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TOWARD A MULTIPLE CONSCIOUSNESS OF LANGUAGE: A TRIBUTE TO PROFESSOR MARI MATSUDA

Shannon Gilreath*

The triumph of the S.S. demands that the tortured victim . . . renounce and abandon himself to the point of ceasing to affirm his identity. . . . They know that the system which succeeds in destroying its victim before he mounts the scaffold . . . is incomparably the best for keeping a whole people in slavery.

— David Rousset (former inmate at Buchenwald concentration camp)¹

I am thrilled to be part of this commemoration of the twenty-fifth anniversary of Professor Matsuda's influential article *Public Response to Racist Speech: Considering the Victim's Story*.² I first read Matsuda's essay as a law student when, I must confess, the mind-numbing one-dimensionality of the law—as one must learn it in the prevailing method—drove me a little crazy. Law school is an environment where the Socratic method reduces people's stories—the stuff of which law is made—to something lawyers like to call “the facts,” and where real-life people, in whom I saw so much of myself—people like Michael Hardwick, for example—get completely lost in the monolith of the law. I was desperate for an alternative. Then came Matsuda, speaking to me through her writing, telling me: “‘No, you are not crazy, the world looks that way to [me], too.’”³ Neither Matsuda's method nor her mind was fettered by supposedly “neutral” legal principles that amounted to so much sexism and racism and homophobia masquerading as something lawyers like to call “reasonableness.” I always wanted to ask:

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1. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 11–12 (Penguin Books 1994) (1963).

2. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

3. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989). Matsuda's work often acknowledges the work of other “outsider” scholars, including Ann Scales, Richard Delgado, Catharine MacKinnon, and Derrick Bell, all of whom also helped save my sanity from the clutches of legal education.

Reasonable to whom? Certainly not to me. In contrast to the prevailing discourse about the law, Matsuda was telling us something different:

High talk about language, meaning, sign, process, and law can mask racist and sexist ugliness if we never stop to ask: “Exactly what are you talking about and what is the implication of what you are saying for my sister who is carrying buckets of water up five flights of stairs in a welfare hotel? What do you propose to do for her *today*, not in some abstract future you are creating in your mind?” If you have been made to feel, as I have, that such inquiry is theoretically unsophisticated, and quaintly naive, resist!⁴

I can’t tell you, even now, how much that missive resonated with me, except to say that it helped keep me sane. Given what Professor Matsuda has meant to me, then, I could fill much more than the space allotted to me here praising her and her work. But, within these constraints, I must be content with reflecting on what Matsuda’s method of multiple consciousness—which is “a deliberate choice to see the world from the standpoint of the oppressed”⁵—means for this country’s positively homicidal stance on so-called free speech, and what hope her method offers.

At the root of the American dream (or delusion) is the notion that words are constitutive. Anyone well versed in American mythology knows that Thomas Jefferson—that great plagiarist of Locke who is nevertheless revered in this country as the brightest of *Les Lumières*—brought this nation into being by a declaration in the name of “We the People.”⁶ We the People today know, of course, that Jefferson’s “we” was not as inclusive as it first appeared. It is worth pausing here to note that at least one founding father, John Adams, apparently complained that Jefferson told too many tall tales; and, in any event, Jefferson’s own pen revealed that he meant only that “all men” were created equal. The fact that these words referred only to *white* men was a default position that Jefferson did not bother to qualify, because he did not need to.

Just a few years shy of the centennial celebration of Jefferson’s Declaration, no less of an academic powerhouse than Noam Chomsky, a professional linguist and well-known liberal public intellectual, pondered the connection between “language and freedom”—a topic that he seemingly did

4. *Id.* at 9.

