the injurious address may appear to fix or paralyze the one it hails, but it may also produce an unexpected and enabling response. If to be addressed is to be interpellated, then the offensive call runs the risk of inaugurating a subject in speech who comes to use language to counter the offensive call. When the address is injurious, it works its force upon the one it injures. What is this force, and how might we come to understand its faultlines?

J. L. Austin proposed that to know what makes the force of an utterance effective, what establishes its performative character, one

must first locate the utterance within a "total speech situation."<sup>2</sup> There is, however, no easy way to decide on how best to delimit that totality. An examination of Austin's own view furnishes at least one reason for such difficulty. Austin distinguishes "illocutionary" from "perlocutionary" speech acts: the former are speech acts that, in saying do what they say, and do it in the moment of that saying; the latter are speech acts that produce certain effects as their consequence; by saying something, a certain effect follows. The illocutionary speech act is itself the deed that it effects; the perlocutionary merely leads to certain effects that are not the same as the speech act itself.

Any delimitation of the total speech act in such illocutionary cases would doubtless include an understanding of how certain conventions are invoked at the moment of utterance, whether the person who invokes them is authorized, whether the circumstances of the invocation are right. But how does one go about delimiting the kind of "convention" that illocutionary utterances presume? Such utterances do what they say on the occasion of the saying; they are not only conventional, but in Austin's words, "ritual or ceremonial." As utterances, they work to the extent that they are given in the form of a ritual, that is, repeated in time, and, hence, maintain a sphere of operation that is not restricted to the moment of the utterance itself.<sup>3</sup> The illocutionary speech act performs its deed *at the moment* of the utterance, and yet to the extent that the moment is ritualized, it is never merely a single moment. The "moment" in ritual is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of utterance.

Austin's claim, then, that to know the force of the illocution is only possible once the "total situation" of the speech act can be identified is beset by a constitutive difficulty. If the temporality of linguistic convention, considered as ritual, exceeds the instance of its utterance, and that excess is not fully capturable or identifiable (the past and future of the utterance cannot be narrated with any certainty), then it seems that part of what constitutes the "total speech situation" is a failure to achieve a totalized form in any of its given instances.

In this sense, it is not enough to find the appropriate context for the speech act in question, in order to know how best to judge its

effects. The speech situation is thus not a simple sort of context, one that might be defined easily by spatial and temporal boundaries. To be injured by speech is to suffer a loss of context, that is, not to know where you are. Indeed, it may be that what is *unanticipated* about the injurious speech act is what constitutes its injury, the sense of putting its addressee out of control. The capacity to circumscribe the situation of the speech act is jeopardized at the moment of injurious address. To be addressed injuriously is not only to be open to an unknown future, but not to know the time and place of injury, and to suffer the disorientation of one's situation as the effect of such speech. Exposed at the moment of such a shattering is precisely the volatility of one's "place" within the community of speakers; one can be "put in one's place" by such speech, but such a place may be no place.

4, "Linguistic survival" implies that a certain kind of surviving takes place in language. Indeed, the discourse on hate speech continually makes such references. To claim that language injures or, to cite the phrase used by Richard Delgado and Mari Matsuda, that "words wound" is to combine linguistic and physical vocabularies.<sup>4</sup> The use of a term such as "wound" suggests that language can act in ways that parallel the infliction of physical pain and injury. Charles R. Lawrence III refers to racist speech as a "verbal assault," underscoring that the effect of racial invective is "like receiving a slap in the face. The injury is instantaneous." (68) Some forms of racial invective also "produce physical symptoms that temporarily disable the victim. . . ." (68) These formulations suggest that linguistic injury acts like physical injury, but the use of the simile suggests that this is, after all, a comparison of unlike things. Consider, though, that the comparison might just as well imply that the two can be compared only metaphorically. Indeed, it appears that there is no language specific to the problem of linguistic injury, which is, as it were, forced to draw its vocabulary from physical injury. In this sense, it appears that the metaphorical connection between physical and linguistic vulnerability is essential to the description of linguistic vulnerability itself. On the one hand, that there appears to be no description that is "proper" to linguistic injury makes it more difficult to identify the specificity of linguistic vulnerability over and against physical vulnerability. On the other hand, that physical meta-

phors seize upon nearly every occasion to describe linguistic injury suggests that this somatic dimension may be important to the understanding of linguistic pain. Certain words or certain forms of address not only operate as threats to one's physical well-being, but there is a strong sense in which the body is alternately sustained and threatened through modes of address.

Language sustains the body not by bringing it into being or feeding it in a literal way; rather, it is by being interpellated within the terms of language that a certain social existence of the body first becomes possible. To understand this, one must imagine an impossible scene, that of a body that has not yet been given social definition, a body that is, strictly speaking, not accessible to us, that nevertheless becomes accessible on the occasion of an address, a call, an interpellation that does not "discover" this body, but constitutes it fundamentally. We may think that to be addressed one must first be recognized, but here the Althusserian reversal of Hegel seems appropriate: the address constitutes a being within the possible circuit of recognition and, accordingly, outside of it, in abjection.

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We may think that the situation is more ordinary: certain already constituted bodily subjects happen to be called this or that. But why do the names that the subject is called appear to instill the fear of death and the question of whether or not one will survive? Why should a merely linguistic address produce such a response of fear? Is it not, in part, because the contemporary address recalls and reenacts the formative ones that gave and give existence? Thus, to be addressed is not merely to be recognized for what one already is, but to have the very term conferred by which the recognition of existence becomes possible. One comes to "exist" by virtue of this fundamental dependency on the address of the Other. One "exists" not only by virtue of being recognized, but, in a prior sense, by being *recognizable*.<sup>5</sup> The terms that facilitate recognition are themselves conventional, the effects and instruments of a social ritual that decide, often through exclusion and violence, the linguistic conditions of survivable subjects.

If language can sustain the body, it can also threaten its existence. Thus, the question of the specific ways that language threatens violence seems bound up with the primary dependency that any speaking

being has by virtue of the interpellative or constitutive address of the Other. In *The Body in Pain*, Elaine Scarry makes the point that the threat of violence is a threat to language, its world-making and sense-making possibility.<sup>6</sup> Her formulation tends to set violence and language in opposition, as the inverse of each other. What if language has within it its own possibilities for violence and for world-shattering? For Scarry, the body is not only anterior to language, but she argues persuasively that the body's pain is inexpressible in language, that pain shatters language, and that language can counter pain even as it cannot capture it. She shows that the morally imperative endeavor to represent the body in pain is confounded (but not rendered impossible) by the unrepresentability of the pain that it seeks to represent. One of the injurious consequences of torture, in her view, is that the one tortured loses the ability to document in language the event of torture; thus, one of the effects of torture is to efface its own witness. Scarry also shows how certain discursive forms, such as interrogation, aid and abet the process of torture. Here, however, language assists violence, but

6, appears not to wield *its own* violence. This raises the following question: if certain kinds of violence disable language, how do we account for the specific kind of injury that language itself performs?

Toni Morrison refers specifically to "the violence of representation" in the 1993 Nobel Lecture in Literature. "Oppressive language," she writes, "does more than represent violence; it is violence." (16) Morrison offers a parable in which language itself is figured as a "living thing," where this figure is not false or unreal, but indicates something true about language. In the parable, young children play a cruel joke and ask a blind woman to guess whether the bird that is in their hands is living or dead. The blind woman responds by refusing and displacing the question: "I don't know . . . but what I do know is that it is in your hands. It is in your hands." (11)

Morrison then elects to read the woman in the parable as a practiced writer, and the bird, as language, and she conjectures on how this practiced woman writer thinks of language: "she thinks of language partly as a system, partly as a living thing over which one has control, but mostly as agency—as an act with consequences. So the question

that the children put to her, 'Is it living or dead?', is not unreal, because she thinks of language as susceptible to death, erasure. . . ." (13)

Here Morrison writes in a conjectural way what the practiced woman writer conjectures, a speculation both in and about language and its conjectural possibilities. Remaining within a figural frame, Morrison announces the "reality" of that frame from within its own terms. The woman thinks of language as living; Morrison gives us the performance of this act of substitution, this simile by which language is figured as life. The "life" of language is thus exemplified by this very enactment of simile. But what sort of enactment is this?

Language is thought of "mostly as agency—an act with consequences," an extended doing, a performance with effects. This is something short of a definition. Language is, after all, "thought of," that is, posited or constituted as "agency." Yet it is *as* agency that it is thought; a *figural* substitution makes the thinking of the agency of language possible. Because this very formulation is offered *in* language, the "agency" of language is not only the theme of the formulation, but its very action. This positing as well as this figuring appear to exemplify the agency at issue. / 7

We might be tempted to think that attributing agency to language is not quite right, that only subjects do things with language, and that agency has its origins in the subject. But is the agency of language the same as the agency of the subject? Is there a way to distinguish between the two? Morrison not only offers agency as a figure for language, but language as a figure for agency, one whose "reality" is incontestible. She writes: "We die. That may be the meaning of life. But we *do* language. That may be the measure of our lives." (22) She does not state: "language is agency," for that kind of assertion would deprive language of the agency she means to convey. In refusing to answer the children's cruel question, the blind woman, according to Morrison, "shifts attention away from the assertions of power to the instrument through which that power is exercised." (12) Similarly, Morrison refuses to offer dogmatic assertions on what language is, for that would obscure how the "instrument" of that assertion participates in that very being of language; the irreducibility of any assertion to its

instrument is precisely what establishes language as self-divided. The failure of language to rid itself of its own instrumentality or, indeed, rhetoricity, is precisely the inability of language to annul itself in the telling of a tale, in the reference to what exists or in the volatile scenes of interlocution.

Significantly, for Morrison, “agency” is not the same as “control”; neither is it a function of the systematicity of language. It seems that we cannot first give an account of human agency and then specify the kind of agency that humans have in language. “We *do* language. That may be the measure of our lives.”

We do things with language, produce effects with language, and we do things to language, but language is also the thing that we do. Language is a name for our doing: both “what” we do (the name for the action that we characteristically perform) and that which we effect, the act and its consequences.

8, In the parable that Morrison offers, the blind woman is analogized to a practiced writer, suggesting that writing is to some extent blind, that it cannot know the hands into which it will fall, how it will be read and used, or the ultimate sources from which it is derived. The scene in the parable is an interlocution, where the children exploit the blindness of the woman in order to force her to make a choice she cannot make, and where the force of that address is what the woman reads, exercising an agency that the address had meant to deny her. She does not make the choice, but calls attention to “the instrument through which power is exercised,” establishing that the choice is in the hands of the interlocutors she cannot see. She cannot know, according to Morrison’s interpretation, whether language will live or die in the hands of those who use speech with the force of cruelty. In both the parable and in the reading that Morrison provides, the question of responsibility is central, figured as “the hands” of the children or, indeed, those who inherit the responsibility for whether language will live or die. The writer is blind to the future of the language in which she writes. Thus language is thought of “mostly as agency,” distinguished from forms of mastery or control, on the one hand, and by the closure of system on the other.

Morrison’s analogy suggests that language lives or dies as a living

thing might live or die, and that the question of survival is central to the question of how language is used. She claims that "oppressive language . . . is violence," not merely a representation of it. Oppressive language is not a substitute for the experience of violence. It enacts its own kind of violence. Language remains alive when it refuses to "encapsulate" (20) or "capture" (21) the events and lives it describes. But when it seeks to effect that capture, language not only loses its vitality, but acquires its own violent force, one that Morrison throughout the lecture associates with statist language and censorship. She writes, "the vitality of language lies in its ability to limn the actual, imagined and possible lives of its speakers, readers, writers. Although its poise is sometimes in displacing experience, it is not a substitute for it. It arcs toward the place where meaning may lie." (20) And later: "its force, its felicity, is in its reach toward the ineffable." (21) The violence of language consists in its effort to capture the ineffable and, hence, to destroy it, to seize hold of that which must remain elusive for language to operate as a living thing.

The children's question is cruel not because it is certain that they have killed the bird, but because the use of language to force the choice from the blind woman is itself a seizing hold of language, one whose force is drawn from the conjured destruction of the bird. The hate speech that the children perform seeks to capture the blind woman in the moment of humiliation, but also to transfer the violence done to the bird to the woman herself, a transfer that belongs to the particular temporality of the threat. In a sense, the threat begins the performance of that which it threatens to perform; but in not quite fully performing it, seeks to establish, through language, the certitude of that future in which it will be performed. / 9

Although the threat is not quite the act that it portends, it is still an act, a speech act, one that not only announces the act to come, but registers a certain force in language, a force that both presages and inaugurates a subsequent force. Whereas the threat tends to produce an expectation, the threat of violence destroys the very possibility of expectation: it initiates a temporality in which one expects the destruction of expectation and, hence, cannot expect it at all.

Whereas the threat prefigures the act, it would be a mistake to



conclude that whereas the threat takes place merely in language, the threatened act takes place in a material instance fully beyond language, between and among bodies. Implicit in the notion of a threat is that what is spoken in language may prefigure what the body might do; the act referred to in the threat is the act that one might actually perform. But this view fails to take into account that *speaking is itself a bodily act*.

In Shoshana Felman's book, *The Literary Speech Act: Don Juan with J. L. Austin, or Seduction in Two Languages*<sup>7</sup>, she reminds us that the relation between speech and the body is a scandalous one, "a relation consisting at once of incongruity and of inseparability . . . the scandal consists in the fact that the act cannot know what it is doing." (96) Felman thus suggests that the speech act, as the act of a speaking body, is always to some extent unknowing about what it performs, that it always says something that it does not intend, and that it is not the emblem of mastery or control that it sometimes purports to be. She calls attention to the way in which a speaking body signifies in ways that are not reducible to what such a body "says." In this sense, the speaker is "blind" in much the same way that, for Morrison, the practiced woman writer is "blind": the utterance performs meanings that are not precisely the ones that are stated or, indeed, capable of being stated at all. Whereas Morrison calls attention to the "instrument through which [assertions] are made," Felman identifies that instrument as the body from which speech is uttered. That body becomes a sign of unknowingness precisely because its actions are never fully consciously directed or volitional. For Felman, what remains unconscious in a bodily action such as speech might be construed as the "instrument" through which the assertion is made. Similarly, that unknowing body marks the limit of intentionality in the speech act. The speech act says more, or says differently, than it means to say.

For Felman, however, this does not mean that speech and the body are radically separable, only that the idea of a fully intentional speech act is perpetually subverted by that in speech which subverts intentionality. Felman writes, "If the problem of the human act consists in the relation between language and the body, it is because the act is conceived—by performative analysis as well as by psychoanalysis—as

that which problematizes at one and the same time the separation and opposition between the two. The act, an enigmatic and problematic production of the *speaking body*, destroys from its inception the meta-physical dichotomy between the domain of the 'mental' and the domain of the 'physical,' breaks down the opposition between body and spirit, between matter and language."<sup>8</sup>

For Felman, however, this breakdown of the opposition between matter and language does not entail a simple unity of these terms. They remain incongruously interrelated. In speaking, the act that the body is performing is never fully understood; the body is the blindspot of speech, that which acts in excess of what is said, but which also acts in and through what is said. That the speech act is a bodily act means that the act is redoubled in the moment of speech: there is what is said, and then there is a kind of saying that the bodily "instrument" of the utterance performs.

Thus a statement may be made that, on the basis of a grammatical analysis alone, appears to be no threat. But the threat emerges precisely through the act that the body performs in the speaking the act. Or the threat emerges as the apparent effect of a performative act only to be rendered harmless through the bodily demeanor of the act (any theory of acting knows this). The threat prefigures or, indeed, promises a bodily act, and yet is already a bodily act, thus establishing in its very gesture the contours of the act to come. The act of threat and the threatened act are, of course, distinct, but they are related as a chiasmus. Although not identical, they are both bodily acts: the first act, the threat, only makes sense in terms of the act that it prefigures. The threat begins a temporal horizon within which the organizing aim is the act that is threatened; the threat begins the action by which the fulfillment of the threatened act might be achieved. And yet, a threat can be derailed, defused, can fail to furnish the act that it threatens. The threat states the impending certitude of another, forthcoming act, but the statement itself cannot produce that forthcoming act as one of its necessary effects. This failure to deliver on the threat does not call into question the status of the speech act as a threat—it merely questions its efficacy. The self-conceit that empowers the threat, however,

is that the speech act that is the threat will fully materialize that act threatened by the speech. Such speech is, however, vulnerable to failure, and it is that vulnerability that must be exploited to counter the threat.

For the threat to work, it requires certain kinds of circumstances, and it requires a venue of power by which its performative effects might be materialized. The teleology of action conjured by the threat is disruptible by various kinds of infelicities. Nevertheless, the fantasy of sovereign action that structures the threat is that a certain kind of saying is at once the performance of the act referred to in that saying; this would be an illocutionary performative, in Austin's view, one that immediately does what it says. The threat may well solicit a response, however, that it never anticipated, losing its own sovereign sense of expectation in the face of a resistance it advertently helped to produce. Instead of obliterating the possibility of response, paralyzing the addressee with fear, the threat may well be countered by a different kind of performative act, one that exploits the redoubled action of the threat (what is intentionally and non-intentionally performed in any speaking), to turn one part of that speaking against the other, confounding the performative power of the threat.

Because the threat is a speech act that is at once a bodily act, it is already, in part, out of its own control. Morrison makes this point: the blind woman returns the implicit threat delivered by the children by referring to "the hands" of the one who holds the bird, to expose the body of the one who speaks, to counter the act with an act that exposes what is most unknown to the ones who deliver the threat, illuminating the blindness that motivates their speech act, the question of what they will do, in a bodily sense, given what they have already done, bodily, in speaking as they have.

The notion that speech wounds appears to rely on this inseparable and incongruous relation between body and speech, but also, consequently, between speech and its effects. If the speaker addresses his or her body to the one addressed, then it is not merely the body of the speaker that comes into play: it is the body of the addressee as well. Is the one speaking merely speaking, or is the one speaking comporting her or his body toward the other, exposing the body of the other as

vulnerable to address. As an “instrument” of a violent rhetoricity, the body of the speaker exceeds the words that are spoken, exposing the addressed body as no longer (and not ever fully) in its own control.

#### UNEXPECTED CALLS

To decide the matter of what is a threat or, indeed, what is a word that wounds, no simple inspection of words will suffice. We may think that an elaboration of the institutional conditions of utterance is necessary to identify the probability that certain kinds of words will wound under such circumstances. But the circumstances alone do not make the words wound. Or we may be compelled to claim that any word can be a word that wounds, that it depends on its deployment, and that the deployment of words is not reducible to the circumstances of their utterance. This last makes sense, but such a view cannot tell us why certain words wound in the way that they do, or why it is more difficult to separate certain words from their power to wound.

Indeed, recent efforts to establish the incontrovertibly wounding power of certain words seem to founder on the question of who does the interpreting of what such words mean and what they perform. The recent regulations governing lesbian and gay self-definition in the military or, indeed, the recent controversies over rap music suggest that no clear consensus is possible on the question of whether there is a clear link between the words that are uttered and their putative power to injure.<sup>9</sup> To argue, on the one hand, that the offensive effect of such words is fully contextual, and that a shift of context can exacerbate or minimize that offensiveness, is still not to give an account of the power that such words are said to exercise. To claim, on the other hand, that some utterances are always offensive, regardless of context, that they carry their contexts with them in ways that are too difficult to shed, is still not to offer a way to understand how context is invoked and restaged at the moment of utterance. / 13

Neither view can account for the restaging and resignifying of offensive utterance, deployments of linguistic power that seek at once to expose and counter the offensive exercise of speech. I will consider these at greater length in the chapters to come, but consider for a

moment how often such terms are subject to resignification. Such a redoubling of injurious speech takes place not only in rap music and in various forms of political parody and satire, but in the political and social critique of such speech, where “mentioning”<sup>10</sup> those very terms is crucial to the arguments at hand, and even in the legal arguments that make the call for censorship, in which the rhetoric that is deplored is invariably proliferated within the context of legal speech. Paradoxically, the explicit legal and political arguments that seek to tie such speech to certain contexts fail to note that even in their own discourse, such speech has become citational, breaking with the prior contexts of its utterance and acquiring new contexts for which it was not intended. The critical and legal discourse on hate speech is itself a restaging of the performance of hate speech. The present discourse breaks with the prior ones, but not in any absolute sense. On the contrary, the present context and its apparent “break” with the past are themselves legible only in terms of the past from which it breaks. The present context does, however, elaborate a new context for such speech, a future context, not yet delineable and, hence, not yet precisely a context.

14/

The arguments in favor of a counter-appropriation or restaging of offensive speech are clearly undercut by the position that the offensive effect of the speech act is *necessarily* linked to the speech act, its originating or enduring context or, indeed, its animating intentions or original deployments. The revaluation of terms such as “queer” suggest that speech can be “returned” to its speaker in a different form, that it can be cited against its originary purposes, and perform a reversal of effects. More generally, then, this suggests that the changeable power of such terms marks a kind of discursive performativity that is not a discrete series of speech acts, but a ritual chain of resignifications whose origin and end remain unfixed and unfixable. In this sense, an “act” is not a momentary happening, but a certain nexus of temporal horizons, the condensation of an iterability that exceeds the moment it occasions. The possibility for a speech act to resignify a prior context depends, in part, upon the gap between the originating context or intention by which an utterance is animated and the effects it produces. For the threat, for instance, to have a future it never intended, for it to be returned to its speaker in a different form, and defused through that

return, the meanings the speech act acquires and the effects it performs must exceed those by which it was intended, and the contexts it assumes must not be quite the same as the ones in which it originates (if such an origin is to be found).

Those who seek to fix with certainty the link between certain speech acts and their injurious effects will surely lament the open temporality of the speech act. That no speech act *has* to perform injury as its effect means that no simple elaboration of speech acts will provide a standard by which the injuries of speech might be effectively adjudicated. Such a loosening of the link between act and injury, however, opens up the possibility for a counter-speech, a kind of talking back, that would be foreclosed by the tightening of that link. Thus, the gap that separates the speech act from its future effects has its auspicious implications: it begins a theory of linguistic agency that provides an alternative to the relentless search for legal remedy. The interval between instances of utterance not only makes the repetition and resignification of the utterance possible, but shows how words might, through time, become disjoined from their power to injure and recontextualized in more affirmative modes. I hope to make clear that by affirmative, I mean “opening up the possibility of agency,” where agency is not the restoration of a sovereign autonomy in speech, a replication of conventional notions of mastery. / 15

The main concerns of *Excitable Speech* are both rhetorical and political. In the law, “excitable” utterances are those made under duress, usually confessions that cannot be used in court because they do not reflect the balanced mental state of the utterer. My presumption is that speech is always in some ways out of our control. In a formulation that anticipates Felman’s reading of the speech act, Austin writes that “actions in general (not all) are liable, for example, to be done under duress, or by accident, or owing to this or that variety of mistake, say, or otherwise unintentionally.” (21) Austin then takes the occasion to delink the speech act from the subject in some instances: “in many such cases we are certainly unwilling to say of some such act simply that it was done or that he did it.” (21) Untethering the speech act from the sovereign subject founds an alternative notion of agency and, ultimately, of responsibility, one that more fully acknowledges the way in

which the subject is constituted in language, how what it creates is also what it derives from elsewhere. Whereas some critics mistake the critique of sovereignty for the demolition of agency, I propose that agency begins where sovereignty wanes. The one who acts (who is not the same as the sovereign subject) acts precisely to the extent that he or she is constituted as an actor and, hence, operating within a linguistic field of enabling constraints from the outset.

The sovereign conceit emerges in hate speech discourse in several ways. The one who speaks hate speech is imagined to wield sovereign power, to do what he or she says when it is said. Similarly, the "speech" of the state often takes a sovereign form, whereby the speaking of declarations are, often literally, "acts" of law. The effort to locate such illocutionary instances of speech, however, posed difficulties for Austin, and led him to devise a series of provisos and new distinctions to take account of the complexity of the performative terrain. Not all utterances that have the form of the performative, whether illocutionary or perlocutionary, actually work. This insight has important consequences for the consideration of the putative efficacy of hate speech.

Rhetorically, the assertion that some speech not only communicates hate, but constitutes an injurious act, presumes not only that language acts, but that it acts *upon* its addressee in an injurious way. These are, however, two importantly different claims, and not all speech acts are the kinds of acts that act upon another with such force. For instance, I may well utter a speech act, indeed, one that is illocutionary in Austin's sense, when I say, "I condemn you," but if I am not in a position to have my words considered as binding, then I may well have uttered a speech act, but the act is, in Austin's sense, unhappy or infelicitous: you escape unscathed. Thus, many such speech acts are "conduct" in a narrow sense, but not all of them have the power to produce the effects or initiate a set of consequences; indeed, many of them are quite comic in this regard, and one might read Austin's tract, *How to Do Things with Words*, as an amusing catalogue of such failed performatives.

A speech act can be an act without necessarily being an efficacious act. If I utter a failed performative, that is, I make a command and no

one hears or obeys, I make a vow, and there is no one to whom or before whom the vow might be made, I still perform an act, but I perform an act with no or little effect (or, at least, not with the effect that is figured by the act). A felicitous performative is one in which I not only perform the act, but some set of effects follows from the fact that I perform it. To act linguistically is not necessarily to produce effects, and in this sense, a speech act is not always an efficacious action. To say that there is an equivocation, then, between speech and action is not necessarily to say that speech acts efficaciously.

Austin offers a tentative typology of the kinds of locutions that are performative. The illocutionary act is one in which in saying something, one is at the same time doing something; the judge who says, "I sentence you" does not state an intention to do something or describe what he is doing: his saying is itself a kind of doing. Illocutionary speech acts produce effects. They are supported, Austin tells us, by linguistic and social conventions. Perlocutionary acts, on the other hand, are those utterances that initiate a set of consequences: in a perlocutionary speech act, "saying something will produce certain consequences,"<sup>17</sup> but the saying and the consequences produced are temporally distinct; those consequences are not the same as the act of speech, but are, rather, "what we bring about or achieve by saying something" (109). Whereas illocutionary acts proceed by way of conventions (107), perlocutionary acts proceed by way of consequences. Implicit in this distinction is the notion that illocutionary speech acts produce effects without any lapse of time, that the saying is itself the doing, and that they are one another simultaneously.

Austin remarks as well that some consequences of a perlocution may be unintentional, and the example he offers is the unintentional insult, thus locating verbal injury within the orbit of the perlocution. Thus, Austin suggests that injury does not inhere in the conventions that a given speech act invokes, but in the specific consequences that a speech act produces.

Austin's work has been cited recently by legal scholars and philosophers (Catharine MacKinnon, Rae Langton, among others<sup>11</sup>) in order to argue that pornographic representations are performative, that is,



they do not state a point of view or report on a reality, but constitute a certain kind of conduct. These scholars further claim that the conduct “silences” those who are depicted in a subordinate fashion within pornographic representations.

18, These arguments will be considered at length in subsequent chapters, but for introductory purposes, it is important to note that pornography is construed as a kind of hate speech, and that its performative force is described as illocutionary. Significantly, MacKinnon’s argument against pornography has moved from a conceptual reliance on a perlocutionary model to an illocutionary one.<sup>12</sup> In the work of Mari Matsuda, hate speech is understood not only to *act upon* its listener (a perlocutionary scene), but to contribute to the social constitution of the one addressed (and, hence, to become part of a process of social interpellation).<sup>13</sup> The listener is understood to occupy a social position or to have become synonymous with that position, and social positions themselves are understood to be situated in a static and hierarchical relation to one another. By virtue of the social position he or she occupies, then, the listener is injured as a consequence of that utterance. The utterance also enjoins the subject to reoccupy a subordinate social position. According to this view, such speech reinvokes and reinscribes a structural relation of domination, and constitutes the linguistic occasion for the reconstitution of that structural domination. Although sometimes this view on hate speech enumerates a set of consequences that such speech produces (a perlocutionary view of the matter), there are other formulations of this position where the force of the performative is secured through conventional means (an illocutionary model). In Mari Matsuda’s formulation, for instance, speech does not merely *reflect* a relation of social domination; speech *enacts* domination, becoming the vehicle through which that social structure is reinstated. According to this illocutionary model, hate speech *constitutes* its addressee at the moment of its utterance; it does not describe an injury or produce one as a consequence; it is, in the very speaking of such speech, the performance of the injury itself, where the injury is understood as social subordination.<sup>14</sup>

What hate speech does, then, is to constitute the subject in a subordinate position. But what gives hate speech the power to constitute the

subject with such efficacy? Is hate speech as felicitous as it appears in this account, or are there faultlines that make its constituting power less felicitous than the above description would imply?

I wish to question for the moment the presumption that hate speech always works, not to minimize the pain that is suffered as a consequence of hate speech, but to leave open the possibility that its failure is the condition of a critical response. If the account of the injury of hate speech forecloses the possibility of a critical response to that injury, the account confirms the totalizing effects of such an injury. Such arguments are often useful in legal contexts, but are counter-productive for the thinking of nonstate-centered forms of agency and resistance.

Even if hate speech works to constitute a subject through discursive means, is that constitution necessarily final and effective? Is there a possibility of disrupting and subverting the effects produced by such speech, a faultline exposed that leads to the undoing of this process of discursive constitution? What kind of power is *attributed to* speech such that speech is figured as having the power to constitute the subject with such success? /19

Matsuda's argument presumes that a social structure is enunciated at the moment of the hateful utterance; hate speech reinvokes the position of dominance, and reconsolidates it at the moment of utterance. As the linguistic rearticulation of social domination, hate speech becomes, for Matsuda, the site for the mechanical and predictable reproduction of power. In some ways, the question of mechanical breakdown or "misfire" and of the unpredictability of speech is precisely what Austin repeatedly emphasizes when he focuses on the various ways in which a speech act can go wrong. More generally, however, there are reasons to question whether a static notion of "social structure" is reduplicated in hate speech, or whether such structures suffer deconstruction through being reiterated, repeated, and rearticulated. Might the speech act of hate speech be understood as less efficacious, more prone to innovation and subversion, if we were to take into account the temporal life of the "structure" it is said to enunciate? If such a structure is dependent upon its enunciation for its continuation, then it is at the site of enunciation that the question of its continuity is to be posed. Can

there be an enunciation that discontinues that structure, or one that subverts that structure through its repetition in speech? As an invocation, hate speech is an act that recalls prior acts, requiring a future repetition to endure. Is there a repetition that might disjoin the speech act from its supporting conventions such that its repetition confounds rather than consolidates its injurious efficacy?

#### SCENES OF UTTERANCE

It would be a mistake to think that working out the theoretical problems of the speech act will offer a set of clarifying solutions to the contemporary political operation of the speech act. The relation between theory and politics tends to work the other way. Theoretical positions are always appropriated and deployed in political contexts that expose something of the strategic value of such theories. A cursory review of the political instances in which the speech act makes an appearance show that there is significant disagreement on which speech acts, if any, should be viewed as conduct rather than “speech” in the legal sense. 20, Broadly considered arguments in favor of the collapse of the speech/conduct distinction tend to strengthen the case for state regulation and to suspend reference to the first Amendment. Arguments that insist that speech acts are speech rather than conduct, on the other hand, tend to work in favor of suspending state intervention. In Chapter One, “Burning Acts,” I note that a majority opinion on the Supreme Court in *R.A. V. v. St. Paul* struck down a local ordinance which would have construed the burning of a cross in the front of a black family’s house as “fighting words” and questioned whether that kind of “speech” simply “communicates a message” and expresses “a viewpoint”—even as that “viewpoint” was also held to be “reprehensible.”<sup>15</sup> The Court clearly discounted a more recent legal argument that the burning cross is *both* speech and conduct, that is, the communication of a message of inferiority as well as an act of discrimination (in the sense that a sign, “whites only,” both expresses an idea and constitutes in itself discriminatory conduct.)

In MacKinnon’s recent work, *Only Words*, pornography is construed as both speech and conduct, indeed, as “performative utter-

ance,” and is understood not only to “act on” women in injurious ways (a perlocutionary claim), but to constitute, through representation, the class of women as an inferior class (an illocutionary claim). The burning cross is understood to be analogous to the pornographic utterance to the extent that both of them represent and enact an injury. But can the illocutionary claim be made about pornography as easily as it can about the burning cross? The theory of representation and, indeed, the theory of performativity at work differs in each of these cases. I will argue that, taken generically, the visual text of pornography cannot “threaten” or “demean” or “debase” in the same way that the burning cross can. To suggest that both examples instantiate the same kind of verbal conduct is not only a mistake in judgment, but the exploitation of the sign of racial violence for the purposes of enhancing, through a metonymical slippage, the putatively injurious power of pornography.

We have heard recently about speech that “incites” certain kinds of action. The Israeli press devoted much attention to the incendiary rhetoric of the rightwing in Israel and whether that rhetoric could be held responsible for the slaying of Yitzhak Rabin. How is it in such cases that we imagine utterance to have insinuated itself into action: / 21  
how do we imagine that speech is heard, taken up as motivation, mechanically or contagiously inducing the listener to act? “Pro-life” activists have argued with limited legislative success that terms such as “abortion” that appear on the Internet are themselves “obscenity,” and I recently saw an airplane movie in which the word “abortion” was “bleeped” in the course of its utterance. The utterance is understood not merely to offend a set of sensibilities, but to constitute an injury, as if the word performed the act, and the injured party were the defenseless “unborn.” The ascription of such magical efficacy to words emerges in the context of the U.S. military in which the declaration that one is a homosexual is understood to communicate something of homosexuality and, hence, to be a homosexual act of some kind.

Significantly, this magical view of the performative does not operate in those political instances in which speech is, as it were, violently separated from conduct. The Court’s willingness to treat the burning cross in *R.A.V. v. St. Paul* as potentially protected “speech” suggests that the nonperformative view of speech can be extended to defend

certain kinds of racist conduct, a defense that manipulates the distinction between speech and conduct in order to achieve certain political aims. Similarly, MacKinnon's appeal to the state to construe pornography as performative speech and, hence, as the injurious conduct of representation, does not settle the theoretical question of the relation between representation and conduct, but collapses the distinction in order to enhance the power of state intervention over graphic sexual representation.

22 / In many ways, this very extension of state power, however, comes to represent one of the greatest threats to the discursive operation of lesbian and gay politics. Central to such politics are a number of "speech acts" that can be, and have been, construed as offensive and, indeed, injurious conduct: *graphic self-representation*, as in Mapplethorpe's photography; *explicit self-declaration*, such as that which takes place in the practice of coming out; and *explicit sexual education*, as in AIDS education. In these three instances, it is important to note that to represent homosexuality is not exactly the same as performing it, even when the representation has a significantly performative dimension to it. When one declares that one is a homosexual, the declaration is the performative act—not the homosexuality, unless we want to claim that homosexuality is itself nothing but a kind of declaration, which would be an odd move to make. Similarly, it seems crucial and right to argue that to represent sexual practices in AIDS education is not to circulate AIDS nor to incite certain kinds of sexuality (unless we understand the incitation to safe sex as one of the aims of such an education). In a related way, when conservative critics suggest that gangsta rap is responsible for urban crime and the degradation of women, they construe representation not merely as performative, but as causative. In calling for public opposition to gangsta rap, William Bennett and C. Delores Tucker<sup>16</sup> did not seek state intervention against the corporations financing the music, but they did circulate the view that such music (and lyrics) have perlocutionary effects, and they represented representation itself as inducing criminal violence. The collapse of speech and conduct thus works to localize the "cause" of urban violence, and perhaps, as in the Israeli concern with incendiary rhetoric, to silence a discussion of the broader institutional conditions

that produce right-wing violence. In the United States, the turn against the lyrics of gangsta rap may also operate as a deflection from a more fundamental analysis on race, poverty and rage, and how those conditions are graphically registered in urban African-American popular musical genres.<sup>17</sup>

Unfortunately, it seems that some appropriations of the hate speech argument tend to minimize the effects of racial injury while expanding the possible field of sexual injury; and in the conservative attack on rap, feminist arguments against injurious representation appear to be tacitly appropriated. New standards of “decency” require that certain urban conditions of violence not be represented. At the same time, sexual injury to women is to be understood through racial tropes: the dignity of women is understood to be under attack not by the weakening of rights to reproductive freedom and the widespread loss of public assistance, but primarily by African-American men who sing.

There are views that subscribe to the efficacious model of the performative in both its illocutionary and perlocutionary forms that are feminist and anti-feminist, racist and anti-racist, homophobic and anti-homophobic. Thus there is no simple way to correlate views on the efficacy of the speech act with political views in general or, more specifically, with a view on the appropriate jurisdiction of the first Amendment. Nevertheless, it seems clear that legal precedents for the curtailment of “speech,” broadly construed, are supported by the use of the illocutionary model of hate speech. The firmer the link is made between speech and conduct, however, and the more fully occluded the distinction between felicitous and infelicitous acts, the stronger the grounds for claiming that speech not only produces injury as one of its consequences, but constitutes an injury in itself, thus becoming an unequivocal form of conduct. The collapse of speech into conduct, and the concomitant occlusion of the gap between them, tends to support the case for state intervention, for if “speech” in any of the above cases can be fully subsumed under conduct, then the first Amendment is circumvented. To insist on the gap between speech and conduct, however, is to lend support for the role of nonjuridical forms of opposition, ways of restaging and resignifying speech in contexts that exceed those determined by the courts. Strategies devised on the part of progressive

legal and social movements thus run the risk of being turned against those very movements by virtue of extending state power, specifically legal power, over the issues in question. Whether by expanding the scope of obscenity or attempting the implementation of the fighting words doctrine (unsuccessful so far) or extending anti-discrimination law to include speech as discriminatory conduct, such strategies tend to enhance state regulation over the issues in question, potentially empowering the state to invoke such precedents against the very social movements that pushed for their acceptance as legal doctrine.

#### SPEECH ACTS AS INTERPELLATION

If hate speech acts in an illocutionary way, injuring in and through the moment of speech, and constituting the subject through that injury, then hate speech exercises an interpellative function.<sup>18</sup> At first, it appears that the Austinian notion of an illocutionary utterance is incompatible with an Althusserian notion of interpellation. For 24 / Austin, the subject who speaks precedes the speech in question. For Althusser, the speech act that brings the subject into linguistic existence precedes the subject in question. Indeed, the interpellation that precedes and forms the subject in Althusser appears to constitute the prior condition of those subject-centered speech acts that populate Austin's domain of analysis. Austin, however, makes clear that he does not think the workings of the performative always depend on the intention of the speaker. He refutes forms of psychologism that would require that "fictitious inward acts" (10) accompany the promise, one of the first speech acts he considers, in order to validate that act. Although a good intention may well make a promise felicitous, an intention not to perform the act does not deprive the speech act of its status as a promise; the promise is still performed (11). The force of the speech act is separable from its meaning, and illocutionary force is secured through convention.<sup>19</sup> Just as for Austin the convention governing the institution of promise-making is verbally honored even in the case of a promise that no one intends to fulfill, so for Althusser one is entered into the "ritual" of ideology regardless of whether there is a prior and authenticating belief in that ideology.

Austin's view that the illocutionary speech act is conditioned by its conventional, that is, "ritual" or "ceremonial" dimension, finds a counterpart in Althusser's insistence that ideology has a "ritual" form, and that ritual constitutes "the material existence of an ideological apparatus" (168). Ritual is material to the extent that it is productive, that is, it produces the belief that appears to be "behind" it. Thus Althusser scandalously invokes Pascal on religious belief at the moment he is called upon to explain the ritual dimension of ideology: "Pascal says more or less: 'Kneel down, move your lips in prayer, and you will believe.'" The hollow gesture becomes filled in time, and ideation is produced in the course of this ritualized repetition of convention. "Ideas," for Althusser, do not *precede* such actions, but have their "existence . . . inscribed in the actions of practices governed by rituals. . ." (170). In the famous scene of interpellation that Althusser provides, the policeman hails the passerby with "hey you there" and the one who recognizes himself and turns around (nearly everyone) to answer the call does not, strictly speaking, preexist the call. Althusser's scene is, therefore, fabulous, but what could it mean? The passerby turns precisely to acquire a certain identity, one purchased, as it were, with the price of guilt. The act of recognition becomes an act of constitution: the address animates the subject into existence. / 25

Neither the Austinian promise nor the Althusserian prayer require a preexisting mental state to "perform" in the way that they do. But where Austin assumes a subject who speaks, Althusser, in the scene in which the policeman hails the pedestrian, postulates a voice that brings that subject into being. The Austinian subject speaks *conventionally*, that is, it speaks in a voice that is never fully singular. That subject invokes a formula (which is not quite the same as following a rule), and this may be done with no or little reflection on the conventional character of what is being said. The ritual dimension of convention implies that the moment of utterance is informed by the prior and, indeed, future moments that are occluded by the moment itself. Who speaks when convention speaks? In what time does convention speak? In some sense, it is an inherited set of voices, an echo of others who speak as the "I."<sup>20</sup>

To bridge the Austinian and Althusserian views, one would need



to offer an account of how the subject constituted through the address of the Other becomes then a subject capable of addressing others. In such a case, the subject is neither a sovereign agent with a purely instrumental relation to language, nor a mere effect whose agency is pure complicity with prior operations of power. The vulnerability to the Other constituted by that prior address is never overcome in the assumption of agency (one reason that “agency” is not the same as “mastery”).

The argument that hate speech is illocutionary, that it produces the subject in a position of subordination, approximates the view that the subject is interpellated by an anterior voice, one that exercises a ritual form. In hate speech, the ritual in question appears to be that of subordination. Indeed, one of the strongest arguments in favor of the state regulation of hate speech is that certain kinds of utterances, when delivered by those in positions of power against those who are already subordinated, have the effect of resubordinating those to whom such utterances are addressed.

26 / For such a view to become persuasive, it is necessary to distinguish between kinds of injury that are socially contingent and avoidable, and kinds of subordination that are, as it were, the constitutive condition of the subject. This distinction is difficult to make, though not impossible, because it seems that the former kind of speech exploits the prior possibility of the latter. Hate speech exposes a prior vulnerability to language, one that we have by virtue of being interpellated kinds of beings, dependent on the address of the Other in order to be. That one comes to “be” through a dependency on the Other—an Hegelian and, indeed, Freudian postulation—must be recast in linguistic terms to the extent that the terms by which recognition is regulated, allocated, and refused are part of larger social rituals of interpellation. There is no way to protect against that primary vulnerability and susceptibility to the call of recognition that solicits existence, to that primary dependency on a language we never made in order to acquire a tentative ontological status. Thus we sometimes cling to the terms that pain us because, at a minimum, they offer us some form of social and discursive existence.<sup>21</sup> The address that inaugurates the possibility of agency, in a single stroke, forecloses the possibility of radical autonomy. In this sense,

an “injury” is performed by the very act of interpellation, the one that rules out the possibility of the subject’s autogenesis (and gives rise to that very fantasy). It is therefore impossible to regulate fully the potentially injurious effect of language without destroying something fundamental about language and, more specifically, about the subject’s constitution in language. On the other hand, a critical perspective on the kinds of language that govern the regulation and constitution of subjects becomes all the more imperative once we realize how inevitable is our dependency on the ways we are addressed in order to exercise any agency at all.

The utterances of hate speech are part of the continuous and uninterrupted process to which we are subjected, an on-going subjection (*assujettissement*) 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 enacted; the utterance is the occasion for the renewal of that interpellating operation; indeed, that operation is only instanced by the “verbal conduct,” but the operation of interpellation happens with or without such conduct. Indeed, one can be interpellated, put in place, given a place, through silence, through not being addressed, and this becomes painfully clear when we find ourselves preferring the occasion of being derogated to the one of not being addressed at all.

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We might be tempted to understand the existence of injurious language as posing an ethical question on the order of: what kind of language ought we to use? How does the language we use affect others? If hate speech is citational, does that mean that the one who uses it is not responsible for that usage? Can one say that someone else made up this speech that one simply finds oneself using and thereby absolve oneself of all responsibility? I would argue that the citationality of discourse can work to enhance and intensify our sense of responsibility for it. The one who utters hate speech is responsible for the manner in which such speech is repeated, for reinvigorating such speech, for reestablishing contexts of hate and injury. The responsibility of the speaker does not consist of remaking language *ex nihilo*, but rather of negotiating the legacies of usage that constrain and enable that speaker’s speech.

To understand this sense of responsibility, one afflicted with impurity from the start, requires that we understand the speaker as formed in the language that he or she also uses. This paradox intimates an ethical dilemma brewing at the inception of speech.

The question of how best to use speech is an explicit ethical question that can emerge only later. It presupposes a prior set of questions: who are “we” such that without language we cannot be, and what does it mean “to be” within language? How is it that injurious language strikes at this very condition of possibility, of linguistic persistence and survival? If the subject who speaks is also constituted by the language that she or he speaks, then language is the condition of possibility for the speaking subject, and not merely its instrument of expression. This means that the subject has its own “existence” implicated in a language that precedes and exceeds the subject, a language whose historicity includes a past and future that exceeds that of the subject who speaks. And yet, this “excess” is what makes possible the speech of the subject.

28 / Foucault refers to this loss of control over language when he writes, “discourse is not life; its time is not yours.”<sup>22</sup> By this statement, Foucault appears to mean that one’s life is not reducible to the discourse that one speaks or to the sphere of discourse that animates one’s life. What he fails to emphasize, however, is that the time of discourse, even in its radical incommensurability with the time of the subject, *makes possible* the speaking time of the subject. That linguistic domain over which the subject has no control becomes the condition of possibility for whatever domain of control is exercised by the speaking subject. Autonomy in speech, to the extent that it exists, is conditioned by a radical and originary dependency on a language whose historicity exceeds in all directions the history of the speaking subject. And this excessive historicity and structure makes possible that subject’s linguistic survival as well as, potentially, that subject’s linguistic death.

#### THE INJURIOUS ACTION OF NAMES

Although some injurious language depends on the use of names, calling another a name, other forms seem to rely on descriptions or even silences. And yet, we may understand something of linguistic vulnera-

bility through a consideration of the power of the name. Lacan writes that, “the name is the time of the object.” But it is also the time of the Other. One is, as it were, brought into social location and time through being named. And one is dependent upon another for one’s name, for the designation that is supposed to confer singularity. Whether the name is shared by others, the name, as a convention, has a generality and a historicity that is in no sense radically singular, even though it is understood to exercise the power of conferring singularity. At least, this is the general understanding of the *proper name*. But do other kinds of names, descriptions, linguistic bearings (including silence) borrow and derive some of the constituting power of the proper name? Do they also confer a spatial and temporal specificity, inaugurating a time of the subject that is not the same as the time of language, enforcing the sense of the subject’s finitude that follows from that incommensurability?

Consider for a moment the more general conditions of naming. First, a name is offered, given, imposed by someone or by some set of someones, and it is attributed to someone else. It requires an intersubjective context, but also *a mode of address*, for the name emerges as the *addressing of a coinage to another, and in that address, a rendering of that coinage proper*. The scene of naming appears then first as a unilateral action: there are those who address their speech to others, who borrow, amalgamate, and coin a name, deriving it from available linguistic convention, and establish that derivation as *proper* in the act of naming. And yet, the one who names, who works within language to find a name for another, is presumed to be already named, positioned within language as one who is already subject to that founding or inaugurating address. This suggests that such a subject in language is positioned as both addressed and addressing, and that the very possibility of naming another requires that one first be named. The subject of speech who is named becomes, potentially, one who might well name another in time.

Although we might think of this action first and foremost as conferring a proper name, it does not necessarily take that form. The jarring, even terrible, power of naming appears to recall this initial power of the name to inaugurate and sustain linguistic existence, to confer

singularity in location and time. After having received the proper name, one is subject to being named again. In this sense, the vulnerability to being named constitutes a constant condition of the speaking subject. And what if one were to compile all the names that one has ever been called? Would they not present a quandary for identity? Would some of them cancel the effect of others? Would one find oneself fundamentally dependent upon a competing array of names to derive a sense of oneself? Would one find oneself alienated in language, finding oneself, as it were, in the names addressed from elsewhere? Thus, as Benveniste has shown, the very conditions of the possibility for becoming an "I" in language remain indifferent to the "I" that one becomes. The more one seeks oneself in language, the more one loses oneself precisely there where one is sought.

30, Positioned as both addressed and addressing, taking its bearings within that crossed vector of power, the subject is not only founded by the other, requiring an address in order to be, but its power is derived from the structure of address as both linguistic vulnerability and exercise. If one comes to be through address, can we imagine a subject apart from his or her linguistic bearing? We cannot imagine them or they could not be what they are, apart from the constitutive possibility of addressing others and being addressed by others. If these subjects could not be who they are without this linguistic bearing toward one another, then it seems that this linguistic bearing might well qualify as something essential to who these subjects are, something without which they could not be said to exist; their linguistic bearing toward one another, their linguistic vulnerability toward one another, is not something simply added on to their social relations to one another. It is one of the primary forms that this social relation takes.<sup>23</sup>

The linguistic scene we have been considering is one in which there are subjects who stand in a relation of addressing and being addressed, where the capacity to address appears to be derived from having been addressed, where a certain subjectivation in language is constituted by this reversibility. The presumption of a dyadic relation, however, need not constrain our understanding of interpellation.

Consider the situation in which one is named without knowing

that one is named, which is, after all, the condition of all of us at the beginning and even, sometimes, prior to the beginning. The name constitutes one socially, but one's social constitution takes place without one's knowing. Indeed, one may well imagine oneself in ways that are quite to the contrary of how one is socially constituted; one may, as it were, meet that socially constituted self by surprise, with alarm or pleasure, even with shock. And such an encounter underscores the way in which the name wields a linguistic power of constitution in ways that are indifferent to the one who bears the name. One need not know about or register a way of being constituted for that constitution to work in an efficacious way. For the measure of that constitution is not to be found in a reflexive appropriation of that constitution, but, rather, in a chain of signification that exceeds the circuit of self-knowledge. The time of discourse is not the time of the subject.

In this sense, Althusser's view of interpellation requires revision. The subject need not always turn around in order to be constituted as a subject, and the discourse that inaugurates the subject need not take the form of a voice at all.

/ 31

In "Ideology and Ideological State Apparatuses," Althusser attempts to describe the subject-constituting power of ideology through recourse to the figure of a divine voice that names, and in naming brings its subjects into being. The divine name makes what it names, but it also subordinates what it makes. In claiming that social ideology operates in an analogous way to the divine voice, Althusser inadvertently assimilates social interpellation to the divine performative. The example of religion thus assumes the status of a paradigm for thinking ideology as such: the authority of the "voice" of ideology, the "voice" of interpellation, is figured as a voice almost impossible to refuse. The force of interpellation in Althusser is derived from notable examples: God's voice in the naming of Peter (and Moses) and its secularization in the postulated voice of the representative of state authority; the policeman's voice in the hailing of the wayward pedestrian with "Hey you there!"

In other words, the divine power of naming structures the theory of interpellation that accounts for the ideological constitution of the

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subject. God names "Peter," and this address establishes God as the origin of Peter (177); the name remains attached to Peter permanently by virtue of the implied and continuous presence residing in the name of the one who names him. Within the terms of Althusser's examples, however, this naming cannot be accomplished without a certain readiness or anticipatory desire on the part of the one addressed. To the extent that the naming is an address, there is already an addressee, prior to the address; but given that the address is a name which creates what it names, there appears to be no "Peter" without the name, "Peter". Indeed, "Peter" does not exist without the name that supplies that linguistic guarantee of existence. In this sense, as a prior and essential condition of the formation of the subject, there is a certain readiness to be compelled by the authoritative interpellation, a readiness that suggests that one is, as it were, already in a binding relation to the divine voice before one succumbs to its call. In other words, one is already claimed by the voice that calls the name, already subordinate to the authority to which one subsequently yields.

32, As useful as it is, Althusser's scheme restricts the notion of interpellation to the action of a voice, attributing a creative power to the voice that recalls and reconsolidates the figure of the divine voice in its ability to bring about what it names. Interpellation must be dissociated from the figure of the voice in order to become the instrument and mechanism of discourses whose efficacy is irreducible to their moment of enunciation. Consider the efficacy of written or reproduced language in the production of social effects and, in particular, the constitution of subjects. But perhaps most important to consider is that the voice is implicated in a notion of *sovereign* power, power figured as emanating from a subject, activated in a voice, whose effects appear to be the magical effects of that voice. In other words, power is understood on the model of the divine power of naming, where to utter is to create the effect uttered. Human speech rarely mimes that divine effect except in the cases where the speech is backed by state power, that of a judge, the immigration authority, or the police, and even then there does sometimes exist recourse to refute that power. If we concede that the one who speaks powerfully, who makes happen what she

or he says, is enabled in his/her speech by first having been addressed and, hence, initiated into linguistic competence through the address, then it follows that the power of the speaking subject will always, to some degree, be derivative, that it will not have its source in the speaking subject.

The policeman who hails the person on the street is enabled to make that call through the force of reiterated convention. This is one of the speech acts that police perform, and the temporality of the act exceeds the time of the utterance in question. In a sense, the police *cite* the convention of hailing, participate in an utterance that is indifferent to the one who speaks it. The act “works” in part because of the citational dimension of the speech act, the historicity of convention that exceeds and enables the moment of its enunciation. For Althusser, there must be a one who turns around, who reflexively appropriates the term by which one is hailed; only once this appropriative gesture takes place does hailing become interpellation. But if we accept the notion that the linguistic constitution of the subject can take place without that subject’s knowing, as when one is constituted out of earshot, as, say, the referent of a third-person discourse, then interpellation can function without the “turning around,” without anyone ever saying, “Here I am.” / 33

Imagine the quite plausible scene in which one is called by a name and one turns around only to protest the name: “That is not me, you must be mistaken!” And then imagine that the name continues to force itself upon you, to delineate the space you occupy, to construct a social positionality. Indifferent to your protests, the force of interpellation continues to work. One is still constituted by discourse, but at a distance from oneself. Interpellation is an address that regularly misses its mark, it requires the recognition of an authority at the same time that it confers identity through successfully compelling that recognition. Identity is a function of that circuit, but does not preexist it. The mark interpellation makes is not descriptive, but inaugurative. It seeks to introduce a reality rather than report on an existing one; it accomplishes this introduction through a citation of existing convention. Interpellation is an act of speech whose “content” is neither true nor

false: it does not have description as its primary task. Its purpose is to indicate and establish a subject in subjection, to produce its social contours in space and time. Its reiterative operation has the effect of sedimenting its “positionality” over time.

The interpellative name may arrive without a speaker—on bureaucratic forms, the census, adoption papers, employment applications. Who utters such words? The bureaucratic and disciplinary diffusion of sovereign power produces a terrain of discursive power that operates without a subject, but that constitutes the subject in the course of its operation. This does not mean that there are no individuals who write and distribute the forms. It means only that they are not the originators of the discourse they convey and that their intentions, however strong, are not finally what control the meaning of that discourse.