5. *Id.*

6. The exact phrasing “We the People” is, of course, associated with the Constitution, not the Declaration of Independence. Nevertheless, it is fair to say that Jefferson’s “we”—his collective assertion of the will of the “good people of these colonies”—was the precursor of the Constitution’s immortal phrase. The Constitution simply made plainer which men did not count as part of the governing “we” or, indeed, as even fully human—as in, for example, the three-fifths clause.

not choose for himself. In a 1970 lecture delivered at Loyola University Chicago, Chomsky said the following:

When I was invited to speak on the topic “language and freedom,” I was puzzled and intrigued. Most of my professional life has been devoted to the study of language. There would be no great difficulty in finding a topic to discuss in that domain. And there is much to say about the problems of freedom and liberation as they pose themselves to us and others in the mid-twentieth century. What is troublesome in the title of this lecture is the conjunction. In what way are language and freedom to be interconnected?⁷

Chomsky did not resolve the problem. He ended his lecture claiming to be as “puzzled by the topic” as when he started.⁸

I began this essay about Matsuda’s contributions to the study of language with commentary on Jefferson and Chomsky in order to show why Matsuda’s work on the subject of language and freedom is so brilliant: it is a question of point of departure—of radical perspective. Jefferson, today claimed by conservatives and liberals alike, but, I think, more fairly labeled a conservative, and Chomsky, an unabashed leftist activist, represent two sides of the same philosophical liberalism. In America, this liberalism is all-encompassing. Both the “conservative” and “liberal” political manifestations of what Gore Vidal once described as a one-party system have emerged from it. And this totalizing liberalism serves as the philosophical origin of our peculiarly American concept of “free speech.” As Matsuda recognizes, “[This liberalism] allows theorists to discuss liberty, property, and rights . . . with no connection to what those concepts mean in real people’s lives.”⁹ This is the split consciousness of liberalism to which Matsuda’s radical outsider scholarship—exemplified by her call for multiple consciousness as legal method—provides an answer.

I have long thought of free speech, as it has been fictionalized principally by the liberal Left, as the apogee of liberalism’s split consciousness. Suppressed in the familiar incantation of “free speech” is the following question: Free for whom? Speech designed to degrade the equal dignity of a targeted class, as Matsuda recognizes, is not free at all. “The application of absolutist free speech principles to hate speech, then, is a choice to burden one group with a disproportionate share of the costs of speech promotion.”¹⁰

7. Noam Chomsky, *Language and Freedom*, in N. CHOMSKY, FOR REASONS OF STATE 387 (1970).

8. *Id.* at 406.

9. Matsuda, *supra* note 3, at 9.

10. Matsuda, *supra* note 2, at 2376. As Matsuda points out, free speech absolutism—the belief that all speech must be absolutely protected—is not the law of the First Amendment. But it is certainly the predominating myth urged on all of us, chiefly as the principal advocacy position of the American Civil Liberties Union (“ACLU”), an organization that claims to be

In this sense, “free speech” is magnificently Orwellian. It means exactly the opposite of what it says. The literary among us would call this irony. But when such obfuscation is used to mask a literal brutality, it becomes a political tool honed to lethal sharpness. This manipulation of language was a common tactic of the totalitarian state in George Orwell’s *1984*. “Ministry of Love,” for example, actually meant ministry of war. “Joycamp” was, in fact, a concentration camp. Orwell called this system of reversal “newspeak,” a state-sanctioned way of speaking that masked real horror.

To this catalogue of newspeak we must surely add American “free speech.” Free speech, like “We the People,” masquerades as universal and a priori true when it is, in fact, neither. Matsuda’s particularly lucid explanation of the free-speech paradox is worth quoting at some length:

The selective consideration of one victim’s story and not another’s results in unequal application of the law. Unlike the victims of defamation and other torts, the victims of racist speech are not representative of the population at large. In making typical legal concessions to the first amendment, we burden a range of victims. In the case of flag-burning, we force patriots, veterans, and flag-lovers of all races to tolerate flag desecration as part of the price of freedom. In contrast, when victims of racist speech are left to assuage their own wounds, we burden a limited class: the traditional victims of discrimination. This class already experiences diminished access to private remedies such as effective counterspeech, and this diminished access is exacerbated by hate speech. Debasing speech discredits targets, further reducing their ability to have their speech taken seriously. . . . The principle of equality is violated by such allocation.¹¹

For Matsuda, hate speech, coupled with the state’s active support (something that, in true newspeak fashion, lawyers call “neutrality”), actually

antisexist and antiracist. (In some cases, it is.). The ACLU presents a classic case of liberal split consciousness. Matsuda’s method of multiple consciousness, therefore, not only helps us to understand the law but also the activist organizations that shape it. In contrast to the absolutist propaganda, the law of the First Amendment actually allows numerous exceptions. Capitalism overcomes free speech in many ways, *id.* at 2354, as do multiple interests of the already powerful, including the need for public order, moral authority (obscenity), defamation, and privacy, *id.* at 2354–55.