34, Although the subject surely speaks, and there is no speaking without a subject, the subject does not exercise sovereign power over what it says. As a result, interpellation after the diffusion of sovereign power has an origin that is as unclear as its end. From whom does the address emerge, and to whom is it addressed? If the one who delivers it does not author it, and the one who is marked by it is not described by it, then the workings of interpellative power exceed the subjects constituted by its terms, and the subjects so constituted exceed the interpellation by which they are animated.

The workings of interpellation may well be necessary, but they are not for that reason mechanical or fully predictable. The power of a name to injure is distinct from the efficacy with which that power is exercised. Indeed, power is not as easy to identify or to localize as some speech act theory appears to imply.<sup>24</sup> The subject who speaks hate speech is clearly responsible for such speech, but that subject is rarely the originator of that speech. Racist speech works through the invocation of convention; it circulates, and though it requires the subject for its speaking, it neither begins nor ends with the subject who speaks or with the specific name that is used.

Foucault counsels against the effort to localize the conceptualization of power, and his theory of power has implications for the attempt to locate power in the name. His remarks have less to do with the

power of the name than with *the name of power*, and with the nominalistic presuppositions that go along with construing power as if it were a name.

He writes, (HS, 93): "One needs to be nominalistic, no doubt: power is not an institution, and not a structure; neither is it a certain strength we are endowed with; *it is the name that one attributes to a complex strategical situation* in a particular society" (my emphasis). It is the name that one attributes to a complexity which is not easily named. Power does not arrive in the form of a name; its structures and its institutions are not such that the name seems perfectly suited to whatever power is. A name tends to fix, to freeze, to delimit, to render substantial, indeed, it appears to recall a metaphysics of substance, of discrete and singular kinds of beings; a name is not the same as an undifferentiated temporal process or the complex convergence of relations that go under the rubric of "a situation." But power is the name that one attributes to this complexity, a name that substitutes for that complexity, a name that renders manageable what might be otherwise too unwieldy or complex, and what, in its complexity, might defy the limiting and substantializing ontology presupposed by the name. Of course, when Foucault claims that "power is the name that one attributes to a strategical situation," then it appears that power is but the name that one attributes, that the name is an arbitrary or abbreviated version of what power is but then Foucault offers a description: "a strategical situation in a particular society," and the question emerges: is this description any less arbitrary or abbreviated than the name by which it is replaced, the name which stands as a substitution for this description? In other words, is the description any less of a substitute than the name?

/ 35

What is power in this view? If it is not a certain strength with which we are endowed, is it perhaps a certain strength with which language is endowed? If it is neither, that is, if power cannot be said to inhere in every subject as an "endowed strength" or, for that matter, to inhere in any set of names as an "endowed strength," then how might we account for those occasions in which power comes to appear precisely as that with which a subject is endowed *or* as that with which a name is endowed.

Power works through dissimulation: it comes to appear as something other than itself, indeed, it comes to appear as *a name*. "Power" Foucault writes, placing the term in quotation marks; power so-called; power, as people say. Power, the name, is, among other things, the over-all effect that emerges from all these mobilities, "the concatenation that rests on each of these ["mobilities"] *and seeks to arrest their movement*." (HS, 93) It is movement, it is a concatenation, a concatenation that rests on them, but which is in a sense derived from them, a concatenation derived from them which turns against them, which seeks to arrest movement itself. Is the "name" perhaps one way in which that arrest is performed? A strange way to think about power, as the arrest of movement, as a movement which comes to a halt or arrests itself—through nominalization. The name carries within itself the movement of a history that it arrests.

Clearly, injurious names have a history, one that is invoked and reconsolidated at the moment of utterance, but not explicitly told. This is not simply a history of how they have been used, in what contexts, and for what purposes; it is the way such histories are installed and arrested in and by the name. The name has, thus, a *historicity*, what might be understood as the history which has become internal to a name, has come to constitute the contemporary meaning of a name: the sedimentation of its usages as they have become part of the very name, a sedimentation, a repetition that congeals, that gives the name its force.<sup>25</sup>

If we understand the force of the name to be an effect of its historicity, then that force is not the mere causal effect of a an inflicted blow, but works in part through an encoded memory or a trauma, one that lives in language and is carried in language. The force of the name depends not only on its iterability, but on a form of repetition that is linked to trauma, on what is, strictly speaking, not remembered, but relived, and relived in and through the linguistic substitution for the traumatic event. The traumatic event is an extended experience that defies and propagates representation at once.<sup>26</sup> Social trauma takes the form, not of a structure that repeats mechanically, but rather of an ongoing subjugation, the restaging of injury through signs that both

occlude and reenact the scene. Can repetition be both the way that trauma is repeated but also the way in which it breaks with the historicity to which it is in thrall? What makes for a reverse citation in the scene of trauma, how can hate speech be cited against itself?

The proposals to regulate hate speech invariably end up citing such speech at length, offering lengthy lists of examples, codifying such speech for regulatory purposes, or rehearsing in a pedagogical mode the injuries that have been delivered through such speech. It seems that the repetition is inevitable, and that the strategic question remains, what best use is to be made of repetition? This is not an exercise of agency at a distance, but precisely a struggle from within the constraints of compulsion. In the case of hate speech, there appears to be no way to ameliorate its effects except through its recirculation, even if that recirculation takes place in the context of a public discourse that calls for the censorship of such speech: the censor is compelled to repeat the speech that the censor would prohibit. No matter how vehement the opposition to such speech is, its recirculation inevitably reproduces trauma as well. There is no way to invoke examples of racist speech, for instance, in a classroom without invoking the sensibility of racism, the trauma and, for some, the excitement. / 37

I found through a difficult experience in the summer 1995 at the Dartmouth School for Criticism and Theory that to offer examples of such language is in some instances to incite their usage. A student, apparently responding to the course content, sent hateful letters to various students in the class, offering "knowing" speculation on their ethnicity and sexuality; she or he wrote the letters with no name attached: nameless, calling names, attempting to distill the operation of interpellation into a unilateral address according to which the letter-writer can only address others, but cannot be addressed in return. Hence, the trauma of the example returned, as it were, in the trauma of the unsigned letter. Afterwards, in the class, the trauma was reiterated again for pedagogical purposes. The incitement of discourse about the trauma, though, did not work to ameliorate it, although there was a way in which the affectless scrutiny of the terms did something to ameliorate the rush of excitement that, for some, went along with the

utterance. The liberal capacity to refer to such terms as if one were merely mentioning them, not making use of them, can support the structure of disavowal that permits for their hurtful circulation. The words are uttered and disavowed at the moment of the utterance, and the critical discourse on them becomes precisely the instrument of their perpetration.

This story underscores the limits and risks of resignification as a strategy of opposition. I will not propose that the pedagogical recirculation of examples of hate speech always defeats the project of opposing and defusing such speech, but I want to underscore the fact that such terms carry connotations that exceed the purposes for which they may be intended and can thus work to afflict and defeat discursive efforts to oppose such speech. Keeping such terms unsaid and unsayable can also work to lock them in place, preserving their power to injure, and arresting the possibility of a reworking that might shift their context and purpose.

38 / That such language carries trauma is not a reason to forbid its use. There is no purifying language of its traumatic residue, and no way to work through trauma except through the arduous effort it takes to direct the course of its repetition. It may be that trauma constitutes a strange kind of resource, and repetition, its vexed but promising instrument. After all, to be named by another is traumatic: it is an act that precedes my will, an act that brings me into a linguistic world in which I might then begin to exercise agency at all. A founding subordination, and yet the scene of agency, is repeated in the ongoing interpellations of social life. This is what I have been called. Because I have been called something, I have been entered into linguistic life, refer to myself through the language given by the Other, but perhaps never quite in the same terms that my language mimes. The terms by which we are hailed are rarely the ones we choose (and even when we try to impose protocols on how we are to be named, they usually fail); but these terms we never really choose are the occasion for something we might still call agency, the repetition of an originary subordination for another purpose, one whose future is partially open.

## SCHEMA

If agency is not derived from the sovereignty of the speaker, then the force of the speech act is not sovereign force. The “force” of the speech act is, however incongruously, related to the body whose force is deflected and conveyed through speech. As excitable, such speech is at once the deliberate and undeliberate effect of a speaker. The one who speaks is not the originator of such speech, for that subject is produced in language through a prior performative exercise of speech: interpellation. Moreover, the language the subject speaks is conventional and, to that degree, citational. The legal effort to curb injurious speech tends to isolate the “speaker” as the culpable agent, as if the speaker were at the origin of such speech. The responsibility of the speaker is thus misconstrued. The speaker assumes responsibility precisely through the citational character of speech. The speaker renews the linguistic tokens of a community, reissuing and reinvigorating such speech. Responsibility is thus linked with speech as repetition, not as origination.

/ 39

If the performativity of injurious speech is considered perlocutionary (speech leads to effects, but is not itself the effect), then such speech works its injurious effect only to the extent that it produces a set of non-necessary effects. Only if other effects may follow from the utterance does appropriating, reversing, and recontextualizing such utterances become possible. To the extent that some legal approaches assume the illocutionary status of hate speech (speech is the immediate and necessary exercise of injurious effects), the possibility of defusing the force of that speech through counter-speech is ruled out. Significantly, the legal discourse in which the status of the performativity of hate speech takes place is its own performative exercise. In the current U.S. political climate, the law that decides the question of hate speech tends to be applied inconsistently in order to further reactionary political aims: the action of speech is considered unequivocally to be injurious conduct (an illocutionary view of the speech act) in those instances in which the graphic representation of sexuality is at issue. Gay and lesbian self-declaration in the military is one such example. The relation



between speech and conduct is considered equivocal, if not undecidable, by the courts in instances of racist speech.

My view is that efforts to argue that speech is conduct are taken up by conservative courts to endorse the view that sexual speech is a sexual act; the courts tend to dispute the conflation of speech and conduct, however, in matters pertaining to racist language. This becomes painfully clear in those cases in which racial minorities come to stand for the source or origin of sexually injurious representation (as in rap) or where that very pornographic debasement is exercised by the state itself when the speech of Anita Hill, rendered as a sexualized racial spectacle, is deprived of credibility. The transposition of the hate speech model from race to sex thus fails to work without producing a series of politically problematic consequences. Racial tropes are exploited to make false analogies with sex, and the intersection between the two remains critically uninterrogated.

40, As much as this text seeks to understand the particulars of recent arguments concerning hate speech, it also seeks to outline a more general theory of the performativity of political discourse. The point is not to enumerate the political consequences of a theory of the performative, but rather to show how a theory of the performative is already at work in the exercise of political discourse (theory can work in implicit and fugitive ways). Understanding performativity as a renewable action without clear origin or end suggests that speech is finally constrained neither by its specific speaker nor its originating context. Not only defined by social context, such speech is also marked by its capacity to break with context. Thus, performativity has its own social temporality in which it remains enabled precisely by the contexts from which it breaks. This ambivalent structure at the heart of performativity implies that, within political discourse, the very terms of resistance and insurgency are spawned in part by the powers they oppose (which is not to say that the latter are reducible to the former or always already coopted by them in advance).

The political possibility of reworking the force of the speech act against the force of injury consists in misappropriating the force of speech from those prior contexts. The language that counters the injuries of speech, however, must repeat those injuries without pre-

cisely reenacting them. Such a strategy affirms that hate speech does not destroy the agency required for a critical response. Those who argue that hate speech produces a “victim class” deny critical agency and tend to support an intervention in which agency is fully assumed by the state. In the place of state-sponsored censorship, a social and cultural struggle of language takes place in which agency is derived from injury, and injury countered through that very derivation.

Misappropriating the force of injurious language to counter its injurious operations constitutes a strategy that resists the solution of state-sponsored censorship, on the one hand, and the return to an impossible notion of the sovereign freedom of the individual, on the other. The subject is constituted (interpellated) in language through a selective process in which the terms of legible and intelligible subjecthood are regulated. The subject is called a name, but “who” the subject is depends as much on the names that he or she is never called: the possibilities for linguistic life are both inaugurated and foreclosed through the name.

Thus, language constitutes the subject in part through foreclosure, a kind of unofficial censorship or primary restriction in speech that constitutes the possibility of agency in speech. The kind of speaking that takes place on the border of the unsayable promises to expose the vacillating boundaries of legitimacy in speech. As a further marking of the limit to sovereignty, this view suggests that agency is derived from limitations in language, and that limitation is not fully negative in its implications. / 41

Indeed, as we think about worlds that might one day become thinkable, sayable, legible, the opening up of the foreclosed and the saying of the unspeakable become part of the very “offense” that must be committed in order to expand the domain of linguistic survival. The resignification of speech requires opening new contexts, speaking in ways that have never yet been legitimated, and hence producing legitimation in new and future forms.

[illegible]

# 1 / 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.

44, 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.” / 45

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 the 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 bloß 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 Täter*, which translates merely as a “doer.”<sup>1</sup> 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  
46, 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 ist zum Tun blos hinzuge-dichtet.” 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 to install a subject, and 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. Does tracing the injury to the act of a subject and privileging of the juridical domain as the site to negotiate social injury 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."<sup>2</sup> "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.<sup>3</sup> 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.<sup>4</sup>

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 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.<sup>5</sup>

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, as 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 one who speaks the performative effectively is understood to operate according to uncontested power. 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.<sup>6</sup> The power to "race" and, indeed, the power to gender, precedes the "one" who speaks such power, and yet the one who speaks nevertheless appears to have that power.

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 him 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 sta-

tus 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 and the "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.

50/ 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? 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*].<sup>7</sup>

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? / 51

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 final 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.<sup>8</sup>

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 impermissibly 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 a “viewpoint” within the “free marketplace of ideas” and that such “viewpoints” are categorically protected by the first Amendment.<sup>9</sup> 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 possible 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.

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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 injuri-

ous, 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 with which it is invested to regulate, sanction, and restrict such speech.

54 / 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 precedent. 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 continued, “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 is itself 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.<sup>10</sup>

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 'non-speech' element of communication." *R.A.V. v. St. Paul*, 112 S. Ct. at 2545, 120 L. Ed. 2d at 319. In his efforts 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.*

56, 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.<sup>11</sup> 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 fifty-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.<sup>12</sup> 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.<sup>13</sup> / 57

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 Stevens'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 disruptions; 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.

58/ 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<sup>14</sup> 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 beliefs” 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 an 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 consti-

tuted 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 *unprotected* 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.<sup>15</sup>

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.<sup>16</sup>

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."<sup>17</sup>

60, 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. '61

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  
62, 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.<sup>18</sup> 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 cir-

cumscribed 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.

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. '63

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, suggest 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, like the injury of Rodney King, proves too ambiguous, too hypothetical to abrogate the ostensible sanctity of the first Amendment.<sup>19</sup> 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.” I will consider that conflation of speech and conduct in Chapter Three. According to this policy, the act

of coming out is implicitly 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?

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#### FROM HATE SPEECH TO PORNOGRAPHY

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. A fuller discussion of her position takes place in the following chapter, but I offer an analysis of the putative performativity of pornography here to show how the construal of the visual image as illocutionary speech effectively sidesteps the first Amendment by claiming that pornography is sovereign conduct.

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. (25)

66,

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. 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 Mac-

Kinnon 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. 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 the 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. / 67

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, *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 that assertion of a metaphorical collapse into identity. Through what means does the "as" turn into a "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 a "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 *unrealizability*. 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. To read such texts against themselves is to concede that the performativity of the text is not under sovereign control. On the contrary, if the text acts once, it can act again, and possibly against its prior act. This raises the possibility of *resignification* as an alternative reading of performativity and of politics. / 69

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# 2 / SOVEREIGN PERFORMATIVES

Recent proposals to regulate hate speech on campus, in the workplace, and in other public domains have spawned a set of ambivalent political consequences. 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,



72/ seeking to establish verbal conduct as discriminatory action.<sup>1</sup> 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 adherents 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 also to enact the very message it communicates: the very communication is at once a form of conduct.<sup>2</sup>

I propose to review some of the senses in which “verbal conduct” is thought in the proposed hate speech regulation, and to offer an alternative view of how one might at once affirm that language does act, even injuriously, while insisting that it does not directly or causatively “act on” the addressee in quite the way that proponents of hate speech legislation tend to describe. Indeed, the act-like character of certain offensive utterances may be precisely what keeps them from saying what they mean to say or doing what it is they say.

The legal scholars and activists who have contributed to the volume *Words that Wound*, 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.<sup>3</sup> 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 neighborhood with full police protection is a statement of state authorization.” (49) The utterance thus has the power to effect the subordination that it either depicts or promotes precisely 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.” (25)

Relying on recently proposed hate speech regulation, Catharine MacKinnon makes a similar argument concerning pornography. In *Only Words* (1993) pornography ought to be construed as a kind of “wound,” according to MacKinnon, because it proclaims and effects the subordinated status of women.<sup>4</sup> Thus, MacKinnon invokes the constitutional principle of equality (the Fourteenth Amendment, in particular) and argues that pornography is a form of unequal treatment; she takes this discriminatory action to be more serious and severe than any spurious exercise of “liberty” or “free expression” on the part of the pornographic industry. That exercise of “freedom,” she argues, takes place at the expense of other citizens’ rights to equal participation and the equal exercise of fundamental rights and liberties. In Matsuda’s view, there are certain forms of harassing speech that qualify as discriminatory action, and those forms of racially and sexually based hate speech may undermine the social conditions for the exercise of fundamental rights and liberties on the part of those who are addressed through such speech.

I propose to focus here on the power attributed to the pornographic text to effect the subordinated status of women not to ascertain whether the text does effect that subordination in the way that she

describes, but rather to discover what version of the performative is at work in the claim that it does. MacKinnon's use of the performative engages a figure of the performative, a figure of sovereign power that governs how a speech act is said to act—as efficacious, unilateral, transitive, generative. Finally, I read the figure of sovereignty as it emerges within the contemporary discourse on the performative in terms of the Foucaultian 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 overdetermination of the performative as the “linguistification” of the political field (one for which discourse theory is hardly responsible, but which it 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, to be considered in the following chapter, in which certain kinds of *utterances*, namely, “I am a homosexual,” are, within the recently contested policy, now considered to be “offensive conduct.”<sup>5</sup> Similarly—but not identically—certain kinds of sexually graphic aesthetic representations, such as those produced and performed by the rap groups, 2 Live Crew or Salt n Pepa, are debated in legal contexts on the question of whether they fall under the rubric of “obscenity” as defined by *Miller v. California* (1973). Is the recirculation of injurious epithets in the context of the performance (where “performance” and “recirculation” are importantly equivocal) substantially different from the use of such epithets on campus, in the workplace, or in other spheres of public life? The question is not simply whether such works 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. Paradoxically and poignantly, when the courts become the ones who are invested with the power to regulate such expressions, new occasions for discrimination are produced in which the courts discount African-American cultural production as well as lesbian and gay self-representation as such through the arbitrary and tactical use of obscenity law.<sup>6</sup>

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 a teacher to a student. The effect of the speech is, in Matsuda’s view, to degrade or demean; it may “hit the gut” (23) of the addressee; 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” (25). If the speech in question has undermined this capacity of the addressee to participate in the 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 specifically, being addressed in an injurious way establishes that person’s social subordination and, moreover, has the effect of depriving the addressee of the capacity to exercise commonly accepted rights 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 na-

tional 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,” 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.

76, In the case of the U.S. military, there is some public quarrel over the question of whether stating publicly 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. In an early version of the policy, the military found offensive 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 an explicit disclaimer of that prior statement and the articulation 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?<sup>7</sup> In any case, in the revised guidelines to the policy, still in dispute in the courts, it is now possible to say, “I am a homosexual” and to add to that statement “and I have no intention or propensity to act on that desire.” 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 consider the logic of this policy in the next chapter, and I propose to return to that figure of efficacious and offensive utterance toward the end of this one. In the interim, however, I aim to consider the construal of hate speech as offensive conduct, the effort to construe pornography as hate speech, and the concomitant effort to seek re-

course 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 over to the state through the process of legal redress.

I would like to suggest a formulation for the problem that might seem paradoxical, but which 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 publicly 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 speech). Precisely 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 intervened upon by the state, it is, in these contexts, right. '77

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?

78, 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, 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.<sup>8</sup> 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,” (96) ones that require neither the sovereign representative of the state, i.e., the king, nor his “subjects” as its sole or primary sites of exercise. 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” (97).<sup>9</sup> The subject, for Foucault, is precisely *not* the extreme of power’s exercise. In an anti-voluntarist 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. (97)

/ 79

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*” (97, emphasis mine).

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?<sup>10</sup> And does this not lead to a view of the power of the subject who speaks and, hence, of his/her culpability, in which the subject is prematurely identified as the “cause” of the problem of racism?

80/ 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 an 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 ourselves 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 such 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"<sup>11</sup> that performative may be. As a performative, hate speech also deprives the one addressed of precisely *this* performative power, a performative power that some see as a linguistic condition of citizenship. The ability to use words efficaciously in this way is considered to be the necessary condition for the normative operation of the speaker and the political actor in the public domain.

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 be? 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 (the one who utters hate speech) is nevertheless invested with the sovereign power of law. What the law says, it does, but so, too, the speaker of hate. The performative power of hate speech is figured as the performative power of state-sanctioned legal language, and 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 power, backed by the police?

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

82, 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 intends to mean.<sup>12</sup>

MacKinnon invokes Anita Hill to illustrate this expropriation and deformation of speech performed by pornography. The very act by which Anita Hill gave testimony, one intended to establish that an injury was done to her, was taken up by the Senate hearings—itsself 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 illocution-

ary 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 counter. Within pornography, there is no countering of this sexualization without having that very countering become a sexualized act. The pornographic is marked precisely 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 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 for a purification in prurience for the white imaginary. African-American status permits for a spectacularization of sexuality and a recasting of whites as outside the fray, witnesses and watchers who have circuited their own sexual anxieties through the publicized bodies of blacks. / 83

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 of MacKinnon's view 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, Hill 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 act-like 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 the pornographic construal of her speech 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. But this remains true only as long as the meaning she intends is consonant with the sexualization of her utterance, and the one she does not intend is in opposition to that very sexualization.

84, This pornographic recontextualization of Anita 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 presumed to be a "yes." Pornography, like the Freudian unconscious, knows no negation. This account of the "structure" of pornography, however, cannot account for the context of Hill's speech act; it is not regarded as communicative, but a racialized sexual spectacle. She 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. Presupposed by this conception of the utterance is a normative view of a person with the ability and power to exercise speech in a straightforward way; this view is elaborated by the

philosopher Rae Langton in an essay that seeks to give logical force to MacKinnon's largely rhetorical claims.<sup>13</sup> 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 such as those guaranteed under the Equal Protection Clause of the Fourteenth Amendment.

Significantly and paradoxically, the argument against pornography seeks to limit the first Amendment rights of pornographers but also to expand the sphere of first Amendment protection for those depicted and (hence, ostensibly) "addressed" by pornography: pornographic representation discredits and degrades those whom it depicts—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, indeed, a consenting subject whose "no" is always undercut by her implied "yes." Although this attribution of a reversed intention effectively violates the sovereignty of the speaking subject, it seems equally true that this account of pornography also exploits a certain notion of liberal sovereignty to further its own aims, insisting that consent always and only constitutes the subject. / 85

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 inten-

tion, 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

86, If pornography performs a deformation of speech, what is presumed to be the proper form of speech? 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" (314) and of "authority" (315) and "one mark of powerlessness is an inability to perform speech acts that one might otherwise like to perform." (314) 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 where no speech act is permissible that performatively refutes another's ability to consent through speech. Indeed, although neither Langton nor MacKinnon consults 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 terms in question submit 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 as long as all par-

ticipants stick to the reference point of possibly achieving a mutual understanding in which the *same* utterances are assigned the same meaning.”<sup>14</sup> But are we, whoever “we” are, the kind of community in which such meanings could be established once and for all? Is there not a permanent diversity within the semantic field that constitutes an irreversible situation for political theorizing? Who stands above the interpretive fray in a position to “assign” the same utterances the same meanings? And why is it that the threat posed by such an authority is deemed less serious than the one posed by equivocal interpretation left unconstrained?

If utterances bear equivocal meanings, then their power is, in principle, less unilateral and sure than it appears. Indeed, the equivocity 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, most importantly, that the very words that seek to injure might well miss their mark and produce an effect counter to the one 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 in this case, they were taken up precisely to discount her agency. The citationality of the performative produces that possibility for agency and expropriation at the same time.

/ 87

The political advantages to be derived from insisting on such a disjuncture are starkly different from those supposedly gained by 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 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” (198) 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.” (199) Matsuda’s arguments appear to coincide with this view as well, since one of the arguments she makes against racist speech is that it implicitly makes a claim of racial inferiority rejected and invalidated by the international community. Hence, 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 speakability 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 a reasonable criteria by which protected speech is to be distinguished from unprotected speech. Moreover, at stake in the delineation of protected speech is the question: What will constitute the domain of the legally and legitimately

speakable? 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?<sup>15</sup> 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 already established formulations exhaust the possibilities of what might be meant by the universal. To say that a convention of consensus has been achieved is not to acknowledge that the temporal life of convention exceeds its past. 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 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, performative contradiction 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.<sup>16</sup> 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.

90,      The border that produces the speakable by excluding certain forms of speech becomes an operation of censorship exercised by 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 radicalization? 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, 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 which 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 claim 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 deauthorized (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*. / 91

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 judgment 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 the utterance.<sup>17</sup>

92, 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 means, but whose utterance is singular and universal at once. 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 *renegotiation* of language that exploits the undetermined character of these relations? Could the concept of universality become 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 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. The recent appropriation of “civil rights” discourse to oppose affirmative action in California is such a perilous expropriation, one which can only now be countered by an aggressive reappropriation. / 93

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 presupposes that political agency and citizenship in particular requires 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.<sup>18</sup>

Is this political possibility for reappropriation distinguishable from pornographic appropriation 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 Foucaultian 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. Sexuality thus appropriates unexpected discourses. 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 sexualization. The putative repression of sexuality becomes the sexualization of repression.<sup>19</sup>

94 /     Recontextualizing the law—prohibition, in this case—occasions a reversal in which the sexuality prohibited becomes the sexuality produced. The discursive occasion for a prohibition—renunciation, interdiction, confession—become precisely the new incitement 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 re-

lation 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-Freudian notion of liberal individualism in which “consent” is constitutive of personhood.

/ 95

For Anita 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 that no amount of marking off can safeguard against.

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 a pornographic 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 *referred* to as a kind of speech that acts and, hence, as 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.