11. *Id.* at 2376. Matsuda mentions the lack of effective counterspeech as a private matter, but its extinction as an operation of law is also highly informative in terms of the overwhelming antiegalitarian thrust of free-speech doctrine. There used to be a more egalitarian approach than what now exists. The affirmative action approach to free speech—an approach that said the speech of those who could afford to monopolize the market, at least in the broadcast media, had to yield so that others had access (*see Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969))—has now been completely destroyed. The Supreme Court has ensured that corporations and billionaires can buy elections, too, all in the name of free speech. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

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creates and maintains the inequality of its targets. Of course it does! Isn't this the connection between language and freedom that eluded Chomsky? As I will show, this is, in fact, an old insight. But it took on Matsuda's part extraordinary intellectual will to expound. How could it not? Every system of totalitarianism—including the American system of free-speech absolutism—depends on obliterating the knowledge of any alternative. As Orwell tells us, "Newspeak was designed not to extend but to diminish the range of thought."¹²

Rousseau knew the connection between language and inequality that Matsuda illumines again by the light of critical race theory. In his *Essay on the Origin of Languages*, Rousseau provides this parable:

Upon encountering others, a savage man will at first be afraid. His fright will make him see those men as taller and stronger than himself. He will give them the name Giants. After many experiences he will recognize that as these supposed giants are neither taller nor stronger than himself, their stature does not agree with the idea that he had first attached to the word Giant. He will therefore invent another name common to them and to him, such as the name man for example, and will leave that of Giant for the false object that had struck him during his illusion.¹³

Here, Rousseau describes the creation of inequality in its most literal and basic sense,¹⁴ as well as discusses the necessary part that language plays in this process. It is the perfect parable for describing language's role in creating hierarchy and inequality, with language policing the boundaries between good and bad, frightful and familiar.

Rousseau's parable also exposes the lie of formal equality theory, which sees problems of inequality only when no legitimate "difference" exists to warrant unequal treatment. In Rousseau's narrative, no genuine difference existed; the only difference was constructed in the mind of primitive man. In the American system, where equality theory is still almost exclusively premised on a differences approach, the traditionally marginalized continue being marginalized because the system refuses to see that the powerful always control the definition of difference. Hate speech (or anti-identity speech, as I prefer to call it¹⁵) is essential to a caste system predicated on this

12. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 373 (1st World Lib. 2004) (1949) (emphasis on "diminish" in original).

13. Jean-Jacques Rousseau, *Essay on the Origin of Languages*, in *THE COLLECTED WRITINGS OF ROUSSEAU* 295, 295 (vol. 7) (John T. Scott, trans. 1998).

14. I mean that he did not consider in his explanation the way in which power hierarchy might prevent "man" from overcoming difference when this same hierarchy in fact depends on the perpetuation of difference.

15. Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 For My Broken Hand": *Thoughts on a Substantive Equality Theory of Free Speech*, 44 *WAKE FOREST L. REV.* 557, 572 n.63 (2009).

differences approach because it is a powerful method of policing the boundaries between the powerful and the powerless (whom the powerful often propagandize as dangerous). For example, observable anatomical differences between men and women become sublimated into abstract differences.¹⁶ These outward differences do not really need to mean anything, for in fact they may have no genuine significance apart from their simply existing as observable phenomena; instead, what matters is what they have been abstracted to mean, i.e., what they have been politicized to mean for purposes of domination. This is how sexism, racism, and homophobia work. It is how they become institutionalized. It is not surprising, then, that feminism and critical race theory have emerged as the primary challengers of what liberalism has wrought. Liberalism transforms hate speech from a real-world practice into an academic abstraction called “free speech,” making it nonregulable, and making “freedom of speech” a glove that covers the hand of dominance in America. On this score, Matsuda brooks no compromise. She has the guts to say that the American doctrine of free speech is itself racist.¹⁷

From the perspective of multiple consciousness, the strongest argument against regulating hate speech—that it is viewpoint based—becomes no justification whatsoever. An honest look at the First Amendment ineluctably reveals that it was written by white men who owned slaves and women. Surely, at least some of them were homosexual, but none dared to say so. To go back to “We the People” for a moment, these men possessed a freedom of speech that meant something. An exercise of their declaratory authority made a nation, at least according to the myth they created; and when this same We the People decided to create a central government and address potential worries about possible ways this new government might take away their rights, they had something that could, theoretically, be taken away. In other words, the story of the First Amendment is a story of preservation. Those who had, kept.