96 / 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.<sup>20</sup> 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 precisely the reverse of the logical relation in which there is no hate speech prior to the decision of the court. Although the hate speech which is not yet hate speech precedes the judicial consideration of that utterance, it is only upon the affirmative decision of the court that the speech in question becomes hate speech. 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. I am suggesting, however, that they are indissociable in a specific and consequential way. Consider as misnomer the claim that an instance of hate speech is submitted to the court for adjudication, since what is at stake in such an adjudication is whether the speech in question is hateful. And here I don't mean hateful in any sense, but in the legally precise senses which Matsuda, Delgado, and Lawrence explicate. The process of adjudication—which presumes that the injury precedes the judgment of the court—is an effect of that judgment, a production of that judgment. 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. Thus, the rubric is a legal norm to be augmented or restricted by the judiciary in the ways that it deems fit. / 97

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 publicly protected and unprotected speech. Thus Justice Scalia asked in *R.A.V. v. St. Paul* whether a burning cross, though “reprehensible,” may not be communicating a message that is protected within the free marketplace of ideas. In each of these cases, the state not only constrains speech, but in the very act of constraining, produces legally consequential speech: not only does the state curb homosexual speech, but produces as well—through its decisions—a public notion of the self-cen-

soring 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 state's exercise of this productive discursive function is underestimated in the writings that favor of hate speech legislation. 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 invests all power and agency in the subject who would use such an instrument. However reactionary its history, this 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," (50) approving of a method of doctrinal *reconstruction*. In other words, legal language is precisely the kind of language that can be cited into a reverse meaning, where the reversal takes a law with a reactionary history and turns it into 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 supposed to be its pernicious power. And yet, even MacKinnon's act of advocacy in which she represents a woman's "yes" and "no" depends upon a recontextualization and a textual violence of sorts, one that Matsuda, in the case of the 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 to be 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.” 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, reservised, 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 in the way that legal language is. / 99  
Indeed, although all sorts of historically and potentially injurious words are recirculated in rap, in film, even as calligrammatic emblems 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 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 does a word become 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 one in which 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 reuse.

100, 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 is limited when it comes to certain words. Richard Delgado writes, "Words such as 'nigger' and 'spick' are badges of degradation even when used between friends: *these words have no other connotation.*" 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 difficult to utter those words or, indeed, to write them here, because they unwittingly recirculate that degradation, it does not follow that such words can have *no other connotation*. Indeed, their repetition is necessary (in court, as testimony; in psychoanalysis, as traumatic emblems; in aesthetic modes, as a cultural working-through) 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 even Derrick Bell has remarked: “racist structures are vulnerable.” I take this to apply to racist linguistic structures as well.

I do not mean to subscribe to a simple opposition between the aesthetic and juridical domains, for what is at stake in many of these controversies is precisely the power of the state to define what will count as aesthetic representation. The aesthetic sphere, considered as “protected,” still exists as a dispensation of the state. The legal domain of the state clearly has its own “aesthetic” moments as well, some of which we have considered here: dramatic rearticulation and reenactment, the production of sovereign speech, the replaying of phantasmatic scenes.

When the task of reappropriation, however, is taken up within the domain of protected public discourse, the consequences seem more promising and more democratic than when the task of adjudicating the injury of speech is given over to the law. The state resignifies only and always 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 be a legal discourse on racial and sexual slurring, but it will also reiterate and restage those slurs, reproduce them this time as state-sanctioned speech. 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 dubious.

/ 101

Hate speech regulations that are not state-centered, such as those that have restricted jurisdiction within a university, for instance, are clearly less worrisome in this regard. But here I would suggest that such regulations must remain restricted to hate speech as a perlocutionary scene, that is, one in which the effects of such speech must be shown, in which the burden of evidence must be assumed. If certain kinds of verbal conduct on the part of a professor undermine a student’s capacity to work, then it seems crucial to show a pattern of verbal conduct and make a persuasive case that such conduct has had the debilitating effects on the student that it has. If we accept that hate speech is il-

locutionary, we accept as well that words perform injury immediately and automatically, that the social map of power makes it so, and we are under no obligation to detail the concrete effects that hate speech does produce. The saying is not itself the doing, but it can lead to the doing of harm that must be countered. Maintaining the gap between saying and doing, no matter how difficult, means that there is always a story to tell about how and why speech does the harm that it does.

102 / In this sense, I am not opposed to any and all regulations, but I am skeptical about the value of those accounts of hate speech that maintain its illocutionary status and thus conflate speech and conduct completely. But I do think that the ritual chain of hateful speech cannot be effectively countered by means of censorship. 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 sexual and 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; 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?

# 3 / CONTAGIOUS WORD

## PARANOIA AND “HOMOSEXUALITY” IN THE MILITARY

The question of whether citizenship requires the repression of homosexuality is not new, but the recent efforts to regulate the self-declaration of homosexuality within the military repose this question in a different light. After all, military personnel enjoy some of the rights and obligations of citizenship, but not all of them. The military is thus already a zone of partial citizenship, a domain in which selected features of citizenship are preserved, and others are suspended. Recent efforts of the U.S. military to impose sanctions on homosexual speech have undergone a series of revisions<sup>1</sup> and at the time of this writ-



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ing, continue to be contested in court. In the first version of these regulations proposed by the Department of Defense, the term "homosexual" was disallowed as part of a self-ascription or self-definition on the part of military personnel. The term itself was not banished, but only its utterance within the context of self-definition. The very regulation in question, must utter the term in order to perform the circumscription of its usage. The occasion for the formulation of this regulation was, of course, one in which the term "homosexual" already proliferated in military, state, and media discourse. Thus, it is apparently not a problem, within the terms of the regulation, to utter the word: as a consequence of the regulation, in fact, it appears that public discourse on homosexuality has dramatically increased. Indeed, the regulations might be held accountable, paradoxically, for the apparent fact that the word has become more speakable rather than less. And yet the proliferation of public sites in which it has become speakable seems directly tied to the proposal to make it unspeakable in the military as a term that might be taken to describe oneself. The regulations propose the term as unspeakable within the context of self-definition, but they still can only do this by repeatedly proposing the term. Thus, the regulations bring the term into public discourse, rhetorically enunciating the term, performing the circumscription by which—and through which—the term becomes speakable. But the regulations insist as well that there are conditions under which the term is *not* to be insisted on at all, that is, in the service of self-definition. The regulation must conjure one who defines him or herself as a homosexual in order to make plain that no such self-definition is permissible within the military.

The regulation of the term is thus no simple act of censorship or silencing; on the contrary, the regulation redoubles the term it seeks to constrain, and can only effect this constraint through this paradoxical redoubling. The term not only appears in the regulation as that discourse to be regulated, but reappears in the public debate over its fairness and value, specifically as the conjured or imagined act of self-ascription that is explicitly prohibited by the regulation, a prohibition that cannot take place without a conjuring of the very act. We might conclude that the state and the military are merely concerned *to retain*

*control* over what the term will mean, the conditions under which it may be uttered by a speaking subject, restricting that speaking to precisely and exclusively those subjects who are not described by the term they utter. The term is to remain a term used to describe others, but the term is not to be used by those who might use it for the purposes of self-description; to describe oneself by the term is to be prohibited from its use, except in order to deny or qualify the description. The term “homosexual” thus comes to describe a class of persons who are to remain prohibited from defining themselves; the term is to be attributed always from elsewhere. And this is, in some ways, the very definition of the homosexual that the military and the Congress provide. A homosexual is one whose definition is to be left to others, one who is denied the act of self-definition with respect to his or her sexuality, one whose self-denial is a prerequisite for military service.

What could account for such a strange regulation of homosexual locution, one that seems bound to redouble the term at the site of its prohibition? How do we understand this simultaneous production and restriction of the term? What is it about the speaking of the term in the context of self-description that seems more threatening to military morale than the tacit operation of the sexual practice itself?

/ 105

The military suspends certain rights for its own personnel that are accorded to civilians, but that very suspension offers an opportunity to interrogate what is perhaps most uneasily anchored in, and most easily jettisoned from, the zone of citizenship. In this sense, one might consider gays in the military as overlapping with other retractable zones of citizenship: recent immigration law and the suspended zone of citizenship for immigrants, the various degrees of suspension accorded to different immigrant statuses, not only legal and illegal, but degrees of legality as well. Such comparisons might well be considered in relation to Giorgio Agamben’s recent thesis that the state itself has become a protracted “state of emergency,” one in which the claims of citizenship are more or less permanently suspended.<sup>2</sup>

The revisions of the policy on gay speech in the military make clear how rights based on the first Amendment, privacy claims, or the Equal Protection Clause have been systematically suspended. Whereas

Clinton proposed that homosexuals ought only to be excluded from military service to the extent that they engaged in conduct, and not on the basis of their "status;" it became clear in subsequent clarifications of the policy that stating that one is a homosexual, that is, making reference to one's status is reasonably construed as homosexual conduct itself. In the Department of Defense Policy, statements are themselves conduct: according to the more recent Congressional Statute, statements present evidence of a homosexual "propensity" that poses an unacceptable risk for the military.

106 / It seems clear, as Janet Halley has shown, that arguments that seek to restrict the prosecution of homosexuality to either status or conduct are bound to produce ambiguities that threaten the coherence of either legal basis. In the most recent version of the policy, Halley argues, the question of whether a reasonable person would surmise that another person has a "propensity" to engage in homosexual conduct constitutes the standard by which interrogations proceed. Halley rightly points out that the "reasonable person" is, in this instance, the one who embodies homophobic cultural norms. I would add that this reasonable person is also pervasively paranoid, externalizing a homosexuality that "endangers" the reasonable person from within. It is no longer the case that a statement making reference to one's homosexuality is sufficient to infer the "propensity" to engage in homosexuality: there may be other "signs" —affiliations, gestures, nuances, all of which equally point in the same direction. The "propensity" clause appears to ascribe a natural teleology to homosexual status, whereby we are asked to understand such status as always almost culminating in an act. And yet, this "propensity," though attributed to homosexual status as its natural inclination to express itself, is attributed by the "reasonable" person, and thus remains a figment of the homophobic imaginary.

Although the military now suspects all kinds of signs as indices of "propensity," I will be concentrating on the view of explicit gay self-declaration that the military seeks to prevent, and which it takes to be equivalent to homosexual conduct itself.

The act by which the Department of Defense seeks to circumscribe this act of speech is one that depends on a fabrication of the

speech act to be constrained, one in which the fabrication already begins to perform the work of constraint.

In the recent military regulations on homosexual conduct, homosexual self-definition is explicitly construed as contagious and offensive conduct. The words, "I am a homosexual," do not merely describe; they are figured as performing what they describe, not only in the sense that they constitute the speaker as a homosexual, but that they constitute the speech as homosexual conduct. In what follows, I hope to show that the regulation describes as performative the self-ascription of homosexuality, doing precisely that which it says. In describing the power of such acts of utterance, the regulations produce such utterances for us, exercising a performativity that remains the tacit and enabling condition for the delineation of "I am a homosexual" as a performative utterance. Only within that regulatory discourse is the performative power of homosexual self-ascription performatively produced. In this sense, the regulations conjure the spectre of a performative homosexual utterance—an utterance that does the deed—that it seeks to censor, engaging in a circularity of fabrication and censorship that will be specified as paranoid. / 107

If, however, the military can be said to produce a paranoid construal of homosexual utterance as contagious and offensive action, as performing or constituting that to which such utterances refer, how is this attributed performativity to be distinguished from the kind of performativity that is explicitly owned by the movement to authorize greater homosexual publicity, the clear aim of queer politics? According to this latter movement, coming out and acting out are part of the cultural and political meaning of what it is to be homosexual; speaking one's desire, the public display of desire, is essential to the desire itself, the desire cannot be sustained without such speaking and display, and the discursive practice of homosexuality is indissociable from homosexuality itself.

Toward the end of this chapter, I will return to this issue, if only to pose the question of whether homosexuality is not the kind of term that constantly threatens—or promises—to become its own referent, that is, to constitute the very sexuality to which it refers. I hope to sug-

gest that the term cannot fully or exhaustively perform its referent, that no term can, and that “it’s a good thing, too.” The political benefits to be derived from this incommensurability between performativity and referentiality have to do with setting limits on authoritative constructions of homosexuality and keeping the signifiers of “homosexuality,” “gayness,” or “queerness,” as well as host of related terms, alive for a future linguistic life. Over and against the commonly stated worry that if homosexuality has no referent, there can be no effective gay and lesbian politics, I would suggest that the absence of a final referent for the term keeps the term from ever being quite as performative as the military imagines that it is. The term gestures toward a referent it cannot capture. Moreover, that lack of capture constitutes the linguistic possibility of a radical democratic contestation, one that opens the term to future rearticulations.<sup>3</sup>

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108 / In what sense are the military regulations symptomatic of a paranoia that forms the possibility of military citizenship? The specific performativity attributed to homosexual utterance is not simply that the utterance performs the sexuality of which it speaks, but that it transmits sexuality through speech: the utterance is figured as a site of contagion, a figure that precipitates a return to Freud’s *Totem and Taboo* in which the speaking of prohibited names becomes the occasion for an uncontrollable communication. Through recourse to Freud’s view of conscience, in which the repression of male homosexuality becomes the prerequisite for constituting manhood, the analysis of the military regulations can be read as producing a notion of the “man” as a self-denying homosexual. Against a psychological reductionism that might locate military acts as acts of individual psyches, I propose to turn to psychoanalysis as a way of reading the text of a highly symptomatic regulation of military citizenship.<sup>4</sup>

Psychoanalysis not only sheds theoretical light on the tensions between homosexuality and citizenship, but psychoanalytic discourse is itself a textual allegory for how the production of the citizen takes place through the rejection and transmutation of an always imagined homo-

sexuality. Indeed, I hope to show that the peculiar form of imagining against oneself which is paranoia constitutes homosexuality not only as a form of inversion, but as the exemplary model for the action of conscience, the turning against oneself that involves the inversion and idealization of the sexual aim. In this sense, Freud's text proves to be as much diagnosis as symptom, and though I propose to read his text psychoanalytically (and, hence, not merely as the enunciation of psychoanalytic practice), I will also be proposing a way to read psychoanalysis allegorically.<sup>5</sup> What this means, more simply, is that Freud will appear to tell us a story about how citizenship and social feeling emerge from the sublimation of homosexuality, but his discourse will be, in the course of this narration, implicated in the very sublimation it describes.<sup>6</sup>

To understand the act of homosexual self-definition as an offense, it seems reasonable to ask, what set of relations or bonds are potentially offended or threatened by such an utterance? It makes sense to turn to Freud's text, "On the Mechanism of Paranoia," in which he links the suppression of homosexual drives to the production of social feeling. At the end of that essay, he remarks that "homosexual drives" help to constitute "the social instincts, thus contributing an erotic factor to friendship and comradeship, to *esprit de corps* and to the love of mankind in general." (31) And at the close of the essay "On Narcissism," he might be read as specifying the logic whereby this production of social feeling takes place. The "ego-ideal," he writes, has a social side: "it is also the common ideal of a family, a class or a nation. It not only binds the narcissistic libido, but also a considerable amount of the person's homosexual libido, which in this way becomes turned back into the ego. The dissatisfaction due to the non-fulfillment of the ideal liberates homosexual libido, which is transformed into sense of guilt (dread of the community)." (81) This transformation of homosexuality into guilt and, therefore, into the basis of social feeling, takes place when the fear of parental punishment becomes generalized as the dread of losing the love of fellow men. Paranoia is the way in which that love is consistently reimagined as always almost withdrawn, and it is, paradoxically, the fear of losing that love that motivates the sublimation or introversion of homosexuality. Indeed, this sublimation is not quite as instrumental as it may sound, for it is not that one disavows homosexuality in



order to gain the love of fellow men, but that it is precisely a certain homosexuality that can be achieved and contained only *through and as* this disavowal.

In Freud's discussion of the formation of conscience in *Civilization and its Discontents*, the very prohibition against homosexuality that conscience is said to enact or articulate is precisely what founds and constitutes conscience itself as a psychic phenomenon. The prohibition against the desire is the desire as it turns back upon itself, and this turning back upon itself becomes the very inception of what is later called "conscience." Hence, what the noun form of "conscience" suggests as a psychic entity, is nothing other than an habituated reflexive activity, the turning back upon oneself, a routing of desire against desire, such that the prohibition becomes the site and satisfaction of desire. That repeated practice of introversion constitutes the misnomer of "conscience" as a mental faculty.

110, The restrictions on homosexual self-definition suggest that the very circuit of self-prohibition necessary for the production and maintenance of social feeling can no longer be guaranteed by conscience, that conscience is no longer in the service of social regulation. If the military represents a fairly explicit extreme of this regulatory production of homoerotic sociality, it seems that this circuit by which homosexuality is enjoined to turn back on itself again and again has failed to close. This paradox was articulated perhaps most obviously in the claim that social cohesion in the military requires the prohibition on homosexuality, where that cohesion was then described as a magical *je ne sais quoi* that kept military men glued together. The formulation might read: *we must not have our homosexuality in order to have our homosexuality: please take it / don't take it away from us.*

The prohibition that seeks to restrict the outbreak of homosexuality from within this circle of collective introversion figures the very word as a contagious substance, a dangerous fluid. Contagion will be important here, as I will try to show, for homosexuality will be figured implicitly on the model of AIDS, and will be said to "communicate" along the lines of a disease.

The text is overtly one which seeks to regulate homosexual behav-

ior, but as regulatory, it is also incessantly productive. What is conjured in this text is a kind of homosexuality that acts through the magical efficacy of words: to declare that one is a homosexual becomes, within the terms of this law, not merely the representation of conduct, offensive conduct, but offensive conduct itself.

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.<sup>7</sup>

The statement begins by making a distinction between orientation and conduct, restricting the military to discharging only those who engage in homosexual conduct. But then homosexual conduct is defined through a set of appositions which, rather than delimit the barriers of homosexual conduct, proliferate the possibilities of homosexuality. Homosexual conduct includes “a homosexual act”—even in the singular, which is to say that it is not yet a practice, a repeated or ritual affair. And though subsequent clarifications have made clear that a one-time act, if disavowed as a mistake, will be pardoned, the language of the policy maintains the one-time requirement, insisting on a conflation of “act” and “conduct.” What is perhaps more properly an *inflation* of act *into* conduct is significant, for it tacitly and actively imagines the singularity of the event as a series of events, a regular practice, and so imagines a certain force of homosexuality to drive the one-time practitioner into a compulsive or regular repetition. If the act is already conduct, then it has repeated itself before it has any chance to repeat; it is, as it were, always already repeating, a figure for a repetition—compulsion with the force to undermine all sorts of social morale. / 111

Let us return to the phrasing in order to read this passage as an articulation of a homophobic phantasmatic:

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.

112, Homosexual conduct, defined as “a statement that the member is homosexual or bisexual”; in this definition the “statement” is a form of “conduct,” and new meaning is given to MacKinnon’s reference to “only words.” If the statement is conduct, and it is homosexual conduct, then the statement that one is a homosexual is construed as acting homosexually on the person to whom or before whom it is uttered. The statement is in some sense not only an act, but a form of conduct, a ritualistic form of speech that wields the power to *be* what it *says*, not a re-presentation of a homosexuality, but a homosexual act and, hence, an offense. Under what conditions does an utterance that represents a disposition or a practice become that very disposition and practice, a becoming, a transitivity, that depends on and institutes the collapse of the distinction between speech and conduct? This is not to say that an absolute distinction between speech and conduct might be drawn. On the contrary, that a statement is a kind of act, a speech act, is true enough, but that is not the same as claiming that the statement perforce enacts what it says or constitutes the referent to which it refers. Many speech acts are “conduct” in a narrow sense, but not all of them are felicitous in the sense that Austin maintains. That is, not all of these acts have the power to produce effects or initiate a set of consequences.

The utterance which claims or proclaims homosexual identity is construed as offensive conduct only if we concede that something about the very speaking of homosexuality in the context of self-definition is disruptive. But what gives such words the disruptive power they are presumed to wield? Does such a presumption not imply that the one who hears the utterance imagines him/herself to be solicited by the statement? In a sense, the reception traces the Foucaultian formulation in reverse: if Foucault thought that there were first homosexual “acts” and only later did homosexuality emerge as an “identity,” then the military takes every ascription of identity as equivalent to the doing of an act. It is important to distinguish, however, between two ways of rethinking identity as act: where one might say

that what I mean by saying that “I am a homosexual” is that “I perform homosexual acts, or engage in homosexual practices or relationships,” I would still be referring to those acts, but not, strictly speaking, performing them and certainly not performing them through the act of speaking. The military reading of the claim, however, appears to be of another order. That reading takes the claim, “I am a homosexual” to be one of the very acts of homosexuality, not a reporting on the happening of acts, but the discursive happening of the act itself.

In what sense is the act “conduct”? Surely, one might claim that any locution is “conduct,” and Austin concedes that all utterance is in some sense an “act.” But even if every utterance can be construed as an act, it does not follow that all utterance *acts upon* its listener in a prescribed or mechanical way; the problem of “uptake” in Austin underscores the contingent dimension of all such appropriation regarding perlocutionary performatives. But are there situations in which the contingency, the interpretive diversity, and potential failure of “uptake” appears to be determined by the force of the utterance? And is the proclamation, “I am a homosexual,” an instance of such a determining utterance?

/ 113

The problem of uptake is displaced from view when the performative force attributed to the utterance becomes overdetermined in fantasy. Such an overdetermination takes place in the paranoid fantasy by which the military construes homosexual utterance to take place. The statement, then, “I am a homosexual,” is fabulously misconstrued as, “I want you sexually.” A claim that is, in the first instance, reflexive, that attributes a status only to oneself, is taken to be solicitous, that is, a claim that announces availability or desire, the intention to act, the act itself: the verbal vehicle of seduction. In effect, a desirous intention is attributed to the statement *or* the statement is itself invested with the *contagious* power of the magical word, whereby to hear the utterance is to “contract” the sexuality to which it refers. The presumption here is that when and if the term, “homosexual,” is claimed for oneself, it is in the service not only of a statement of desire, but becomes the discursive condition and vehicle of the desire, transferring that desire, arousing that desire. This is a statement construed as a solicitation; a constative taken as an interrogative; a self-ascription taken as an address.

Presumed in the military construal of the self-defining statement as offensive action is that the speakability of the term breaks a taboo within public discourse, the floodgates open, and expressions of desire become uncontrollable. Hence, the one before whom the desire under taboo is spoken becomes immediately afflicted by the desire borne by the word; to speak the word before such a person is to implicate that person in unspeakable desire. The word—and the desire—is caught in precisely the way in which a disease is said to be caught. Within contemporary military discourse, the taboo status of homosexuality is intensified by the phobic reduction of homosexual relations to the communication of AIDS, intensifying the sense of homosexual proclamations as contagious acts.

Indeed, consider the salience of the metaphor of contagion for Freud's discussion of taboo in *Totem and Taboo*:

114 /      taboo is a . . . prohibition imposed (by some authority) from outside, and directed against the most powerful longings to which human beings are subject. The desire to violate it persists in their unconscious; those who obey the taboo have an ambivalent attitude to what the taboo prohibits. The magical power that is attributed to taboo is based on the capacity for arousing temptation; and it acts like a contagion because examples are contagious and because the prohibited desire in the unconscious shifts from one thing to another.(35)

In this last remark, Freud makes clear that the prohibited desire in the unconscious shifts from one thing to another, is itself an uncontrollably transferable desire, subject to a metonymic logic that is not yet constrained by the law. Indeed, it is the incessant transferability of this desire that is instituted by the taboo, and that informs the logic of contagion by which the desire under taboo enters into discourse as a highly communicable name. If I say, "I am a homosexual," in front of you, then you become implicated in the "homosexuality" that I utter; the utterance is presumed to establish a relationship between the speaker and the audience, and if the speaker is proclaiming homosexuality, then that discursive relationship becomes constituted by virtue of that utterance, and that very homosexuality is communicated in the

transitive sense. The utterance appears both to communicate and transfer that homosexuality (becomes itself the vehicle for a displacement onto the addressee) according to a metonymic rush which is, by definition, beyond conscious control. Indeed, the sign of its *unconscious* status is precisely that it “communicates” or “transfers” between speaker and audience in precisely that uncontrollable way.

Earlier in this same text, Freud refers to “dangerous attributes” applied indifferently and simultaneously to persons, their states, their acts; the attribute not only shifts between these registers, but it becomes tempting and terrifying precisely by virtue of this shiftiness: “Anyone who has violated a taboo becomes taboo himself because he possesses the dangerous quality of tempting others to follow his example: why should *he* be allowed to do what is forbidden to others? Thus he is truly contagious in that every example encourages imitation...” (32) Freud distinguishes between those kinds of taboos invested with contagious power that “produce temptation and encourage imitation” and another in which the transmissibility of a taboo is its displacement onto material objects. (34) These two forms converge later, however, when he refers to taboo *names* as that material instance of language that carries both the desire and its prohibition, that is, that becomes the discursive site for the displacement of ambivalence. The “transmissibility of taboo” is a function of metonymic displacement, “the tendency . . . for the unconscious instinct . . . to shift constantly along associative paths on to new objects.” (34)

/ 115

The question that emerges in trying to read the logic of contagion as it operates within the military ban on homosexual statements and acts is how a name and the act of self-naming in particular becomes precisely such a material/discursive carrier for this displacement and “transmissibility.” The sign uttered in the service of a prohibition carries that prohibition and becomes speakable only in the service of that prohibition. The breaking of the prohibition through the uttering of the sign becomes, then, a disjoining of that sign from its prohibitive function, and an unconscious transfer of the desire that the sign has, until this resignification, kept in check. The name, “homosexual,” is not merely a sign of desire, but becomes the means by which desire is absorbed into and carried by the sign itself. The sign, in the service of

prohibition, has substituted for the desire it represents, but also has acquired a “carrier” function that links homosexuality with contagion. It is, of course, not difficult to imagine which one. How are we to account for this symbolic conflation of the fluidity of the sign and “dangerous fluids”? Homosexuality, within this paranoid metonymy, has become a paradigm for contagion. The self-descriptive utterance of “homosexuality” becomes the very act of dangerous communication which, participating in a contemporary revaluation of that sacred scene, infects its listener—immaculately—through the ear.

116, Freud concludes his remarks with the reminder that the taboo can be reinstalled only through the speech act that *renounces* desire: “The fact that the violation of a taboo can be atoned for by a renunciation shows that renunciation lies at the basis of obedience to taboo.” (35) In a corollary move, the military makes provisions for those who would recant their indiscretion; the only way to counter the public force and threat of a public act of self-definition as a homosexual is through an equally public self-renunciation. In remarks intended to clarify how the policy would be implemented, the military makes clear that to assert one is a homosexual presents a “rebuttable presumption” that one will act in a homosexual way. In other words, one may now say, “I am a homosexual and I intend not to act on my desire,” and in such a case, the first clause, “I am a homosexual,” loses its performative force; its constative status is restored through the addition of the second clause. In Freud, the renunciation takes the form of regret and atonement, but it makes no claims to having annihilated the desire; indeed, within renunciation, the desire is kept intact, and there is a strange and important way in which prohibition might be said to *preserve* desire.

In *Civilization and its Discontents*, the repression of the libido is itself a libidinally-invested repression. The libido is not absolutely negated through repression, but rather becomes the instrument of its own subjection. The repressive law is not external to the libido that it represses, but the repressive law represses to the extent that repression becomes a libidinal activity.<sup>8</sup> Further, moral interdictions, especially those that are turned against the body, are themselves sustained by the very bodily activity that they seek to curb:

An idea . . . which belongs entirely to psychoanalysis and which is foreign to people's ordinary way of thinking . . . it tells us that conscience (or more correctly, the anxiety which later becomes conscience) is indeed the cause of instinctual renunciation to begin with, but that later that relationship is reversed. Every renunciation of instinct now becomes a dynamic source of conscience and every fresh renunciation increases the latter's severity and intolerance. (CD,84)

According to Freud the self-imposed imperatives that characterize the circular route of conscience are pursued and applied precisely because they become the site of the very satisfaction they seek to prohibit. In other words, prohibition becomes the displaced site of satisfaction for the "instinct" or desire that is prohibited, an occasion for the reliving of the instinct under the rubric of the condemning law. This is of course the source of that form of comedy in which the bearer of the moral law turns out to be the most serious transgressor of its precepts. And precisely because this displaced satisfaction is experienced through the application of the law, that application is reinvigorated and intensified with the emergence of every prohibited desire. The prohibition does not seek the obliteration of prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects. The afterlife of prohibited desire takes place through the prohibition itself, where the prohibition not only sustains, but is *sustained by*, the desire that it forces into renunciation. In this sense, then, renunciation takes place *through* the very desire that is renounced, which is to say that the desire is *never* renounced, but becomes preserved and reasserted in the very structure of renunciation. The renunciation by which the military citizen is purged of his sin and reestablished in his or her place, then, becomes the act by which the prohibition at once denies and concedes homosexual desire; it is not, strictly speaking, *unspeakable*, but is, more generally, retained in the speaking of the prohibition. In the case of the homosexual who claims to be one, but insists that he or she will not act on his or her desire, the homosexuality persists in and as the application



of that prohibition to oneself. This is, interestingly, how Paul Ricoeur once described the psychic circuit of hell: a vicious circle of desire and interdiction. And it may be that the military "regulation" is an intensified cultural site for the continuing theological force of that interdiction.

118/ But consider how it is that a term or the proclamation of an identity might be understood discursively to carry or cause an injury. What is the theory of causation in this instance, and is this a "cause" established in paranoia? Freud offers the following account of how it is that paranoia is *caused*, but not in the analysis of how the causal account of paranoia slides into the paranoid account of causation: He writes, "paranoia is a disorder in which a sexual aetiology is by no means obvious; on the contrary, the strikingly prominent features in the causation of paranoia, especially among males, are social humiliations and slights. . . ." So far Freud appears to be substituting a true for a false cause of paranoia: it appears that what causes paranoia are slights and injuries, but what truly causes paranoia is a sexual wish subject to an introversion; the imagined punishment by others is the idealized and exteriorized effect of a prohibition against one's desire that is at the origin of that idealization and exteriorization. The agency of that prohibition is in some sense displaced, and the reasons for the beratement have already become illegible. Freud then continues, claiming that if we go into the matter "more deeply," we shall see that "the really operative factor in these social injuries lies in the part played in them by the homosexual components of affective life." (30)

It is this last phrase that introduces ambiguity into Freud's account. For how are we to understand how "homosexual components of affective life play a part in these social injuries." To feel slighted or injured, to imagine oneself slighted or injured, how precisely is this to be read as a permutation of homosexuality? Is the slight, the injury, the imagined external form that the prohibition against homosexuality takes, and is one being slighted and injured by virtue of one's homosexual desires? Or is this being slighted and injured an imagining of the social injury to which an exposed homosexual might very well be subject? The uncertainty appears to be this: is the prohibition a social one which might be said to become diffuse and generalized, or is it a psy-

chic and internal one which becomes externalized and generalized in the course of paranoia?

In the first instance, it is the social vulnerability of the homosexual to injury which is projected onto a more generalized sense of others as berating and slighting in their behavior; but in the latter case, it is the psychic sublimation of homosexuality which creates the very notion of the social, the notion of Others as regulating, watching, and judging, an imaginary scenario which becomes what is known as "conscience" and prepares the subject for that social feeling that supports citizenship. The two possible sequences differ dramatically in their consequences. The second view postulates a homosexual desire which turns against itself, and then produces a notion of the social as a consequence of that turning back against itself: social feeling, understood here as coextensive with social regulation, is a consequence of sublimated homosexuality, the projection and generalization of a set of judging and watching Others. This is a formulation that postulates homosexuality as the outside to the social, as the presocial, and derives the social, understood as a primarily regulatory domain, from the self-suppression of this sexuality.

/ 119

But how are we to understand this self-suppression apart from the social regulations by which homosexuality is itself cast as the asocial, the presocial, the impossibility of the social within the social? If the two versions of prohibition (psychic and social) cannot be dissociated from one another, how are they to be thought together? The slights and injuries experienced within what is called paranoia are the psychic traces of existing social regulations, even as those traces have become estranged from the regulations from which they are derived. The slights and injuries are not only the effects of a desire turned back on itself, and the subsequent projection of those turned back desires onto the judgments of others (Indeed a blending of super-egoic functions with social ones); rather, it is the coincidence of the judgment of Others and that turning back upon oneself that produces the imaginary scenario in which the condemned and un-lived desire registers psychically as the imagined slights and injuries performed by Others.

Thus, the turn to Freud is not an effort to read Freud as the truth of homosexuality, but, rather, as a way to exemplify or allegorize the

circularity in the account of paranoia, a circularity that comes to afflict Freud's own account. For instance, in "On the Mechanism of Paranoia," he writes approvingly of the way in which homosexual feelings are necessary to the love of mankind, how they euphemistically "combine" with the instincts for self-preservation to produce "man" in the "proper sense" of that term. If, to use his terms, homosexual tendencies "combine with" ego-instincts, where ego-instincts are defined as self-preservative, then it becomes part of the project of "man's" self-preservation—the preservation of "man, properly speaking"—to deflect, and preserve in deflection, his homosexuality.<sup>(69)</sup> Hence, the etiology that Freud offers us is already within the normative and regulatory domain of the social for which he seeks to give an account. It is not that there are first homosexual feelings which then combine with self-preservative instincts, but that, according to the social norms that govern the conditions of self-preservation *as a man*, homosexuality must remain a permanently deflected possibility. Hence, it is not man's homosexuality that helps to constitute his social instincts, and his general mindfulness of others, but, rather, the repression or deflection of the ostensible narcissism of homosexuality that is construed as the condition for altruism, understood as one of the benefits of an accomplished heterosexuality. In this sense, the desexualization and externalization of homosexuality makes for a "man"—properly speaking—who will always feel slights and injuries in the place where homosexual desire might have lived, and for whom this transposition of desire into imagined injury will become the basis of social feeling and citizenship. Note that this unacted homosexuality becomes the condition for sociality and the love of mankind in general.

It is not simply that homosexuality must remain unacted and deflected such that man in his self-preserving and proper sense may live, but that the very notion of the "ego-ideal"—the imaginary measure by which citizenship is psychically regulated—is itself composed of this unacted and deflected homosexuality. The ego-ideal is formed through the withdrawal of large quantities of homosexual cathexis.<sup>9</sup> This homosexuality, however, is neither simply withdrawn nor simply deflected or repressed, but, rather turned back on itself, and this turning back on itself is not a simple self-cancellation; on the contrary, it is

the condition for the fabrication of the ego-ideal in which homosexuality and its prohibition “combine” in the figure of the heterosexual citizen, one whose guilt will be more or less permanent. Indeed Freud will say that homosexual libido is “transformed into sense of guilt” and citizenship itself—the attachment to and embodiment of the law—will be derived from this guilt.

How, then, do we return to the problem that emerges within the military, where the military is at once a zone of suspended citizenship, and one which, by virtue of this suspended status, articulates in graphic terms the production of the masculinist citizen through the prohibition on homosexuality. Although the military regulations appear to figure homosexuality in masculinist terms, it is clear that lesbians are targeted as well, but that, paradoxically, the interrogations into their personal life often take the form of sexual harassment. In other words, women cannot speak their homosexuality because that would be to threaten the heterosexual axis along which gender subordination is secured. And if men speak their homosexuality, that speaking threatens to bring into explicitness and, hence, destroy, the homosociality by which the class of men coheres. / 121

The line that demarcates the speakable from the unspeakable instates the current boundaries of the social. Could the uttering of the word constitute a slight, an injury, indeed, an offense, if the word did not carry the sedimented history of its own suppression? In this sense, the word becomes an “act” precisely to the extent that its unspeakability circumscribes the social. The speaking of the word outside its prohibition calls into question the integrity and the ground of the social as such. In this way, the word contests the boundaries of the social, the repressive ground of the citizen subject by naming the relation that must be assumed for that sociality to emerge, but which can only produce that sociality by remaining unnamed. Unwittingly, it seems, the military introduces that word into its contagious circuit precisely through the prohibition which is supposed to secure its unspeakability. And it is in this way that the military speaks its desire again and again at the very moment, through the very terms, by which it seeks its suppression.

In fact, it is crucial to consider that the military does not merely

confront the homosexual as a problem to be regulated and contained, but it actively produces this figure of the homosexual, insisting that this homosexual be deprived of the power of self-ascription, remaining named and animated by the state and its powers of interpellation. In its military dimension, the state insists on the codification of homosexuality. The homosexual subject is brought into being through a discourse that at once names that "homosexuality" and produces and defines this identity as an infraction against the social. But where it names this subject compulsively, it denies to this subject the power to name itself; thus the state seeks to curb not merely homosexual actions, but the excessive power of the name when it becomes unshackled from the prohibitions by which it is spawned. What and who will the name describe on the occasion when it no longer serves the disciplinary aims of military nomination?

122 / How, then, do we think about the situation in which the self-ascription, the reflexive statement, "I am a homosexual," is misconstrued as a seduction or an assault, one in which a desire is not merely described but, in being described, is understood to be enacted and conveyed? In the first instance, I think we must read this construal of homosexuality and homosexual acts as assault and/or disease as an effort to circumscribe homosexuality within that pathologizing set of figurations. This is not simply an account of how the words of homosexuals performatively produce homosexuality, but, as state-sanctioned figure, a restrictive definition of homosexuality as an assaultive and contagious action. Hence, the performativity attributed to the homosexual utterance can only be established through the performativity of a state discourse that makes this very attribution. The figuring of homosexual utterance as contagion is a performative sort of figuring, a performativity that belongs to regulatory discourse. Does the statement reveal the performative power of homosexual utterance, or does it merely underscore the productive or performative power of those who exercise the power to define homosexuality in these terms?

This discursive power to enforce a definition of the homosexual is one that finally belongs neither to the military nor to those who oppose it. After all, I have just produced the military production for you and entered into the chain of performativity that I've been chart-

ing, implicating myself in the reproduction of the term, with far less power, admittedly, than those whose acts I describe. Is anything like homosexuality being described in this chain of performativity? Perhaps it is a mistake to claim that we might have the power to produce an authoritative or affirmative notion of homosexuality when we go about naming it, naming ourselves, defining its terms. The problem is not merely that homophobic witnesses to self-proclaiming homosexuals hallucinate the speaking of the word as the doing of the deed, but that even those who oppose the military are willing to accept the notion that naming is performative, that to some extent it brings into linguistic being that which it names. There does seem to be a sense in which speech acts and speech, more generally, might be said to constitute conduct, and that the discourse produced about homosexuality is part of the social constitution of homosexuality as we know it. Conventional distinctions between speech and conduct do collapse when, for instance, what we might loosely call representation is coextensive with, say, being “out” as a cultural practice of gayness and queerness, between cultural representations that express homosexuality and homosexuality “itself”. It would, after all, be somewhat reductive to claim that homosexuality is only sexual behavior in some very restricted sense, and that there is then, superadded to this behavior, a set of representations of homosexuality that, strictly speaking, *are not* homosexuality proper. Or are they?

/ 123

Many would want to argue that homosexuality and its cultural representation are *not* dissociable, that representation does not follow sexuality as its dim reflection, but that representation has a constitutive function, and that, if anything, sexuality follows representation as one of its effects: this appears to be the presumption in the claim that public conventions organize and make possible “sexuality” and that the acts, and the cultural practices that orchestrate and sustain the acts, as it were, cannot be strictly distinguished. To construe sexuality as an “act” is already to abstract from a cultural practice, a reiterative ritual, in which it takes place and of which it is an instance. Indeed, the very notion of a sexual practice is precisely that which overrides the distinction between “act” and “representation.”

To insist, however, that discourse on homosexuality, including the

discursive act of “coming out,” is part of what is understood, culturally, as “homosexuality” is not quite the same as claiming that saying one is homosexual is itself a homosexual act, much less a homosexual offense. Although I think we can imagine queer activists who would claim that the self-appellation is a sexual act in some broadly interpreted sense of that term, there is a certain comedy that emerges when “queer” becomes so utterly disjoined from sexual practice that every well-meaning heterosexual takes on the term. But we surely need to take seriously the contention that “coming out” is intended as a contagious example, that it is supposed to set a precedent and incite a series of similarly structured acts in public discourse. The military may be responding precisely to the felicitous perlocutionary consequences of coming out, the way in which the example has spawned a rash of coming outs throughout the public sphere, proliferating itself as if it were a certain kind of linguistic contagion—a contagion, we might conjecture, that is meant in part to counter the force of that other contagion, namely, AIDS. What, then, is the difference between the logic that governs the military policy and the one which governs queer activism?

124,

One way of understanding this, I think, is to note the way in which paranoid military listening consistently closes the gap between the speaking of a desire and the desire that is being spoken. The one appears to communicate the other directly in moments of seduction (but even there we know through painful examples that the communication is not always interpreted in quite the right way); in paranoia, though, the desire that the speaking elicits is imagined as emerging wholly and without solicitation from the one who speaks it. It comes from the outside, as an assault, or as a disease, and becomes registered as injury and/or contamination. Hence, the desire is already figured as assault or disease, and can be received in one form or the other, or both. How is that figuration to be understood as different from the production of a discourse about homosexuality, which might work against this pathological reduction and constitute a socially affirmative meaning for homosexuality?

Here is where I want to argue for the notion that a discursive production of homosexuality, a talking about, a writing about, and institu-

tional recognition of, homosexuality, is not exactly the same as the desire of which it speaks. Whereas the discursive apparatus of homosexuality constitutes its social reality, it does not constitute it fully. The declaration that is “coming out” is certainly a kind of act, but it does not fully constitute the referent to which it refers; indeed, *it renders homosexuality discursive, but it does not render discourse referential*. This is not to say that desire is a referent that we might describe in some other or better way; on the contrary, it is a referent that sets a certain limit to referential description in general, one that nevertheless compels the chain of performativity by which it is never quite captured. In an effort to preserve this sense of desire as a limit to referentiality, it is important not to close the gap between the performative and the referential and to think that by proclaiming homosexuality, homosexuality itself becomes nothing other than the proclamation by which it is asserted. Although Foucault might claim that discourse becomes sexualized through such an act, it may be that discourse is precisely what desexualizes homosexuality in this instance.<sup>11</sup> My sense is that this kind of account of the discursive production of homosexuality makes the mistake of substituting the name for what it names, and though that referent cannot be finally named, it must be kept separate from what is nameable, if only to guarantee that no name claims finally to exhaust the meaning of what we are and what we do, an event that would foreclose the possibility of becoming more and different than what we have already become, in short, foreclose the future of our life within language, a future in which the signifier remains a site of contest, available to democratic rearticulation. / 125

In this sense, I would argue that the discourse about homosexual desire is not, strictly speaking, the same as the desire that it speaks, and when we think that we are acting homosexually when we speak about homosexuality we are, I think, making a bit of a mistake. For one of the tasks of a critical production of alternative homosexualities will be to disjoin homosexuality from the figures by which it is conveyed in dominant discourse, especially when they take the form of either assault or disease. Indeed, as much as it is necessary to produce other figures, to continue the future of performativity and, hence, of homo-



sexuality, it will be the distance between something called “homosexuality” and that which cannot be fully interpellated through such a call that will undermine the power of any figure to be the last word on homosexuality. And it is that last word, I think, that is most important to forestall.

Yes, speech is a species of action. Yes, there are some acts that only speech can perform. But there are some acts that speech alone cannot accomplish. You cannot heal the sick by pronouncing them well. You cannot uplift the poor by declaring them to be rich.

HENRY LOUIS GATES, JR.

## 4 / IMPLICIT CENSORSHIP AND DISCURSIVE AGENCY

To argue that certain speech acts are more properly construed as conduct rather than speech sidesteps the question of censorship. Censorship appears to be the restriction of speech, and if hate speech or pornography or gay self-declaration is no longer understood as “speech,” then the restriction on any of those activities would no longer appear to be censorship. Indeed, MacKinnon has argued that the ordinances against pornography that she has devised and supported are not censorship, that they are rather concerned with extending the scope of the Equal Protection Clause of the Constitution.<sup>1</sup> What might have been

considered a free speech issue is now to be construed as a question of substantive equality.

If we do not remain restricted to the legal definition of censorship, we are in a position to ask how the very regulation of the distinction between speech and conduct works in the service of a more implicit form of censorship. To claim that certain speech is not speech and, therefore, not subject to censorship is already to have exercised the censor. Indeed, this particular exercise of censorship exceeds the bounds of legal definition even as it deploys the law as one of its instruments.<sup>2</sup>

#### COUNTERING THE CENSOR

Conventional accounts of censorship presume that it is exercised by the state against those who are less powerful. Conventional defenses of those less powerful argue that it is their freedom that is being constrained and sometimes, more particularly, their freedom of speech.

128 / Censorship is most often referred to as that which is directed against persons or against the content of their speech. If censorship, however, is a way of *producing* speech, constraining in advance what will and will not become acceptable speech, then it cannot be understood exclusively in terms of juridical power. In the conventional view, censorship appears to follow the utterance of offensive speech: speech has already become offensive, and then some recourse to a regulatory agency is made. But in the view that suggests that censorship *produces* speech, that temporal relation is inverted. Censorship precedes the text (by which I include "speech" and other cultural expressions), and is in some sense responsible for its production.

At a recent conference, I heard two apparently opposite views voiced on the topic. One view maintained that "uncensoring a text is necessarily incomplete."<sup>3</sup> This claim appears to suggest that no text can remain a text, that is, remain readable, without first being subjected to some kind of censorship. This view presupposes that censorship precedes the text in question, and that for a text to become readable, it must be produced through a process of selection that rules out certain possibilities, and realizes others. The process of selection appears to pre-

suppose a decision, one made by the author of the text. And yet, the author does not create the rules according to which that selection is made; those rules that govern the intelligibility of speech are “decided” prior to any individual decision. A more radical view would be that those rules, “decided” prior to any individual decision, are precisely the constraining conditions which *make possible* any given decision. Thus, there is an ambiguity of agency at the site of this decision. The speaking subject makes his or her decision only in the context of an already circumscribed field of linguistic possibilities. One decides on the condition of an already decided field of language, but this repetition does not constitute the decision of the speaking subject as a redundancy. The gap between redundancy and repetition is the space of agency.

The second view was that “censoring a text is necessarily incomplete.” This view maintains that a text always escapes the acts by which it is censored, and that censorship is always and only an attempted or partial action. Here, it seems, something about the text under censorship exceeds the reach of the censor, suggesting that some account is required of this “excessive” dimension of speech. One might appeal to a generalized theory of textuality to suggest ways in which the effort to constrain speech cannot fully target or capture the polysemy of language. Similarly, one might argue that the communicative sphere of language necessarily posits a realm of obscenity that it seeks, with always partial success, to keep rigorously excluded from its own operation.<sup>4</sup> This attempt to purify the sphere of public discourse by institutionalizing the norms that establish what ought properly to be included there operates as a preemptive censor. Such efforts not only labor under a fear of contamination, but they are also compelled to restage in the spectacles of public denunciations they perform the very utterances they seek to banish from public life. Language that is compelled to repeat what it seeks to constrain invariably reproduces and restages the very speech that it seeks to shut down. In this way, speech exceeds the censor by which it is constrained.

The generalizable character of both of these explanations is useful but limited: they cannot tell us when and why certain kinds of censorship are, in fact, more complete than others, why some operations of censorship seem to capture the offensive speech, and others seem quite

helpless to effect any capture at all. What accounts for the efficacy and vulnerability to failure that characterizes different operations of censorship? Never fully separable from that which it seeks to censor, censorship is implicated in its own repudiated material in ways that produce paradoxical consequences. If censoring a text is always in some sense incomplete, that may be partly because the text in question takes on new life as part of the very discourse produced by the mechanism of censorship.<sup>5</sup>

130, This paradoxical production of speech by censorship works in implicit and inadvertent ways. Thus, it becomes important to distinguish between explicit and implicit censorship. The latter refers to implicit operations of power that rule out in unspoken ways what will remain unspeakable. In such cases, no explicit regulation is needed in which to articulate this constraint. The operation of implicit and powerful forms of censorship suggests that the power of the censor is not exhausted by explicit state policy or regulation. Such implicit forms of censorship may be, in fact, more efficacious than explicit forms in enforcing a limit on speakability. Explicit forms of censorship are exposed to a certain vulnerability precisely through being more readily legible. The regulation that *states what it does not want stated* thwarts its own desire, conducting a performative contradiction that throws into question that regulation's capacity to mean and do what it says, that is, its sovereign pretension. Such regulations introduce the censored speech into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt.

A case in point was discussed in the previous chapter: the congressional statute passed in October of 1994 put into law the "don't ask, don't tell" policy on homosexual self-declaration in the military. The statute did not constrain reference to homosexuality in the military, but proliferated such references in its own supporting documentation and in the public debates fostered on the issue. The point of the statute was not only to limit the "coming out" of military personnel, but to establish that such self-ascriptive speech constitutes either a form of homosexual conduct or a sign that a propensity to engage in homosexual conduct is likely.<sup>6</sup> The military thus engaged in a rather protracted discussion on the matter of what is to be considered "homosexual" and

how speech and conduct is to be distinguished, and whether it can or should be. The regulation of the term "homosexual" is thus no simple act of censorship or silencing. The regulation *redoubles* the term it seeks to constrain, and can only effect this constraint through this paradoxical redoubling. The term is not itself unspeakable, but only becomes unspeakable in those contexts in which one uses it to describe oneself, and fails to make an adequate or convincing distinction between that ascription of a status and the intention to engage in homosexual conduct.

Thus, the effort to constrain the term culminates in its very proliferation—an unintended rhetorical effect of legal discourse. The term not only appears in the regulation as that discourse to be regulated, but reappears in the public debate over its fairness and value specifically as the conjured or imagined act of self-ascription that is explicitly prohibited by the regulation. The prohibition thus conjures the speech act that it seeks to constrain, and becomes caught up in a circular, imaginary production of its own making. This uttering of the utterance that the military seeks to censor also enacts the fulfillment of the desire to establish itself as the author-origin of all the utterances that take place within its domain. The regulation, as it were, will speak the part of the one censored as well as the censoring voice itself, assimilating the drama as one way to establish control over the utterance.

/ 131

I elaborate upon this example because it illustrates the way in which the mechanism of censorship is engaged in the production of a figure of homosexuality, a figure that is, as it were, backed by the state. The regulations that determine whether homosexuals will be allowed to enter or remain in the military does not simply constrain the speech of those it regulates; it appears to be about certain kinds of speech, but it is also concerned *to establish a norm by which military subjectification proceeds*. In relationship to the masculine military subject, this means that the norms governing masculinity will be those that require the denial of homosexuality. For women, the self-denial requires either a return to an apparent heterosexuality or to an asexuality (sometimes linked together within dominant conceptions of female heterosexuality) that suits the military's notion of unit cohesion.

Thus, the mechanism of censorship is not only actively engaged in

the production of subjects, but also in circumscribing the social parameters of speakable discourse, of what will and will not be admissible in public discourse.<sup>7</sup> The failure of censorship to effect a complete censoring of the speech under question has everything to do with (a) the failure to institute a complete or total subjectification through legal means and (b) the failure to circumscribe effectively the social domain of speakable discourse.

Clearly, the military's effort to regulate speech is not paradigmatic of all kinds of censorship. It does, however, introduce at least two "productive" modalities of power that contrast with the conventional view of censorship as juridical power. By "productive" I do not mean positive or beneficial, but rather, a view of power as formative and constitutive, that is, not conceived exclusively as an external exertion of control or as the deprivation of liberties.<sup>8</sup> According to this view, censorship is not merely restrictive and privative, that is, active in depriving subjects of the freedom to express themselves in certain ways, but also formative of subjects and the legitimate boundaries of speech. This notion of a productive or formative power is not reducible to the tutelary function of the state, that is, the moral instruction of its citizens, but operates to make certain kinds of citizens possible and others impossible. Some who take this point of view make clear that censorship is not primarily about speech, that it is exercised in the service of other kinds of social aims, and that the restriction of speech is instrumental to the achievements of other, often unstated, social and state goals. One example of this includes a conception of censorship as a necessary part of the process of nation-building, where censorship can be exercised by marginalized groups who seek to achieve cultural control over their own representation and narrativization. A similar, but distinct kind of argument, however, is also made typically on behalf of a dominant power that seeks to control any challenges posed to its own legitimacy. Another related example is the use of censorship in an effort to build (or rebuild) consensus within an institution, such as the military, or within a nation; another example is the use of censorship in the codification of memory, as in state control over monument preservation and building, or in the insistence that certain kinds of historical events only be narrated one way.

The view of censorship as “productive,” however, is not always coextensive with views that hold that censorship is always *instrumental* to the achievement of other social aims. Consider that in the examples I have just suggested, censorship is not primarily concerned with speech, and that the control or regulation of speech is incidental to the achievement of other kinds of social aims (strengthening particular views of legitimacy, consensus, cultural autonomy, national memory). In the most extreme version of this kind of instrumentalism, speech is cast as wholly incidental to the aims of censorship or, rather, speech works as a cover for the real political aims of censorship, ones that have nothing or little to do with speech.

Censorship is a productive form of power: it is not merely privative, but formative as well. I propose that censorship seeks to produce subjects according to explicit and implicit norms, and that the production of the subject has everything to do with the regulation of speech. The subject’s production takes place not only through the regulation of that subject’s speech, but through the regulation of the social domain of speakable discourse. The question is not what it is I will be able to say, but what will constitute the domain of the sayable within which I begin to speak at all. To become a subject means to be subjected to a set of implicit and explicit norms that govern the kind of speech that will be legible as the speech of a subject.<sup>9</sup> / 133

Here the question is not whether certain kinds of speech uttered by a subject are censored, but how a certain operation of censorship determines who will be a subject depending on whether the speech of such a candidate for subjecthood obeys certain norms governing what is speakable and what is not. *To move outside of the domain of speakability is to risk one’s status as a subject. To embody the norms that govern speakability in one’s speech is to consummate one’s status as a subject of speech.* “Impossible speech” would be precisely the ramblings of the asocial, the rantings of the “psychotic” that the rules that govern the domain of speakability produce, and by which they are continually haunted.<sup>10</sup>

Some would argue that no text can be fully freed from the shackles of censorship because every text or expression is in part structured through a process of selection that is determined in part by the decisions of an author or speaker and in part by a language that operates



according to selective and differential rules that no individual speaker ever made (that may well be collectively forged, but not traceable to a single author, except in specific cases of grammatical revision and coinage). A highly generalized thesis, it appears to apply to *any* and *all* language. And though it may well be true and valid, I think that in its generalized form, it does not directly translate into a political consideration of censorship or a normative view on how best to decide issues of censorship. Indeed, taken in its most generalized form, one normative implication of such a view is the following: because all expression is always already censored to some degree, it makes no sense to try to oppose censorship, for that would be to oppose the conditions of intelligibility (and, thus, to oppose the very terms by which the opposition is articulated).

134 / The view that I am proposing, however, revises this more generalized thesis in the following direction: the conditions of intelligibility are themselves formulated in and by power, and this normative exercise of power is rarely acknowledged as an operation of power at all. Indeed, we may classify it among the most implicit forms of power, one that works precisely through its illegibility: it escapes the terms of legibility that it occasions. That power continues to act in illegible ways is one source of its relative invulnerability.