Matsuda shows us that the powerless continued to be excluded from We the People. Is there a point of view here? If so, whose is it? Let’s ask ourselves again: Where were the women? Where were the African Americans? Where were the Native Americans? These are the questions Matsuda encourages us to ask. Whose point of view is the American doctrine of free-speech

16. Derrida, reflecting on Rousseau, gets at this—although while making a point different from mine—when he notes that what is outwardly discernible is supplanted by that which is “inward.” See JACQUES DERRIDA, *DE LA GRAMMATOLOGIE* 393 (1967).

17. Matsuda, *supra* note 2, at 2351 (“What the American position means in the area of race is that expressions of ideas of racial inferiority or racial hatred are protected. Anyone who wants to say that African Americans and Jews are inferior and deserving of persecution is entitled to.”).

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neutrality tenaciously protecting? And what would it mean if we, as Matsuda suggests, stopped ignoring the stories of the people who have been excluded from the beginning? These people, silent, and in no sense part of We the People, are too often silenced even today. Historically, their legal betters only had to endure episodic and generally short-lived attempts by the government *they created* to abridge a right to speech that everybody agreed *they* had; in contrast, the silent ones only got more silence. Matsuda's theory of multiple consciousness asks for a breaking of this silence. Significantly, she also asks that someone finally listen.

Matsuda's exhortation to consider the victim's story brings another type of multiple consciousness to mind: a consciousness of the relationship between a First Amendment commitment to freedom of speech and a Fourteenth (and Fifth) Amendment commitment to equality.¹⁸ The Fourteenth Amendment is aspirational. Its commitment to equality is forward looking. It gestures toward a society in the making, not one that is finished. The direction is toward more equality, not less. From this level of consciousness, the questions begin to look different from those asked when the First Amendment is viewed as if it were the only value in play. How do queer baiting and verbal gay bashing contribute to the equality of gays and lesbians?¹⁹ How does the racist speech of the Ku Klux Klan contribute to the equality of blacks? How does the speech of the Nazis contribute to the equality of Jews? How do sexist propaganda and pornography contribute to the equality of women?

These are the questions that courts still stubbornly refuse to ask, let alone answer. The Supreme Court's most recent decisions in this area make for a dark landscape indeed.²⁰ Still, Matsuda's scholarship gives us answers

18. I expound on this connection at length in Gilreath, *supra* note 15, at 601–14. See also Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (highlighting how hate speech decreases equality). See generally JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2013).

19. Matsuda has had the strength of character to call this country's treatment of LGBT people terrorism. It is particularly significant for me that she didn't come to this realization late; she made the statement in 1999. See Mari J. Matsuda, *Foreword: Homophobia as Terrorism*, 1 GEO. J. GENDER & L. 1 (1999). Alas, it is a realization to which this country's leaders still appear blind. See Shannon Gilreath, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 WM. & MARY J. WOMEN & LAW 7 (2011) (detailing the ways in which neither U.S. nor international law has acknowledged homophobic violence as terrorism and how a U.S. foreign policy of military "intervention" has, in fact, unintentionally promoted homophobic terrorism in many parts of the world).

20. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), in which the Court immunized members of the Westboro Baptist Church against an action predicated on their tortious disturbance of the funeral of Matthew Snyder, a marine killed in Iraq. Snyder's father sued them, in part, for the emotional distress that their picketing caused him; the protesters' placards included phrases such as, "Fags Doom Nations" and "Thank God for Dead Soldiers."

that may yet be implemented in a legal culture that has too often been the foe of women, racial minorities, and gays. And she gives us something finer still: the realization that we are not crazy; that inequality must be resisted, not simply endured; and that those of us who have taken up the mantle of the outsider must not give in.

The Court held the church's conduct untouchable on First Amendment grounds. Only Justice Alito dissented.