The one who speaks according to the norms that govern speakability is not necessarily following a rule in a conscious way. One speaks according to a tacit set of norms that are not always explicitly coded as rules. Charles Taylor argues that our understanding of these rules cannot be reduced to having a self-conscious representation of them: "it is carried in patterns of appropriate action."<sup>11</sup> A "background understanding . . . underlies our ability to grasp directions and follow rules," and this background understanding is not only embodied, but embodied as a shared social sense: one does not follow a rule alone. In *Language and Symbolic Power*, Pierre Bourdieu cautions against the reduction of such a bodily understanding, or *habitus*, to the practice of self-consciously following a rule:

All symbolic domination presupposes, on the part of those who submit to it, a form of complicity which is neither passive submis-

sion to external constraint nor a free adherence to values. The recognition of the legitimacy of the official language has nothing in common with an explicitly professed, deliberate and revocable belief, or with an intentional act of accepting a 'norm.' (50–51)

To understand how the social understanding of such "rules" is an embodied activity, let us distinguish more precisely between that operation of censorship that tacitly forms the subject of speech and that action of censorship subsequently imposed on that subject. If censorship produces the parameters of the subject, how do those norms come to inhabit the bodily life of the subject? Finally, we shall ask how the tacit operation of censorship, understood as a kind of foreclosure, constitutes the violent inauguration of the bodily life of the speaking subject, the incongruity of that body's speech, a speaking whose rhetoricity confounds its normativity.

If a subject becomes a subject by entering the normativity of language, then in some important ways, these rules precede and orchestrate the very formation of the subject. Although the subject enters the normativity of language, the subject exists only as a grammatical fiction prior to that very entrance. Moreover, as Lacan and Lacanians have argued, that entrance into language comes at a price: the norms that govern the inception of the speaking subject differentiate the subject from the unspeakable, that is, produce an unspeakability as the condition of subject formation.

/ 135

Although psychoanalysis refers to this inception of the subject as taking place in infancy, this primary relation to speech, the subject's entry into language by way of the originary "bar" is reinvoked in political life when the question of being able to speak is once again a condition of the subject's survival. The question of the "cost" of this survival is not simply that an unconscious is produced that cannot be fully assimilated to the ego, or that a "real" is produced that can never be presented within language. The condition for the subject's survival is precisely the foreclosure of what threatens the subject most fundamentally; thus, the "bar" produces the threat and defends against it at the same time. Such a primary foreclosure is approximated by those traumatic political occasions in which the subject who would speak is con-

strained precisely by the power that seeks to protect the subject from its own dissolution.

This doubled dimension of the Lacanian “bar,” however, is to be thought not merely as a structure that once inaugurated the subject, but as a continuing dynamic in the life of the subject. The rules that constrain the intelligibility of the subject continue to structure the subject throughout his or her life. And this structuring is never fully complete. Acting one’s place in language continues the subject’s viability, where that viability is held in place by a threat both produced and defended against, the threat of a certain dissolution of the subject. If the subject speaks impossibly, speaks in ways that cannot be regarded as speech or as the speech of a subject, then that speech is discounted and the viability of the subject called into question. The consequences of such an irruption of the unspeakable may range from a sense that one is “falling apart” to the intervention of the state to secure criminal or psychiatric incarceration.

136, The link between survival and speakability is delineated in the speech that constitutes the inauguration of the self-denying and repentant homosexual into military ranks: I am not what you suspect me to be, but my not being that is precisely what I have now become, thus, determined by my denial, my new self-definition. Or consider the situation that Saidiya Hartman has outlined in which the emancipation from slavery into citizenship requires the bartering of one’s labor power, the translation of one’s value into a commodity form and, hence, a new form of subjection.<sup>12</sup> The discourse of freedom in which one makes the claim of emancipation suppresses the very energies it purports to unleash. Or note the predicament in which litigating against domestic sexual abuse requires that a woman offer a version of herself that vitiates any doubt as to her sexual purity, her ability to coincide before the law with an idealized and desexualized version of feminine heterosexuality. When we ask what it means to qualify to petition before the law, we note the belated repetition of foreclosure that orchestrates and makes possible a speaking subject with such a claim.<sup>13</sup>

In cultural contexts where there is no necessary or obvious link to the law, forms of “compulsory discursivity”<sup>14</sup> still govern the conditions under which a political claim can be made. Regimes of confes-

sional discourse structure the way in which policy issues are framed; in reference to drugs, for instance, a story about abuse and healing becomes central to the way the topic is addressed in policy; in reference to anti-affirmative action approaches to meritocracy (evidenced in the University of California resolution),<sup>15</sup> narratives of individuals who heroically overcome adverse circumstances to triumph over any analysis of systematic institutional discrimination in education. Such “forced” narratives, as Wendy Brown explains, impose a discursive form on politicization that not only determines (a) under what discursive form a claim becomes legible as political but, more importantly, (b) consolidates *politics as a production of discourse*, and establishes “silence” as a site of potential resistance to such discursive regimes and their normalizing effects.<sup>16</sup>

The view of censorship as one in which a centralized or even sovereign power unilaterally represses speech suggests that the subject of speech is burdened by the exteriority of power. The subject is not quite as victimized in the view that asserts that citizens wield the power to deprive each other of the freedom of speech. When that subject, through its derogatory remarks or representations, works to “censor” another subject, that form of censorship is regarded as “silencing” (Langton). In that form, the citizen addressed by such speech is effectively deprived of the power to respond, deauthorized by the derogatory speech act by which that citizen is ostensibly addressed. Silence is the performative effect of a certain kind of speech, where that speech is an address that has as its object the deauthorization of the speech of the one to whom the speech act is addressed. It is the subject who now is said to wield such power, and not the state or some other centralized institution, although institutional power is presupposed and invoked by the one who delivers the words that silence. Indeed, the subject is described on the model of state power, and though the *locus* of power has shifted from the state to the subject, the unilateral action of power remains the same. Power is exerted by a subject on a subject; its exertion culminates in a deprivation of speech.

It is one thing for certain kinds of speech to be censored, and quite another for censorship to operate on a level prior to speech, namely, as the constituting norm by which the speakable is differentiated from

the unspeakable. The psychoanalysts Jean Laplanche and J.-B. Pontalis have distinguished the censorious act of repression from a preemptive operation of a norm, and offered the term “foreclosure” as a way of designating preemptive action, one that is not performed *by* a subject, but, rather, whose operation makes possible the formation of the subject.<sup>17</sup> Apart from the use of the term in real estate matters to refer to legally barring the redemption of a mortgage for value, “foreclosure” means, according to the Oxford English Dictionary, “to bar, exclude, shut out completely.”

As an action, it appears to presuppose a subject, but that presupposition may well be nothing more than a seduction of grammar. Indeed, psychoanalytically considered, foreclosure is not a singular action, but the reiterated effect of a structure. Something is barred, but no subject bars it; the subject emerges as the result of the bar itself. That barring is an action that is not exactly performed *on* a pregiven subject, but performed in such a way that the subject him/herself is performatively produced as a result of this primary cut. The remainder or what is cut out constitutes the unperformable in all performativity.

Before the bar is what can be known only through an imagining of that “before,” one that is pervaded by the belatedness of the imaginary itself, its thwarted nostalgia. In asking what or who performs the bar, we ask for a grammatical expectation to be fulfilled: that we can ask the question at all appears to presuppose that the question is answerable. But what grammar has produced the possibility of the question, and how was that grammar produced? If the very grammatical position of the subject is the result of foreclosure, then any explanation of foreclosure we might give within such a grammar will always be the effect of that which it seeks to explain. Hence, we ask for the state of affairs prior to such a grammar to be explained within the terms of a grammar that, by definition, postdates the scene. The question thus exposes the limiting condition of the grammar that makes the question possible.

Although the psychoanalytic use of foreclosure is richly complicated, I propose that we actively misappropriate the term for other purposes, transpose its proper meaning into an improper one, for the task of rethinking the way in which censorship acts as a “productive” form

of power. I suggest this not simply because I think such a transposition might be interesting, but because I think that the action of foreclosure does not simply happen once, that it continues to happen, and that what is reinvented by its continued action is precisely that primary scene in which the formation of the subject is tied to the circumscribed production of the domain of the speakable. This accounts for the sense of a subject at risk when the possibility of speech is foreclosed.

The operation of foreclosure is tacitly referenced in those instances in which we ask: what must remain unspeakable for contemporary regimes of discourse to continue to exercise their power? How is the "subject" before the law produced through the exclusion of other possible sites of enunciation within the law? To the extent that such a constitutive exclusion provides the condition of possibility for any act of speech, it follows that "uncensoring a text is necessarily incomplete." On the assumption that no speech is permissible without some other speech becoming *impermissible*, censorship is what permits speech by enforcing the very distinction between permissible and impermissible speech. Understood as foreclosure, censorship produces discursive regimes through the production of the unspeakable.

/ 139

Although the one who speaks is an effect of such a foreclosure, the subject is never fully or exhaustively reduced to such an effect. A subject who speaks at the border of the speakable takes the risk of redrawing the distinction between what is and is not speakable, the risk of being cast out into the unspeakable. Because the agency of the subject is not a property of the subject, an inherent will or freedom, but an effect of power, it is constrained but not determined in advance. If the subject is produced in speech through a set of foreclosures, then this founding and formative limitation sets the scene for the agency of the subject. Agency becomes possible on the condition of such a foreclosure. This is not the agency of the sovereign subject, one who only and always exercises power instrumentally on another. As the agency of a post-sovereign subject, its discursive operation is delimited in advance but also open to a further and unexpected delimitation. Because the action of foreclosure does not take place once and for all, it must be repeated to reconsolidate its power and efficacy. A structure only remains a structure through being reinstated as one.<sup>18</sup> Thus, the subject who

speaks within the sphere of the speakable implicitly reinvokes the foreclosure on which it depends and, thus, depends on it again. This reinvocation, however, is neither mechanical nor deliberate. Indeed, the subject does not stand at an instrumental distance from this foreclosure; what is reinvoked is also that which grounds the possibility of the reinvocation, even as the form that the reinvocation takes is not reducible to its presupposed form. One speaks a language that is never fully one's own, but that language only persists through repeated occasions of that invocation. That language gains its temporal life only in and through the utterances that reinvolve and restructure the conditions of its own possibility.

140 / The critical task is not simply to speak "against" the law, as if the law were external to speech, and speech the privileged venue for freedom. If speech depends upon censorship, then the principle that one might seek to oppose is at once the formative principle of oppositional speech. There is no opposition to the lines drawn by foreclosure except through the redrawing of those very lines. This is, however, not a dead-end for agency, but the temporal dynamic and promise of its peculiar bind. The possibility remains to exploit the presuppositions of speech to produce a future of language that is nowhere implied by those presuppositions.

Such a view of censorship, broadly construed, as engaged in forming the subject of speech does not tell us how best to decide questions of censorship. It does not furnish criteria by which one might distinguish invidious from non-invidious instances of censorship. It offers, however, an analysis of a set of presuppositions on which any such criterial discussion depends. It is important to know what one means by "censorship" (indeed, what has become "censored" in the definition of censorship) in order to understand the limits of its eradicability as well as the bounds within which such normative appeals might plausibly be made. Moreover, what we mean by "normative" necessarily alters once we recognize that the very field of speech is structured and framed through norms that precede the possibility of description. We are accustomed to claiming that we first offer a description of various practices of censorship and then decide among them through recourse to normative principles. But if our descriptions are themselves norma-

tively structured in advance, through a foreclosure that establishes the domain of the speakable (and, within that, the describable), then to view censorship in this way means rethinking where and how we understand the powers of normativity.

Any decision on what to do will be implicated in a process of censorship that it cannot fully oppose or eradicate. In this sense, censorship is at once the condition for agency and its necessary limit. This paradox does not refute the possibility of decision, but merely suggests that agency is implicated in power; decision becomes possible only on the condition of a decided field, one that is not decided once and for all. This prior decision performed by no one does not foreclose agency, but constitutes the foreclosure that first makes agency possible.

#### SPEECH ACTS POLITICALLY

The implicit operation of censorship is, by definition, difficult to describe. If it operates within a bodily understanding, as Taylor and Bourdieu suggest, how do we understand the bodily operation of such a linguistic understanding? If censorship is the condition of agency, how do we best understand linguistic agency? In what does the “force” of the performative consist, and how can it be understood as part of politics? Bourdieu argues that the “force” of the performative is the effect of social power, and social power is to be understood through established contexts of authority and their instruments of censorship. Opposed to this social account of performative force, Derrida argues that the breaking of the utterance from prior, established contexts constitutes the “force” of the utterance.

’ 141

In the introduction I maintained that the speech act is a bodily act, and that the “force” of the performative is never fully separable from bodily force: this constituted the chiasm of the “threat” as a speech act at once bodily and linguistic. Felman’s contribution to speech act theory underscores that speech, precisely because it is a bodily act, is not always “knowing” about what it says. In other words, the bodily effects of speech exceed the intentions of the speaker, raising the question of the speech act itself as a nexus of bodily and psychic forces. In the preceding discussion, I noted that foreclosure, in its revised sense, inaugu-



rates or forms the subject, delimiting the limits of speakable discourse as the viable limits of the subject. Foreclosure implies that the normative production of the subject takes place prior to an overt act of censoring a subject, and ought to be understood as a modality of productive power in Foucault's sense. The question now emerges: how is it that the norms that govern speech come to inhabit the body? Moreover, how do the norms that produce and regulate the subject of speech also seek to inhabit and craft the embodied life of the subject?

Pierre Bourdieu offers one account of how norms become embodied, suggesting that they craft and cultivate the *habitus* of the body, the cultural style of gesture and bearing. In the final discussion, then, I hope to show how Bourdieu offers a promising account of the way in which non-intentional and non-deliberate incorporation of norms takes place. What Bourdieu fails to understand, however, is how what is bodily in speech resists and confounds the very norms by which it is regulated. Moreover, he offers an account of the performativity of political discourse that neglects the tacit performativity of bodily "speech," the performativity of the *habitus*. His conservative account of the speech act presumes that the conventions that will authorize the performative are already in place, thus failing to account for the Derridean "break" with context that utterances perform. His view fails to consider the crisis in convention that speaking the unspeakable produces, the insurrectionary "force" of censored speech as it emerges into "official discourse" and opens the performative to an unpredictable future.

Pierre Bourdieu writes that "modalities of practices . . . are powerful and hard to resist precisely because they are silent and insidious, insistent and insinuating." He makes clear what he means by this in a number of works, but perhaps most precisely in his essay, "Censorship and the Imposition of Form."<sup>19</sup> There he writes of specialized languages, indeed, the specialized languages of the academy, and suggests that they are not only based on censorship, but also on a sedimentation and skewing of everyday linguistic usage—"strategies of euphemization," to use his phrase. Focusing on the work of Heidegger, Bourdieu argues that Heidegger's language consistently engages strategies that produce the illusion that it has broken with ordinary language. Codes

of legitimacy are established precisely through the invocation of non-ordinary words in ways that appear to have a systematic relation to one another. "Once transformed and transfigured in this way," Bourdieu writes, "the word loses its social identity and its ordinary meaning in order to assume a distorted meaning." (142) "Every word," he writes, "carries the indelible trace of the *break* which separates the authentically ontological sense from the ordinary and vulgar one. . . ." (144) He suggests not only that such philosophical discourse depends upon the distinction between sacred and profane knowledge, but that the codification of that distinction must itself be an instance of its sacred exercise.

Bourdieu's task, however, is not simply to return us to a world of ordinary locutions. Indeed, he offers us a theoretical reconstruction of the split that Heidegger's discourse is said to institutionalize, and refuses to treat ordinary language as primary and irreducible. Ordinary language, in his view, is "moulded politically": "the objectively political principles of opposition (between social groups) are recorded and preserved in ordinary language."

/ 143

According to Bourdieu, then, a philosophical discourse apparently opposes itself to ordinary language, and an ordinary language is structured by political and sociological oppositions between groups, and the latter are structured in part by what he calls the market, understood as an objective field. Ordinary language records and preserves social oppositions, and yet it does so in a way that is not readily transparent. Those oppositions are sedimented within ordinary language and a theoretical reconstruction of that very process of sedimentation is necessary in order to understand them at all. A philosophical discourse such as Heidegger's thus distances itself from both ordinary language and the possibility of theoretically reconstructing the ways in which social oppositions have become sedimented there. Moreover, philosophical discourse recapitulates a class opposition, but in a deflected way; opposed to ordinary language, philosophy participates in a hierarchical set of oppositions that obscurely reenacts the very social oppositions sedimented in, and occluded by, ordinary language.

Bourdieu argues in favor of a theoretical reconstruction of this very split between ordinary and philosophical usage. In this sense, he

opposes a hyper-intellectualism that fails to acknowledge the break from ordinary language that it performs, but he opposes as well an anti-intellectualism that fails to give a theoretical account of the split between the ordinary and the philosophical that he outlines.

Several kinds of views have been offered within recent American cultural politics to the effect that it makes sense to throw off the shackles of the censor and return to a more immediate and direct form of discourse. Within literary and cultural studies recently, we have witnessed not merely a turn to the personal voice, but a nearly compulsory production of exorbitant affect as the sign of proof that the forces of censorship are being actively and insistently countered. That these expressions quickly become generic and predictable suggests that a more insidious form of censorship operates at the site of their production, and that the failure to approximate a putatively rule-breaking emotionality is precisely a failure to conform to certain implicit rules, ones that govern the "liberatory" possibilities of cultural life.

144 , When anti-intellectualism becomes the counter to anti-censorship, and academic language seeks to dissolve itself in an effort to approximate the ordinary, the bodily, and the intimate, then the rituals of codification at work in such renderings become more insidious and less legible. The substitution of a notion of ordinary language, often romanticized and hypostacized, for an apparently evasive intellectual language becomes the alternative to censorship, fails to take account of the formative power of censorship, as well as its subversive effects. The "break" with ordinary discourse that intellectual language performs does not have to be complete for a certain decontextualization and denaturalization of discourse to take place, one with potentially salutary consequences. The play between the ordinary and non-ordinary is crucial to the process of reelaborating and reworking the constraints that maintain the limits of speakability and, consequently, the viability of the subject.

The effects of catachresis in political discourse are possible only when terms that have traditionally signified in certain ways are misappropriated for other kinds of purposes.<sup>20</sup> When, for instance, the term "subject" appears to be too bound up with presumptions of sovereignty and epistemological transparency, arguments are made that such a term

can no longer be used. And yet, it seems that the reuse of such a term in, say, a post-sovereign context, rattles the otherwise firm sense of context that such a term invokes. Derrida refers to this possibility as reinscription. The key terms of modernity are vulnerable to such reinscriptions as well, a paradox to which I will return toward the end of this chapter. Briefly, though, my point is this: precisely the capacity of such terms to acquire non-ordinary meanings constitutes their continuing political promise. Indeed, I would suggest that the insurrectionary potential of such invocations consists precisely in the break that they produce between an ordinary and an extraordinary sense. I propose to borrow and depart from Bourdieu's view of the speech act as a rite of institution to show that there are invocations of speech that are insurrectionary acts.

To account for such speech acts, however, one must understand language not as a static and closed system whose utterances are functionally secured in advance by the "social positions" to which they are mimetically related. The force and meaning of an utterance are not exclusively determined by prior contexts or "positions"; an utterance may gain its force precisely by virtue of the break with context that it performs. Such breaks with prior context or, indeed, with ordinary usage, are crucial to the political operation of the performative. Language takes on a non-ordinary meaning in order precisely to contest what has become sedimented in and as the ordinary. / 145

Bourdieu insists that a certain intellectualism, taking place under the rubric of "literary semiology" or "linguistic formalism," misconstrues its own theoretical construction as a valid description of social reality. Such an intellectual enterprise, according to Bourdieu, not only misunderstands the positions of social power that it occupies within the institutions of the legitimate academy, but it fails to discern the critical difference between the *linguistic* and *social* dimensions of the very textual practices it attends. Although Bourdieu does not elaborate on whose intellectual positions he is criticizing under the rubric of "literary semiology," he appears to be engaged in a tacit struggle with Jacques Derrida's reading in "Signature, Event, Context" of Austin's theory of the performative.

Both Bourdieu and Derrida read Austin in order to delineate more

clearly the “force” of the performative utterance, of what gives a linguistic utterance the force to do what it says, or to facilitate a set of effects as a result of what it says. Austin makes clear that the illocutionary performative derives its forcefulness or efficacy through recourse to established conventions. Once a convention is set, and the performative participates in a conventional formula—and all the circumstances are appropriate—then the word becomes the deed: the baptism is performed, the alleged criminal arrested, the straight couple marries. For Austin, conventions appear to be stable, and that stability is mirrored in a stable social context in which those conventions have become sedimented over time. The thinness of this “theory” of social context is criticized by Bourdieu precisely because it presumes without elaborating an account of the power of social institutions, including but not limited to language itself. In an effort to counter the incipient formalism of Austin’s account, Bourdieu writes of “the essence of the error which is expressed in its most accomplished form by Austin (and after him, Habermas)”:

146 /

he thinks that he has found in discourse itself—in the specifically linguistic substance of speech, as it were—the key to the efficacy of speech. By trying to understand the power of linguistic manifestations linguistically, by looking at language for the principle underlying the logic and effectiveness of the language of institutions, one forgets that authority comes to language from outside. . . . Language at most *represents* this authority, manifests and symbolizes it. (109)

For Bourdieu, then, the distinction between performatives that work and those that fail has everything to do with the social power of the one who speaks: the one who is invested with legitimate power makes language act; the one who is not invested may recite the same formula, but produces no effects. The former is legitimate, and the latter, an imposter.

But is there a sure way of distinguishing between the imposter and the real authority? And are there moments in which the utterance forces a blurring between the two, where the utterance calls into question the established grounds of legitimacy, where the utterance, in fact,

performatively produces a shift in the terms of legitimacy as an *effect* of the utterance itself? Bourdieu offers the example of liturgical ritual, and offers several examples of the conditions of its utterance and the alterations in its formulae that render the liturgy false. His judgment, however, on what is a right and wrong ritual assumes that the legitimate forms of liturgical ritual have already been established, and that new forms of legitimate invocation will not come to transform and supplant the old. In fact, the ritual that performs an infringement of the liturgy may still be the liturgy, the liturgy in its futural form.

Bourdieu's example is significant because his theory fails to recognize that a certain performative force results from the rehearsal of the conventional formulae in non-conventional ways. The possibility of a resignification of that ritual is based on the prior possibility that a formula can break with its originary context, assuming meanings and functions for which it was never intended. In making social institutions static, Bourdieu fails to grasp the logic of iterability that governs the possibility of social transformation. By understanding the false or wrong invocations as *reiterations*, we see how the form of social institutions undergoes change and alteration and how an invocation that has no prior legitimacy can have the effect of challenging existing forms of legitimacy, breaking open the possibility of future forms. When Rosa Parks sat in the front of the bus, she had no prior right to do so guaranteed by any of the segregationist conventions of the South. And yet, in laying claim to the right for which she had no *prior* authorization, she endowed a certain authority on the act, and began the insurrectionary process of overthrowing those established codes of legitimacy.

/ 147

Significantly, the very iterability of the performative that Bourdieu fails to see is what preoccupies the reading of Austin that Derrida provides. For Derrida, the force of the performative is derived precisely from its decontextualization, from its break with a prior context and its capacity to assume new contexts. Indeed, he argues that a performative, to the extent that it is conventional, must be repeated in order to work. And this repetition presupposes that the formula itself continues to work in successive contexts, that it is bound to no context in particular even as, I would add, it is always found in some context or another. The "illimitability" of context simply means that any delin-

eation of a context that one might perform is itself subject to a further contextualization, and that contexts are not given in unitary forms. This does not mean, and never meant, that one should cease any effort to delineate a context; it means only that any such delineation is subject to a potentially infinite revision.

If Bourdieu fails to theorize the particular force produced by the utterance as it breaks with prior context, enacting the logic of iterability, Derrida focuses on those ostensibly "structural" features of the performative that persist quite apart from any and all social contexts, and all considerations of semantics. Performative utterances operate according to the same logic as written marks, according to Derrida, which, as signs, carry "a force that breaks with its context . . . the breaking force (*force de rupture*) is not an accidental predicate but the very structure of the written text. . . ." (9) Later on that same page, Derrida links the force of rupture to spacing, or the problem of the interval that iterability introduces. The sign, as iterable, is a differential mark cut off from its putative production or origin. Whether the mark is "cut off" from its origin, as Derrida contends, or loosely tethered to it raises the question of whether the function of the sign is essentially related to the sedimentation of its usages, or essentially free of its historicity.

Derrida's account tends to accentuate the relative autonomy of the structural operation of the sign, identifying the "force" of the performative as a structural feature of any sign that must break with its prior contexts in order to sustain its iterability as a sign. The force of the performative is thus not inherited from prior usage, but issues forth precisely from its break with any and all prior usage. That break, that force of rupture, is the force of the performative, beyond all question of truth or meaning. Derrida opposes the structural dimension of language to the semantic and describes an autonomous operation of the structural apparently purified of social residue. In writing that a performative is "repetitive or citational in its structure," (17) he clearly opposes the Austinian account of repeatability as a function of language as social convention. For Derrida, the iterability proper to convention has a structural status that appears separable from any consideration of the social. That "dissemination is irreducible to polysemy" means that

the dissemination of the sign, as a graphematic mark, is not reducible to the sign's capacity to bear multiple meanings; the dissemination takes place at a structural rather than semantic level.

In response to Austin's claim that "infelicity is an ill to which *all* acts are heir which have the general character of ritual or ceremonial, all *conventional* acts," Derrida responds with the following reformulation of the performative (enacting the repetition of the formula with a difference):

Austin, at this juncture, appears to consider solely the conventionality constituting the *circumstance* of the utterance (*énoncé*), its contextual surroundings, and not a certain conventionality intrinsic to what constitutes the speech act (*locution*) itself, all that might be summarized rapidly under the problematical rubric of 'the arbitrary nature of the sign,' which extends, aggravates, and radicalizes the difficulty. 'Ritual' is not a possible occurrence (*éventualité*), but rather, *as* iterability, a structural characteristic of every mark. (15)

If iterability is a structural characteristic of every mark, then there is no mark without its own proper iterability; that is, for a mark to be a mark, it must be repeatable, and have that repeatability as a necessary and constitutive feature of itself. Earlier in this same essay, Derrida suggests that "communicating, in the case of the performative. . . would be tantamount to communicating a force through the impetus (*impulsion*) of a mark." (13) This force is associated with the break from context, the scene in which, through repetition, the formula establishes its structural independence from any of the specific contexts in which it appears. The "force" is not derived from conditions that are outside of language, as Bourdieu suggests, but results from the iterability of the graphematic sign.

Noting that performative effects are linked with a force that is distinct from questions of meaning or truth, Derrida remarks that "the semantic horizon that habitually governs the notion of communication is exceeded or split by the intervention of writing. . . ." He then adds the phrase that we considered briefly above: ". . . by a *dissemination* irreducible to *polysemy*." (20) In this formulation, the semantic and the structural appear to work always and only at cross-purposes. How is



this “always and only” to be defended? What guarantees the permanence of this crossed and vexed relation in which the structural exceeds and opposes the semantic, and the semantic is always crossed and defeated by the structural? Is there a structural necessity for that relationship of confounding, a structure that founds this structure or, perhaps, a semantics?

The question seems important if one takes seriously the demand to think through the logic of iterability as a social logic. Approaching the question of the performative from a variety of political scenes—hate speech, burning crosses, pornography, gay self-declaration—compels a reading of the speech act that does more than universalize its operation on the basis of its putatively formal structure. If the break from context that a performative can or, in Derridean terms, *must* perform is something that every “mark” performs by virtue of its graphematic structure, then all marks and utterances are equally afflicted by such failure, and it makes no sense to ask how it is that certain utterances break from prior contexts with more ease than others or why certain utterances come to carry the force to wound that they do, whereas others fail to exercise such force at all. Whereas Bourdieu fails to take account of the way in which a performative can break with existing context and assume new contexts, refiguring the terms of legitimate utterance themselves, Derrida appears to install the break as a structurally necessary feature of every utterance and every codifiable written mark, thus paralyzing the social analysis of forceful utterance. We have yet to arrive at an account of the social iterability of the utterance.

When Austin wrote that all conventional acts are subject to infelicity and “all conventional acts are exposed to failure,” he sought to isolate the conditions of failure, in part, as circumstantial. Derrida, however, argues that there is a conventionality and a risk of failure proper to the speech act itself (15)—a failure that is the equivalent of the arbitrariness of the sign. The sense of convention in Austin, augmented by the terms “ritual” and “ceremonial,” is fully transmuted into linguistic iterability in Derrida. The socially complex notion of ritual, which also appears in Althusser’s definitions of ideology as a “ritual,” is rendered void of all social meaning; its repetitive function is abstracted from its

social operation and established as a inherent structural feature of any and all marks.

Bourdieu, on the other hand, will seek to expand the "ritual" sense of "convention" and exclude any consideration of the temporality or logic of performativity. Indeed, he will contextualize ritual within the social field of the "market" in order more radically to exteriorize the source of linguistic power.

The Austinian "infelicities" to which performatives are liable are thus conceived very differently: performatives fail either because, for Derrida, they must fail as a condition of their iterability or, for Bourdieu, they are not backed by the appropriate expressions of social power. Derrida claims that the failure of the performative is the condition of its possibility, "the very force and law of its emergence."<sup>17</sup> That performative utterances can go wrong, be misapplied or misinvoked, is essential to their "proper" functioning: such instances exemplify a more general citationality that can always go awry, and which is exploited by the "imposture" performed by the mimetic arts. Indeed, all performativity rests on the credible production of "authority" and is, thus, not only a repetition of its own prior instance and, hence, a loss of the originary instance, but its citationality assumes the form of a mimesis without end. The imposture of the performative is thus central to its "legitimate" working: every credible production must be produced according to the norms of legitimacy and, hence, fail to be identical with those norms and remain at a distance from the norm itself. The performance of legitimacy is the credible production of the legitimate, the one that apparently closes the gap which makes it possible.

/ 151

Bourdieu argues that every misfire or misapplication highlights the social conditions by which a performative operates, and gives us a way of articulating those conditions. Bourdieu charges Derrida under the rubric of "literary semiology" with offering an excessively formal interpretation of the performative, and yet Bourdieu amplifies the social dimension of the performative at the expense of its transformability. In this way, paradoxically, Derrida's formulation offers a way to think performativity in relation to transformation, to the break with

prior contexts, with the possibility of inaugurating contexts yet to come.

152, The question of what constitutes the “force” of the performative, however, can be adequately answered by neither formulation, although both views, taken together, gesture toward a theory of the social iterability of the speech act. It makes sense to remember that the “force” of the speech act, as it was articulated by both Toni Morrison and Shoshana Felman, has everything to do with the status of speech as a bodily act. That speech is not the same as writing seems clear, not because the body is present in speech in a way that it is not in writing, but because the oblique relation of the body to speech is itself performed by the utterance, deflected yet carried by the performance itself. To argue that the body is equally absent in speech and writing is true only to the extent that neither speech nor writing makes the body immediately present. But the ways in which the body obliquely appears in speech is, of necessity, different from the way it appears in writing. Although both are bodily acts, it is the mark of the body, as it were, that is read in the written text. Whose body it is can remain permanently unclear. The speech act, however, is performed bodily, and though it does not instate the absolute or immediate presence of the body, the simultaneity of the production and delivery of the expression communicates not merely what is said, but the bearing of the body as the rhetorical instrument of expression. This makes plain the incongruous interrelatedness of body and speech to which Felman refers, the excess in speech that must be read along with, and often against, the propositional content of what is said.

Bourdieu offers a theory of bodily knowingness in his notion of the *habitus*, but he does not relate this discussion of the body to the theory of the performative. The *habitus* refers to those embodied rituals of everydayness by which a given culture produces and sustains belief in its own “obviousness.”<sup>21</sup> In this way, Bourdieu underscores the place of the body, its gestures, its stylistics, its unconscious “knowingness” as the site for the reconstitution of a practical sense without which social reality would not be constituted as such. The practical sense is carried by the body, where the body is not a mere positive datum, but the repository or the site of an incorporated history.<sup>22</sup>

The body is not only the site of such a history, but also the instrument through which the belief in contemporary obviousness is reconstituted. Thus, it operates magically, but in the same sense that Bourdieu reserves for the operation of the performative. Bourdieu invokes the phenomenon of “social magic” to characterize the productive force of performative speech acts, those “officialization strategies” by which those in power use language to produce certain kinds of binding social effects. This same term, however, might just as well apply to the *habitus*, his notion of “the bodily hexis,” and the social effects that this embodied practice produces. Interestingly, the generative or productive domain of the *habitus* is *not* linked to the problem of performativity that Bourdieu elaborates in relation to the problem of intellectualism and linguistic formalism. In these latter contexts, Bourdieu rethinks the meaning of performative speech acts in a direction counter to Austin’s in order to establish the dual and separate workings of social and linguistic elements in constituting what makes certain kinds of speech acts into “social magic,” that is, what gives certain speech acts the efficacious force of authority.

/ 153

To what extent is the *habitus* structured by a kind of performativity, admittedly one that is less explicit and juridical than the examples drawn from the operation of state power, i.e. marriage, declarations, pronouncements of various kinds? Indeed, if we consider that the *habitus* operates according to a performativity, then it would appear that the theoretical distinction between the social and the linguistic is difficult, if not impossible, to sustain. The social life of the body is produced through an interpellation that is at once linguistic and productive. The way in which that interpellative call continues to call, to take form in a bodily stylistics that, in turn, performs its own social magic constitutes the tacit and corporeal operation of performativity.

Interpellations that “hail” a subject into being, that is, social performatives that are ritualized and sedimented through time, are central to the very process of subject-formation as well as the embodied, participatory *habitus*. To be hailed or addressed by a social interpellation is to be constituted discursively and socially at once. This interpellation need not take on an explicit or official form in order to be socially efficacious and formative in the formation of the subject. Considered

in this way, the interpellation as performative establishes the discursive constitution of the subject as inextricably bound to the social constitution of the subject. Although Althusser's own account of interpellation does not suffice to account for the discursive constitution of the subject, it sets the scene for the misappropriation of interpellating performatives that is central to any project of the subversive territorialization and resignification of dominant social orders.

154 / In *Outline of a Theory of Practice*, Bourdieu writes of the relation between "Belief and the Body"<sup>23</sup>: "The body believes in what it plays at: it weeps if it mimes grief. It does not represent what it performs, it does not memorize the past, it *enacts* the past, bringing it back to life." Bourdieu here makes clear that the body does not merely act in accordance with certain regularized or ritualized practices; it *is* this sedimented ritual activity; its action, in this sense, is a kind of incorporated memory.<sup>24</sup> Here the apparent materiality of the body is recast as a kind of practical activity, undeliberate and yet to some degree improvisational. But this bodily *habitus* is generated by the tacit normativity that governs the social game in which the embodied subject acts. In this sense, the body appropriates the rule-like character of the habitus through playing by those rules in the context of a given social field. Its participation in the game is the precondition for a mimesis or, more precisely, a mimetic identification, that acquires the habitus precisely through a practical conformity to its conventions. "The process of acquisition," Bourdieu writes, is "a practical *mimesis* (or mimeticism) which implies an overall relation of identification and has nothing in common with an *imitation* that would presuppose a conscious effort to reproduce a gesture, an utterance or an object explicitly constituted as a model."<sup>25</sup> This acquisition is historical to the extent that the "rules of the game"<sup>26</sup> are, quite literally, *incorporated*, made into a second nature, constituted as a prevailing *doxa*. Neither the subject nor its body forms a representation of this conventional activity, for the body is itself formed in the *hexis*<sup>27</sup> of this mimetic and acquisitive activity. The body is, thus, not a purely subjective phenomenon that houses memories of its participation in the conventional games of the social field; its participatory competence is itself dependent on the incorporation of that cultural memory and its knowingness. In this sense, one can hear

strong echoes of Merleau-Ponty on the sedimented or habituated “knowingness” of the body, indeed, on the indissociability of thought and body: “Thought and expression . . . are simultaneously constituted, when our cultural store is put at the service of this unknown law, as our body suddenly lends itself to some new gesture in the formation of habit.”<sup>28</sup> But one hears as well Althusser’s invocation of Pascal in the explaining of ideology: one kneels in prayer, and only later acquires belief.

To the extent that Bourdieu acknowledges that this *habitus* is formed over time, and that its formation gives rise to a strengthened belief in the “reality” of the social field in which it operates, he understands social conventions as animating the bodies which, in turn, reproduce and ritualize those conventions as practices. In this sense, the *habitus* is formed, but it is also *formative*: it is in this sense that the bodily *habitus* constitutes a tacit form of performativity, a citational chain lived and believed at the level of the body. The *habitus* is not only a site for the reproduction of the belief in the reality of a given social field—a belief by which that field is sustained—but it also generates *dispositions* which “incline” the social subject to act in relative conformity with the ostensibly objective demands of the field.<sup>29</sup>

155

The body, however, is not simply the sedimentation of speech acts by which it has been constituted. If that constitution fails, a resistance meets interpellation at the moment it exerts its demand; then something exceeds the interpellation, and this excess is lived as the outside of intelligibility. This becomes clear in the way the body rhetorically exceeds the speech act it also performs. This excess is what Bourdieu’s account appears to miss or, perhaps, to suppress: the abiding incongruity of the speaking body, the way in which it exceeds its interpellation, and remains uncontained by any of its acts of speech.

For Felman, the body that speaks is a scandal precisely because its speech is not fully governed by intention. No act of speech can fully control or determine the rhetorical effects of the body which speaks. It is scandalous as well because the bodily action of speech is not predictable in any mechanical way. That the speech act is a bodily act does not mean that the body is fully present in its speech. The relationship between speech and the body is that of a chiasmus. Speech is bodily,

but the body exceeds the speech it occasions; and speech remains irreducible to the bodily means of its enunciation.

Bourdieu's view, however, presupposes that the body is formed by the repetition and acculturation of norms, and that this forming is effective. What breaks down in the course of interpellation, opening up the possibility of a derailment from within, remains unaccounted for. Bodies are formed by social norms, but the process of that formation runs its risk. Thus, the situation of constrained contingency that governs the discursive and social formation of the body and its (re)productions remains unacknowledged by Bourdieu. This oversight has consequences for his account of the condition and possibility of discursive agency. By claiming that performative utterances are only effective when they are spoken by those who are (already) in a position of social power to exercise words as deeds, Bourdieu inadvertently forecloses the possibility of an agency that emerges from the margins of power. His main concern, however, is that the formal account of performative force be replaced by a social one; in the process, he  
 156, opposes the putative playfulness of deconstruction with an account of social power that remains structurally committed to the status quo.

In Bourdieu's account of performative speech acts, the subject who utters the performative is positioned on a map of social power in a fairly fixed way, and this performative will or will not work depending on whether the subject who performs the utterance is already authorized to make it work by the position of social power she or he occupies. In other words, a speaker who declares a war or performs a wedding ceremony, and pronounces into being that which he declares to be true, will be able to animate the "social magic" of the performative *to the extent* that the subject is already authorized or, in Bourdieu's terms, *delegated* to perform such binding speech acts.<sup>30</sup> Although Bourdieu is clearly right that not all performatives "work" and that not all speakers can participate in the apparently divine authorization by which the performative works its social magic and compels collective recognition of its authority, he fails to take account of the way in which social positions are themselves constructed through a more tacit operation of performativity. Indeed, not only is the act of "delegation" a performative, that is, a naming which is at once the action of entitlement,

but authorization more generally is to a strong degree a matter of being addressed or interpellated by prevailing forms of social power. Moreover, this tacit and performative operation of authorization and entitlement is not always initiated by a subject or by a representative of a state apparatus. For example, the racialization of the subject or its gendering or, indeed, its social abjection more generally is performatively induced from various and diffuse quarters that do not always operate as “official” discourse.

What happens in linguistic practices reflects or mirrors what happens in social orders conceived as external to discourse itself. Hence, in Bourdieu’s effort to elaborate Saussure’s paradox of a “social heterogeneity inherent in language,” he construes a mimetic relation between the linguistic and the social, rehabilitating the base/superstructure model whereby the linguistic becomes epiphenomenal:

the social uses of language owe their specifically social value to the fact that they tend to be organized in systems of difference . . . which reproduce . . . the system of social difference. . . . To speak is to appropriate one or another of the expressive styles already constituted in and through usage and objectively marked by their position in a hierarchy of styles which expresses the hierarchy of corresponding social groups.(54)

/ 157

Referring to the “generative capacities of language [to] produce statements that are *formally* impeccable but semantically empty,” he proceeds to claim that “rituals are the limiting case of situations of *imposition* in which, through the exercise of a technical competence which may be very imperfect, a social competence is exercised—namely, that of the legitimate speaker, authorized to speak, and to speak with authority.” (41) Of interest here is the equivalence posited between “being authorized to speak” and “speaking with authority,” for it is clearly possible to speak with authority *without* being authorized to speak.

Indeed, I would argue that it is precisely the *expropriability* of the dominant, “authorized” discourse that constitutes one potential site of its subversive resignification. What happens, for instance, when those who have been denied the social power to claim “freedom” or “democ-



racy" appropriate those terms from the dominant discourse and rework or resignify those highly cathected terms to rally a political movement?<sup>31</sup> If the performative must compel collective recognition in order to work, must it compel only those kinds of recognition that are *already* institutionalized, or can it also compel a critical perspective on existing institutions? What is the performative power of claiming an entitlement to those terms—"justice," "democracy"—that have been articulated to exclude the ones who now claim that entitlement? What is the performative power of calling for freedom or the end to racism precisely when the one or the "we" who calls has been radically *disenfranchised* from making such a call, when the "we" who makes the call reterritorializes the term from its operation within dominant discourse precisely in order to counter the effects of that group's marginalization? Or, equally important, what is the performative power of appropriating the very terms by which one has been abused in order to deplete the term of its degradation or to derive an affirmation from that degradation, rallying under the sign of "queer" or revaluing affirmatively the category of "black" or of "women"?

158,

The question here is whether the improper use of the performative can succeed in producing the effect of authority where there is no recourse to a prior authorization; indeed, whether the misappropriation or expropriation of the performative might not be the very occasion for the exposure of prevailing forms of authority and the exclusions by which they proceed.

If one argues that language itself can only act to the extent that it is "backed" by existing social power, then one needs to supply a theory of how it is that social power "backs" language in this way. If language only represents the larger, institutional conditions that give it its force, then what is that relationship of "representation" that accounts for institutions being represented in language? Is the mimetic relationship ascribed to language and the prior institutions of social power not itself a relationship of signification, that is, how language comes to signify social power? It seems that such a relationship can only be explained through a further theory of language and signification.

Performatives do not merely reflect prior social conditions, but produce a set of social effects, and though they are not always the

effects of “official” discourse, they nevertheless work their social power not only to regulate bodies, but to form them as well. Indeed, the efforts of performative discourse exceed and confound the authorizing contexts from which they emerge. Performatives cannot always be retethered to their moment of utterance, but they carry the mnemonic trace of the body in the force that they exercise. One need only consider the way in which the history of having been called an injurious name is embodied, how the words enter the limbs, craft the gesture, bend the spine. One need only consider how racial or gendered slurs live and thrive in and as the flesh of the addressee, and how these slurs accumulate over time, dissimulating their history, taking on the semblance of the natural, configuring and restricting the *doxa* that counts as “reality.” In such bodily productions resides the sedimented history of the performative, the ways in which sedimented usage comes to compose, without determining, the cultural sense of the body, and how the body comes to disorient that cultural sense in the moment of expropriating the discursive means of its own production. The appropriation of such norms to oppose their historically sedimented effect constitutes the insurrectionary moment of that history, the moment that founds a future through a break with that past. / 159

#### THE TACIT PERFORMATIVITY OF POWER

The performative needs to be rethought not only as an act that an official language-user wields in order to implement already authorized effects, but precisely as social ritual, as one of the very “modalities of practices [that] are powerful and hard to resist precisely because they are silent and insidious, insistent and insinuating.” When we say that an insult strikes like a blow, we imply that our bodies are injured by such speech. And they surely are, but not in the same way as a purely physical injury takes place. Just as physical injury implicates the psyche, so psychic injury effects the bodily *doxa*, that lived and corporeally registered set of beliefs that constitute social reality. The “constructive” power of the tacit performative is precisely its ability to establish a practical sense for the body, not only a sense of what the body is, but how it can or cannot negotiate space, its “location” in terms of prevail-

ing cultural coordinates. The performative is not a singular act used by an already established subject, but one of the powerful and insidious ways in which subjects are called into social being from diffuse social quarters, inaugurated into sociality by a variety of diffuse and powerful interpellations. In this sense the social performative is a crucial part not only of subject *formation*, but of the ongoing political contestation and reformulation of the subject as well. The performative is not only a ritual practice: it is one of the influential rituals by which subjects are formed and reformulated.

This point seems to me to be a crucial one, and raises again the possibility of a speech act as an insurrectionary act. The argument that a speech act exercises authority to the extent that it is *already* authorized suggests that the authorizing contexts for such acts are already in place, and that speech acts do not work to transform the contexts by which they are or are not authorized. If hate speech constitutes the kind of act that seeks to silence the one to whom it is addressed, but which might revive within the vocabulary of the silenced as its unexpected rejoinder, then the response to hate speech constitutes the “de-officialization” of the performative, its expropriation for non-ordinary means. Within the political sphere, performativity can work in precisely such counter-hegemonic ways. That moment in which a speech act without prior authorization nevertheless assumes authorization in the course of its performance may anticipate and instate altered contexts for its future reception.<sup>32</sup>

With respect to the political discourse of modernity, it is possible to say that its basic terms are all tainted, and that to use such terms is to reinvoke the contexts of oppression in which they were previously used. Paul Gilroy points out, for instance, that terms such as universality have been premised on the exclusion of women, of people of color, that they are wrought along class lines and with strong colonial interests. But he adds, crucially, that the struggles against those very exclusions end up *reappropriating* those very terms from modernity in order to configure a different future. A term like “freedom” may come to signify what it never signified before, may come to embrace interests and subjects who have been excluded from its jurisdiction; “justice” may also come to embrace precisely what could not be contained

under its description. "Equality" has certainly turned out to be a term with a kind of reach that is difficult, if not impossible, to have predicted on the basis of its prior articulations.

Such reappropriations illustrate the vulnerability of these sullied terms to an unexpected innocence; such terms are not property; they assume a life and a purpose for which they were never intended. They are not to be seen as merely tainted goods, too bound up with the history of oppression, but neither are they to be regarded as having a pure meaning that might be distilled from their various usages in political contexts. The task, it seems, is to compel the terms of modernity to embrace those they have traditionally excluded, and to know that such an embrace cannot be easy; it would wrack and unsettle the polity that makes such an embrace. This is not a simple assimilation and accommodation of what has been excluded into existing terms, but, rather, the admission of a sense of difference and futurity into modernity that establishes for that time an unknown future, one that can only produce anxiety in those who seek to patrol its conventional boundaries. If there can be a modernity without foundationalism (and perhaps this is what is meant by the postmodern), then it will be one in which the key terms of its operation are not fully secured in advance, one that assumes a futural form for politics that cannot be fully anticipated: and this will be a politics of both hope and anxiety, what Foucault termed "a politics of discomfort."

/ 161

I would agree with Bourdieu's critique of some deconstructive positions that argue that the speech act, by virtue of its internal powers, breaks with every context from which it emerges. That is simply not the case, and it is clear to me, especially in the example of hate speech, that contexts inhere in certain speech acts in ways that are very difficult to shake. On the other hand, I would insist that the speech act, as a rite of institution, is one whose contexts are never fully determined in advance, and that the possibility for the speech act to take on a non-ordinary meaning, to function in contexts where it has not belonged, is precisely the political promise of the performative, one that positions the performative at the center of a politics of hegemony, one that offers an unanticipated political future for deconstructive thinking.

The opening up of unknown contexts, however, is clearly a source

of anxiety for some. The desire not to have an open future can be strong. In political calculations, it is important not to underestimate the force of the desire to foreclose futurity. This is one reason that asking certain questions is considered dangerous, and why we live in a time in which intellectual work is demeaned in public life, and anti-intellectualism marks a substantial part of the climate within the academy. Imagine the situation that a student of mine reports, that of reading a book and thinking, I cannot ask the questions that are posed here because to ask them is to introduce doubt into my political convictions, and to introduce doubt into my political convictions could lead to the dissolution of those convictions. At such a moment, the fear of thinking, indeed, the fear of the question, becomes a moralized defense of politics, and the work of intellectual life and the work of politics are sundered from one another. Politics becomes that which requires a certain anti-intellectualism. To remain unwilling to rethink one's politics on the basis of questions posed is to opt for a dogmatic stand at the cost of both life and thought.

162,      Such dogmatism appears as well in the effort to circumscribe speech that injures, excites, threatens, and offends. Whether it is the censorship of particular kinds of representation or the circumscription of the domain of public discourse itself, the effort to tighten the reins on speech undercuts those political impulses to exploit speech itself for its insurrectionary effects. The intellectual opposition to questions that destabilize a sense of reality seems a mundane academic case in point.

To question a term, a term like "the subject" or "universality," is to ask how it plays, what investments it bears, what aims it achieves, what alterations it undergoes. The changeable life of that term does not preclude the possibility of its use. If a term becomes questionable, does that mean it cannot be used any longer, and that we can only use terms that we *already know how to master*? Why is it that posing a question about a term is considered the same as effecting a prohibition against its use? Why is it that we sometimes do feel that if a term is dislodged from its prior and known contexts, that we will not be able to live, to survive, to use language, to speak for ourselves? What kind of guarantee does this effort to refer the speech act back to its originating con-

text exercise, and what sort of terror does it forestall? Is it that in the ordinary mode, terms are assumed, terms like “the subject” and “universality,” and the sense in which they “must” be assumed is a *moral* one, taking the form of an imperative, and like some moral interdictions, a defense against what terrifies us most? Are we not paralyzed by a fear of the unknown future of words that keeps us from interrogating the terms that we need to live, and of taking the risk of living the terms that we keep in question?

We began by noting that hate speech calls into question linguistic survival, that being called a name can be the site of injury, and conclude by noting that this name-calling may be the initiating moment of a counter-mobilization. The name one is called both subordinates and enables, producing a scene of agency from ambivalence, a set of effects that exceed the animating intentions of the call. To take up the name that one is called is no simple submission to prior authority, for the name is already unmoored from prior context, and entered into the labor of self-definition. The word that wounds becomes an instrument of resistance in the redeployment that destroys the prior territory of its operation. Such a redeployment means speaking words without prior authorization and putting into risk the security of linguistic life, the sense of one’s place in language, that one’s words do as one says. That risk, however, has already arrived with injurious language as it calls into question the linguistic survival of the one addressed. Insurrectionary speech becomes the necessary response to injurious language, a risk taken in response to being put at risk, a repetition in language that forces change. / 163



## INTRODUCTION

1. Louis Althusser, "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy*, tr. Ben Brewster, (New York and London: Monthly Review Press, 1971), pp. 170-86.

2. J. L. Austin, *How to Do Things With Words*, (Cambridge, Mass.: Harvard University Press, 1962), p. 52.

3. Whereas Pierre Bourdieu emphasizes the ritual dimension of the conventions that support the speech act in Austin, Derrida substitutes the term "iterability" for ritual, thus establishing a structural account of repetition in the place of a more semantically compounded sense of social ritual. The final chapter of this book will attempt to negotiate between these posi-



tions and offer an account of the social power of the speech act that takes into account its specific social iterability and the social temporality. See Pierre Bourdieu, *Language and Symbolic Power*, (Cambridge, Mass.: Harvard University Press, 1991), Part II, pp. 105–62. See Jacques Derrida, “Signature Event Context” in *Limited Inc*, tr. Samuel Weber and Jeffrey Mehlman, ed. Gerald Graff, (Evanston: Northwestern University Press, 1988), pp. 1–23.

4. Matsuda writes of the “deadly violence that accompanies the persistent verbal degradation of those subordinated. . .” and later remarks that “Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.” *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, eds. Mari J. Matsuda, Charles R. Lawrence, III, Richard Delgado, and Kimberlé Williams Crenshaw (Boulder: Westview Press, 1993), p. 23.

5. For a fuller discussion of this point, see my *The Psychic Life of Power: Theories in Subjection*, (Stanford: Stanford University Press, 1997).

6. Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World*, (New York: Oxford University Press, 1985), pp. 2–27.

166, 7. Shoshana Felman, *The Literary Speech Act: Don Juan with J. L. Austin, or Seduction in Two Languages*, tr. Catherine Porter, (Ithaca: Cornell University Press, 1983). This text is originally published as *Le Scandale du corps parlant* (Éditions du Seuil, 1980).

8. Shoshana Felman, *The Literary Speech Act*, p. 94. Felman provides a marvelous reading of Austin’s humor and irony, showing how the reiterated problem of performative “misfire” reveals how the performative is always beset by a failure it cannot explain. The performative performs in ways that no convention fully governs, and which no conscious intention can fully determine. This unconscious dimension of every act surfaces in Austin’s text as the tragi-comedy of performative misfire. At one point, she quotes Lacan: “Failure (misfire) can be defined as what is sexual in every human act.” (110)

9. For a thorough cultural analysis of rap music that complicates its relation to violence, see Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America*, (Hanover, NH: New England Universities Press, 1994). For a fine account of how the censorship of rap is an effort to regulate and destroy cultural memory, see George Lipsitz, “Censorship of Commercial Culture: Silencing Social Memory and Suppressing Social Theory,” on file with the author. This piece was presented at the Getty Center Conference on “Censorship and Silencing” in Los Angeles, December, 1995.

10. Gottlob Frege argued for the distinction between the use and mention of certain terms, suggesting that one might be able to refer to a term, that

is, mention it, without precisely using it. This distinction does not quite hold with hate speech, for the examples in which it is “mentioned” continue to be a kind of use. See “On Sense and Reference,” in *Translations from the Philosophical Writings of Gottlob Frege*, eds., Peter Geach and Max Black, tr. Max Black, (Oxford: Oxford University Press, 1952).

11. See Catharine MacKinnon, *Only Words*, (Cambridge, Mass.: Harvard University Press, 1993) and Rae Langton, “Speech Acts and Unspeakable Acts,” *Philosophy and Public Affairs*, vol. 22: no. 4 (Fall, 1993), pp. 293–330.

12. Catharine MacKinnon, *Only Words*, p. 21.

13. See Matsuda’s introduction to *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment*, eds. Mari Matsuda, Richard Delgado, Charles Lawrence III, and Kimberlè Crenshaw, (Boulder: Westview Press, 1993).

14. See the arguments put forth by Patricia Williams on the constructivist power of racist speech acts in *The Alchemy of Race and Rights*, (Cambridge, Mass.: Harvard University Press, 1991), p. 236.

15. For a thorough discussion of “fighting words” and an interesting argument on the First Amendment, see Kent Greenawalt, *Fighting Words: Individual, Communities, and Liberties of Speech*, (Princeton: Princeton University Press, 1995).

/ 167

16. Op-Ed, *New York Times*, June 2, 1995.

17. See George Lipsitz, “Censorship of Commercial Culture. . .”

18. For a fuller account of Althusser’s theory of interpellation, see my “Conscience Doth Make Subjects of Us All” which appeared first in *Yale French Studies*, #88, (Winter, 1995), pp. 6–26 and reprinted in my *The Psychic Life of Power*, forthcoming.

19. For an excellent overview of current debates on the status of linguistic convention, see *Rules and Conventions: Literature, Philosophy, Social Theory*, ed. Mette Hjort, (Baltimore: Johns Hopkins University Press, 1992). In particular, see “The Temporality of Convention: Convention Theory and Romanticism” by Claudia Brodsky Lacour in that volume. Central to nearly every post-Austinian analytic discussion of convention is David K. Lewis’ *Convention: A Philosophical Study*, (Cambridge, Mass.: Harvard University Press, 1986). Stanley Cavell makes a convincing case for extending Austin’s view of language in a Wittgensteinian direction, implicitly expanding the notion of “convention” in a broader conception of ordinary language. He also defends Austin against those who would oppose Austin’s view of language to literary language. See Cavell, “What Did Derrida Want of Austin?” in *Philosophical Passages: The Bucknell Lectures in Literary Theory* (Cambridge, UK: Basil Black-

well, 1995), pp. 42–65. See as well Cavell's similar discussion in "Counter-Philosophy and the Pawn of Voice" in *A Pitch of Philosophy: Autobiographical Exercises* (Cambridge, Mass.: Harvard University Press, 1994) pp. 53–128.

20. This feature of Austinian iteration leads Shoshana Felman to compare Austin's work with that of Lacan. See Felman, *The Literary Speech Act*, Chapter IV. Also on this very indifference of linguistic convention to the "I" that it enables, see Felman's discussion of Emile Benveniste, pp. 13–22.

21. For a similar view that emphasizes "the imperfect character of verbal statements which renders them answerable and human communication possible," see J.G.A. Pocock, "Verbalizing a Political Act: Towards a Politics of Speech" in Michael J. Shapiro, *Language and Politics*, (New York: New York University Press, 1984), pp. 25–43.

22. Michel Foucault, "Politics and the Study of Discourse," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller, (Chicago: University of Chicago Press, 1991), p. 71

23. Of course, Habermas and others will extrapolate from this fundamentally Heideggerian point to make the claim that we participate in a universal community of sorts by virtue of what is commonly presupposed in every speech act, but this is I think quite a stretch from our current consideration. A more limited and plausible claim is that social context comes to inhere in language. For an excellent essay on how social contexts come to inhere in the literal use of language and the speech act, see William F. Hanks, "Notes on Semantics in Linguistic Practice," in *Bourdieu: Critical Perspectives*, eds. Craig Calhoun, Edward LiPuma, and Moishe Postone, (Chicago: University of Chicago Press, 1993), pp. 139–54.

24. The work of Stanley Cavell on J.L. Austin appears to be an important exception to this rule. Cavell argues that the attempt to attribute a determining intention to the speech act misses Austin's point that intentions are not as important as the conventions that give an illocutionary act its binding power.

For a fuller elaboration of this view, as well as a keen set of suggestions on how to read Austin on the question of seriousness, see Stanley Cavell, *A Pitch of Philosophy*, cited above.

25. Heidegger writes that historicity is not only the immanent operation of history, but its essential operation as well, and cautions against a reduction of historicity to the summation of moments: "Dasein does not exist as the sum of the momentary actualities of Experiences which come along successively and disappear. . . . Dasein does not fill up a track or stretch 'of life' . . . with its momentary actualities. It stretches *itself* along in such a way that its own Being is constituted in advance as a stretching-along," Martin Heidegger, *Being and Time*, ed. John Macquarrie and Edward Robinson, (New York: Harper &

Row, 1962), p. 426. Hans-Georg Gadamer emphasizes that this historicity is not bound to the moment in which it appears to inhere. Revising Heidegger, he writes, "the historical movement of human life consists in the fact that it is never utterly bound to any one standpoint, and hence can never have a truly closed horizon," *Truth and Method* (New York: Seabury Press, 1991), p. 235.

26. Cathy Caruth writes that "trauma is not experienced as a mere repression or defense, but as a temporal delay that carries the individual beyond the shock of the first moment. The trauma is the repeated suffering of the event," "Psychoanalysis, Culture, and Trauma," *American Imago*, 48.1 (Spring, 1991), p. 6. See also Shoshana Felman and Dori Laub, M.D., *Testimony: Crisis of Witnessing in Literature, Psychoanalysis, and History*, (New York: Routledge, 1992).

## CHAPTER 1

1. I greatly appreciate the thoughtful readings given to this chapter 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.

/169

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," 96 *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 Kimberlé Williams Crenshaw (Boulder: Westview Press, 1993), p. 65.

6. I thank Robert Post for this last analogy, suggested to me in conversation.

7. Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of

'Bowers v. Hardwick,' 79 *Virginia Law Review*, 1805–1832 (Oct. 1993).

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 non-whites 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:

170 / . . . 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 reason, 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-matter" 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 "context" 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 proscribability: "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 through 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 status 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.

172,

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, constructed by the court as “anti-government speech,” is taken as *unprotected* 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 repellant, 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*.

/173

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.

## CHAPTER 2

1. Catharine MacKinnon writes in *Only Words* that “group defamation is the verbal form inequality takes.” (99)



2. First Amendment jurisprudence has always allowed for the view that some speech is not protected, and has included in that category libel, threats, fraudulent advertising. Mari Matsuda writes, "there is much speech that is close to action. Conspiratorial speech, inciting speech, fraudulent speech, obscene phone calls, and defamatory speech. . ." (32).

3. Mari Matsuda, *Words that Wound*, 35-40.

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 that they convey, they would not evidence or actualize the discrimination that they do." Catharine MacKinnon, *Only Words*, (14); or "crossburning is nothing but an act, yet it is pure expression, doing the harm it does solely through the message it conveys." (33).

5. One of 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.

6. See Henry Louis Gates, Jr., "An Album is Judged Obscene; Rap, Slick, Violent, Nasty and, Maybe Helpful." *New York Times*, June 17, 1990, p. 1. 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.

7. For an excellent discussion of the "speech act component" of lesbian and gay self-identification, and its dependence on First Amendment protection, see William B. Rubenstein, "The 'Hate Speech' Debate from a Lesbian/Gay Perspective," in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*, eds. Henry Louis Gates, Jr. et al, (New York: New York University Press, 1994), pp. 280-99.

8. Michel Foucault, *Power/Knowledge*, ed. Colin Gordon. "Two Lectures."

9. 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 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 organize and delimit it and extends itself beyond them. . . ." (96)

10. 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*, vol. 47, no. 6 (July, 1995) pp. 1249–1281.

11. See J.L. Austin, *How to Do Things With Words* on the "masquerading" forms of the performative (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.

12. It is important to note that Austin understood all performatives to be subject to misuse and misfire and to a relative impurity; this "failure" of felicity is generalized into a condition of performativity itself for Jacques Derrida and Shoshana Felman.

13. Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs*, vol. 22: no. 4, (Fall, 1993), pp. 293–330.

14. Jürgen Habermas, *The Philosophical Discourse of Modernity*, tr. Frederick Lawrence, (Cambridge, Mass.: MIT Press, 1987), p. 198.

/175

15. Etienne Balibar, "Racism as Universalism," in *Masses, Classes, and Ideas*, trans. James Swenson, (New York: Routledge, 1994).

16. See the comparable views of ideals and idealization in Drucilla Cornell, *The Imaginary Domain* (New York: Routledge, 1995) and Owen Fiss, *The Irony of Free Speech*, (Cambridge, Mass.: Harvard University Press, 1996).

17. On the paradoxical efforts to invoke universal rights by French feminists both included and excluded from its domain, see Joan W. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of "Man"*, Cambridge: Harvard University Press, forthcoming.

18. For an effort to retrieve freedom from conservative political discourse, see the introductory chapter of Wendy Brown's *States of Injury*, (Princeton, N.J.: Princeton University Press, 1995).

19. 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 super-ego is understood to be, at least in part, wrought from the sexualization of a prohibition and only secondarily becomes the prohibition of sexuality.

20. This is, of course, not the case in those instances in which hate speech regulations are implemented within universities or other such institutions that retain ultimate authority over their jurisdiction.

### CHAPTER 3

176 / 1. The Pentagon announced its “New Policy Guidelines on Homosexuals in the Military” on July 19, 1993, which included the following “discharge” policy: “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.” After discussions in Congress on the policy, the Department of Defense on December 22, 1993 issued a set of new regulations seeking to clarify problems concerning implementation of the policy. One of the key issues to be clarified was whether a “statement” to the effect that one is a homosexual can be taken not only as “conduct” but as sufficient grounds for dismissal from the military. The clarification offered by the Department of Defense made clear that “statements that can be a basis for discharge are those which demonstrate a propensity or intent to engage in acts.” Over and against those who claim that statements of the desire or intentions of an individual are not the same as conduct, the Department of Defense insisted that what they now have is “a conduct-based policy,” on that is based on “the likelihood that the person would act.” They explain, “a statement creates a rebuttable presumption a person will engage in acts, but the service member then has an opportunity to rebut. . . .”

Here, the “statement” that one is a homosexual presents the occasion to rebut the presumption, but later in this same presentation, the spokesperson from the Department of Defense appears to suggest the opposite: “Associational activities, like going to a gay parade or reading a magazine—in and of themselves—are not credible information [bearing on the conduct of the individual in question], and only rise to that level if they are such that a reasonable person would believe that *the conduct was intended to make a statement, intended to tell other people that the person is a homosexual*” (my emphasis). Here the question appears no longer to be whether the statement presents a rebuttable presumption that the person will engage in conduct, but whether conduct, of an associational kind, is sufficient to establish that a statement is being made. Whether the basis for dismissal is statement or conduct remains effectively open (July 20, 1993; Dec. 22, 1993, *New York Times*).

In addition to the former and current Department of Defense policy, Congress entered the fray by introducing legislation of its own: The National Defense Authorization Act for Fiscal Year 1994. This binding statute emphasizes the problem of homosexual “propensity,” and states that persons who demonstrate a propensity to act homosexually are deemed incompatible with military service. The statute also shows leniency for those who commit such acts on an occasion, but who repent or claim it was an accident. It also reintroduces the obligation of military officers “to ask” servicemen about their orientation. Whereas it does not accept statements regarding one’s own homosexuality as tantamount to homosexual acts, it does regard such statements as *evidence of a propensity* that poses a rebuttable presumption of homosexuality.

Recent rulings on the new policy have split on the question of whether First Amendment rights are denied by the policy (suits concerning the “old policy” continue to be litigated as well, with mixed results). For a thorough and incisive review of this litigation, one on which I heavily rely in this discussion, see Janet Halley, “The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy” in *GLQ*, Winter, 1996.

2. Giorgio Agamben, “States of Emergency,” lecture at the University of California at Berkeley, November, 1995.

3. Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, (London: Verso, 1986). /177

4. The following texts by Sigmund Freud are cited in this chapter: “On the Mechanism of Paranoia,” (1911) and “On Narcissism: An Introduction” (1914), from *General Psychological Theory: Papers on Metapsychology*, (New York: MacMillan, 1963) pp. 29–48 and pp. 56–82, respectively; *Civilization and its Discontents*, tr. James Strachey, (New York: Norton, 1961; and *Totem and Taboo*, tr. James Strachey, (New York: Norton, 1950).

5. By allegory, I mean a kind of narrative in which, most generally, one speaks otherwise than one appears to speak, where one offers a sequential narrative ordering for something which cannot be described sequentially, and where the apparent referent of the allegory becomes the very action of elaboration that allegorical narrative performs.

6. For an interesting and relevant account of allegory, see Craig Owens, *Beyond Recognition: Representation, Power, and Culture*, ed. Scott Bryson, (Berkeley: University of California Press, 1992).

7. “The Pentagon’s New Policy Guidelines on Homosexuals in the Military,” *The New York Times*, July 20, 1993, p. A14.

8. Here one can see that Foucault’s critique of Freud in *The History of Sexuality*, Volume I is partially wrong.

9. Sigmund Freud, "On Narcissism: An Introduction," *Standard Edition* Vol. XIV, (London: Hogarth Press, 1957), p. 96.

10. This would be a way to both confirm and deny the recent suggestions by Leo Bersani in *Homos* (Cambridge, Mass: Harvard University Press, 1995) that asserting a stable identity is a precondition of gay activism and that the intellectual skepticism directed at the success of that speech act are complicitous with a desexualization of gayness. To come out is still to perform a linguistic act and, hence, not necessarily to have sex or be sexual, except in that discursive way that may constitute a further instance of the linguistic sublimation of sex that Bersani laments.

#### CHAPTER 4

1. For a defense of MacKinnon along these lines, see Francis Ferguson, "Pornography: The Theory," in *Critical Inquiry*, summer, 1995.

2. For a strong defense of First Amendment "values" over and against hate speech regulation, see Robert Post, "Racist Speech, Democracy, and the First Amendment," in *Speaking Sex, Speaking Race*.

178 / 3. I am indebted on this point to insights offered in Richard Burt's wide-ranging work on censorship: "Uncensoring in Detail," presented at the Getty Center in December, 1995, as well as *Licensed by Authority: Ben Johnson and the Discourses of Censorship*, (Ithaca: Cornell University Press, 1993), and *The Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere*, ed. Richard Burt, (Minneapolis: University of Minnesota Press, 1994).

4. Ellen Burt has made this argument in "An Immediate Taste for Truth": Censoring History in Baudelaire's 'Les Bijoux'," in *Censorship and Silencing*, ed. Robert Post, (New York: Oxford University Press), forthcoming.

5. I take up this issue briefly in "The Force of Fantasy: Mapplethorpe, Feminism, and Discursive Excess," in *differences*, 2:2, (Fall, 1990).

6. For a thorough and insightful discussion of the statute and the "propensity" clause, see Janet E. Halley, "Achieving Military Discharge: the 1993 Revisions to Military Anti-Gay Policy" *GLQ: A Journal of Lesbian and Gay Studies*, 1996.

7. See Robert Post's "Racist Speech. . ." for a fuller discussion of public discourse.

8. This is a distinction that Michel Foucault offers in the second volume of *The History of Sexuality* in his effort to counter disciplinary form of power to sovereign power. He distinguishes between power conceived as "repressive," and power, as "productive."

9. This may seem like a convoluted formulation, but consider that political theorists from Aristotle to Arendt have made the claim that it is as *linguistic* that humans become political kinds of beings. My reflections constitute an extension of such a claim. Arendt cites Aristotle's definition of "man as a *zoon logon ekehon*," one for whom exists the possibility of ". . . a way of life in which speech and only speech made sense . . ." in *The Human Condition* (Chicago: University of Chicago Press, 1985) p. 27. See pages 25–27 for Arendt's interpretation of Aristotle on the political animal as a speaking being.

10. A further elaboration of this view can be found in Dina Al-Kassim's dissertation on "ranting" written for the Department of Comparative Literature at Berkeley: "On Pain of Speech: Fantasies of the First Order and the Literary Rant."

11. Charles Taylor, "To Follow a Rule. . .," in *Bourdieu: Critical Perspectives*, eds. Craig Calhoun, Edward LiPuma, and Moishe Postone, (Chicago: University of Chicago Press, 1993), p. 51.

12. See Saidiya Hartman, *Scenes of Subjection*, (New York: Oxford University Press), forthcoming.

13. Vicki Schultz, "Women 'Before the Law'" in *Feminists Theorize the Political*, eds. Butler and Scott, (New York: Routledge, 1993).

14. Wendy Brown, "Freedom's Silences" in *Censorship and Silencing*, ed. Robert Post (New York: Oxford University Press), forthcoming.

/179

15. On July 20, 1995, the Board of Regents of the University of California passed two resolutions, SP-1 and SP-2, which ban the use of "race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study" as well as in employment and contracting by the University.

In Section 4 of this document, the Regents make clear that they are willing to make exceptions for some individuals who have heroically overcome adversity: "consideration shall be given to individuals who, despite having suffered disadvantage economically or in terms of their social environment (such as abusive or otherwise dysfunctional home or a neighborhood of unwholesome or antisocial influences), but have nonetheless demonstrated sufficient character and determination in overcoming obstacles to warrant confidence. . . ."

16. Wendy Brown, "Freedom's Silences."

17. Lacan's word is "forclusion" and is introduced as the French translation of Freud's term, "Verwerfung." "Verwerfung" in Freud is generally translated into English as repudiation or rejection. In the *Vocabulaire de la psychanalyse*, Jean Laplanche and J.-B Pontalis refer to foreclosure as a primordial rejection

of that which remains outside of the symbolic universe of the subject. This definition makes use of a specific sense of the “outside,” however, one that is close to the notion of the “constitutive outside” as used by Jacques Derrida. This “outside” is the defining limit or exteriority to a given symbolic universe, one which, were it imported into that universe, would destroy its integrity and coherence. In other words, what is set outside or repudiated from the symbolic universe in question is precisely what binds that universe together *through its exclusion*.

Laplanche and Pontalis argue that what is foreclosed is to be distinguished from what is repressed (*refoulement* in French, and *Verdrängung* in German). What is foreclosed is not integrated into the unconscious of the subject; it cannot be recalled or remembered and brought into consciousness. It does not belong to the realm of neurosis, but to that of psychosis; indeed, its entry into the symbolic universe threatens psychosis, which is to say that its exclusion guarantees symbolic coherence. Freud makes reference to “*Verwerfung*” in relation to the fear of castration in both “The Three Essays on the Theory of Sexuality” (*SE*, VII, 227) and “The History of an Infantile Neurosis” (*SE*, XVII, 85). Whereas Freud occasionally attempts to define a form of repression that corresponds to psychosis, Lacan introduces “foreclosure” to specify that form of repression.

180,

18. Here I take my cue from Derrida’s influential early essay, “Structure, Sign, and Play in the Discourse of the Human Sciences,” in *Writing and Difference*, tr. Alan Bass, (Chicago: University of Chicago Press, 1978), pp. 278–294.

19. Pierre Bourdieu, *Language and Symbolic Power*, ed. John B. Thompson, tr. Gino Raymond and Matthew Adamson, (Cambridge, Mass: Harvard University Press), 1991, pp. 137–62.

20. See Gayatri Chakravorty Spivak, “In a Word. Interview” with Ellen Rooney, in *differences: A Journal of Feminist Cultural Studies*, vol. 1: no.2, (summer, 1989), pp. 124–56.

21. Bourdieu’s notion of the *habitus* might well be read as a reformulation of Althusser’s notion of ideology. Whereas Althusser will write that ideology constitutes the “obviousness” of the subject, but that this obviousness is the effect of a *dispositif*. That same term reemerges in Bourdieu to describe the way in which a *habitus* generates certain beliefs. Dispositions are generative and transposable. Note in Althusser’s “Ideology and Ideological State Apparatuses” the inception of this latter reappropriation:

“An individual believes in God, or Duty, or Justice, etc. This belief derives (for everyone, i.e. for all those who live in an ideological representation of ideology, which reduces ideology to ideas endowed by

definition with a spiritual existence) from the ideas of the individual concerned, i.e. from him as a subject with a consciousness which contains the ideas of his belief. In this way, i.e. by means of the absolutely ideological 'conceptual' device (*dispositif*) thus set up (a subject endowed with a consciousness in which he freely forms or freely recognizes ideas in which he believes), the (material) attitude of the subject concerned naturally follows." (167)

22. See editor's introduction, *Language and Symbolic Action*, p. 13.

23. *The Logic of Practice*, p. 73.

24. Bourdieu argues in a vein highly reminiscent of Henri Bergson's argument in *Matter and Memory* that the body acts as a repository for the entirety of its history. Bourdieu writes, "the *habitus*—embodied history, internalized as a second nature and so forgotten as history—is the active presence of the whole past of which it is the product." (56). The metaphors of the body as "depository" or "repository" recalls Bergson (and Plato's discussion of the *chora*, that famous receptacle in the *Timaeus*). But the presumption that the entirety of memory is preserved or "acted" in the present characterizes the temporal dimension of the body's materiality for Bergson: "... memory itself, with the totality of our past, is continually pressing forward, so as to insert the largest possible part of itself into our present action." (168). Earlier in *Matter and Memory*, he writes, "Habit rather than memory, it acts our past experience but does not call up its image" (151).

'181

25. *The Logic of Practice*, p. 73.

26. *Ibid.*, p. 66.

27. *Ibid.*, p. 69.

28. Maurice, Merleau-Ponty, *The Phenomenology of Perception* tr. Colin Smith, (London: Routledge & Kegan Paul, 1962), p. 183.

29. For an interesting and thoughtful consideration of the paradoxes produced by Bourdieu's theory of "inclination" and "motivation," see Theodore Richard Schatzki, "Overdue Analysis of Bourdieu's Theory of Practice," *Inquiry*, 30, (March: 1987), pp. 113–135.

30. Bourdieu also argues that this magic is to be understood as the power to produce collective recognition of the authority of the performative, and that the performative cannot succeed without this collective recognition: "One should never forget that language, by virtue of the infinite generative but also originary capacity—in the Kantian sense—which it derives from its power to produce existence by producing the collectively recognized, and thus realized, representation of existence, is no doubt the principal support of the dream of absolute power." *Language and Symbolic Power*, p. 42.



31. For a relevant discussion of the phantasmatic promise of the performative, see Slavoj Žižek, *The Sublime Object of Ideology*, (Verso, 1989), pp. 94–120.

32. Here it is clear that Derrida's notion of the performative as a speech act that must break with prior contexts if it is to remain a performative, that is, governed by an iterable code, offers an important counterpoint to functionalist social theory. One sees as well the specific social meaning of Derridean iterability in the context of this discussion of expropriation and resignification.

# *Index /*

- Affirmative action, 93, 137, 179
- Agamben, Giorgio, 105, 177
- AIDS, 22, 110, 114, 124
- Al-Kassim, Dina, 179
- Althusser, Louis, 2, 5, 24–5, 31–3,  
150, 154–5, 165, 167, 180
- Arendt, Hannah, 178–9
- Austin, J.L., 1–3, 10, 12, 15–17, 19, 24–5,  
43–4, 48, 51, 81–2, 112–13,  
145–51, 165–8, 175
- Balibar, Etienne, 89, 175
- Bell, Derrick, 101
- Bennett, William, 22
- Benveniste, Emile, 30, 168

- 184 /
- Bergson, Henri, 181  
 Bersani, Leo, 177  
 Bhabha, Homi, 91  
 Bourdieu, Pierre, 134–5, 141–3,  
     145–7, 161, 165–6, 180–1  
 Brown, Wendy, 137, 175, 179  
 Burt, Ellen, 178  
 Burt, Richard, 178
- Cavell, Stanley, 167–8  
*Chaplinsky v. New Hampshire*, 53–5,  
     170, 172  
 Clinton, Bill, 76, 106  
 Congressional Statute on gays in  
     the military, 176  
 Cornell, Drucilla, 175  
 Cover, Robert, 47–48, 54, 169  
 Crenshaw, Kimberlé, 166–67, 173
- de Man, Paul, 44  
 Delgado, Richard, 4, 47, 64, 97,  
     100, 166–67  
 Department of Defense policy on  
     gays in the military, 106, 176  
 Derrida, Jacques, 51, 141–42, 145,  
     147–51, 165, 169–70, 175,  
     179–82  
 Equal Protection Clause, 47, 64,  
     73–4, 85, 105, 127
- Felman, Shoshana, 10–11, 15, 141,  
     152, 155, 166, 168–69, 175  
 Ferguson, Francis, 178  
 First Amendment, 20, 23, 54–55,  
     64–65, 72–73, 85, 105, 167, 171,  
     173–74, 178  
 Fiss, Owen, 175  
 Foucault, Michel, 28, 34–6, 74,  
     78–9, 93–4, 112, 125, 142, 161,  
     168, 177
- Frege, Gottlob, 166  
 Freud, Sigmund, 26, 84, 95,  
     108–10, 114–21, 174, 177–78
- Gadamer, Hans-Georg, 168–9  
 Gates, Henry Louis, Jr., 75, 127, 174  
 Gilroy, Paul, 160  
 Greenawalt, Kent, 167
- Habermas, Jürgen, 86–7, 88, 91,  
     146, 168, 175  
 Halley, Janet, 106, 177–78  
 Hanks, William, 168  
 Hartman, Saidiya, 136, 179  
 Hegel, G.W.F., 5, 26  
 Heidegger, Martin, 142–43,  
     168–69  
 Helms, Jesse, 63  
 Hill, Anita, 40, 82–5, 87, 95  
 Holmes, Justice, 171
- Ice T, 100
- Kennedy, Justice Anthony, 53  
 King, Rodney, 59, 64, 172
- Lacan, Jacques, 29, 135–36, 166,  
     168, 179–80  
 Laclau, Ernesto, 177  
 Lacour, Claudia Brodsky, 167  
 Langton, Rae, 17, 85–6, 92–4, 137,  
     175  
 Laplanche, Jean, 138, 179–80  
 Laub, Dori, 169  
 Lawrence III, Charles, 4, 60, 64,  
     97, 166–67, 169–70, 172  
 Lewis, David, 167  
 Lipsitz, George, 166–67
- MacKinnon, Catharine 17–8, 20,

- 22, 63–8, 73–4, 82–6, 92–5, 98,  
112, 127, 167, 173–74
- Mapplethorpe, Robert, 22, 97, 178
- Matsuda, Mari, 4, 18–19, 60, 64,  
73, 75–6, 79, 88, 91–2, 97–9,  
166–67, 172–74
- Merleau-Ponty, Maurice, 155, 181
- Michelman, Frank, 169
- Miller v. California*, 62–63, 74, 172
- Mitchell, Todd, 60–2
- Morrison, Toni, 6–13, 152, 172
- Mouffe, Chantal, 177
- New York v. Ferber*, 62
- Nietzsche, Friedrich, 45–6
- Owens, Craig, 177
- Parks, Rosa, 147
- Pascal, Blaise, 25, 155
- Pocock, J.G.A., 168
- Pontalis, J.-B., 138, 179–80
- Post, Robert, 169, 174, 178
- R.A.V. v. Saint Paul*, 20–21, 52–58,  
60, 62, 97, 170–72
- Rabin, Yitzhak, 21
- Rehnquist, Justice William, 53, 60
- Ricouer, Paul, 118
- Rose, Tricia, 166
- Rubenstein, William, 174
- Salt n Pepa, 74
- Scalia, Justice Antonin, 54–56, 59,  
62, 97, 171–73
- Scarry, Elaine, 6, 166
- Schatzki, Theodore, 181
- Schultz, Vicki, 179
- Scott, Joan, 175
- Souter, Justice David, 53
- Spence v. Washington*, 174
- Spivak, Gayatri, 180
- St. Paul Bias Motivated Crime  
Ordinance, 170
- Stevens, Justice John Paul, 57–59,  
170–72
- Taylor, Charles, 134, 141, 179
- The New York Times, 167, 173, 177
- Thomas, Justice Clarence, 83
- Thomas, Kendall, 49, 169, 172
- Title VII, 63
- Tucker, C. Delores, 22 /185
- 2 Live Crew, 74
- U.S. Military, 21, 74, 76, 97,  
103–116, 121–22, 124, 130–32,  
176
- University of California Regents  
Resolution, SP-1 and SP-2, 179
- White, Justice Byron, 171
- Williams, Patricia, 167
- Wisconsin v. Mitchell*, 60–61
- Zižek, Slavoj, 181