

## TINKER AT 50: STUDENT ACTIVISM ON CAMPUS

### LAW, LANGUAGE, AND POLITICS

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#### ABSTRACT

*This Article celebrates the creative role of language in producing profound social change. It therefore argues for great circumspection in regulations of hate speech that may be used to limit socially oppressed groups' access to the words and symbols they view as most forceful and effective in political communication. Although many thoughtful racial-justice advocates support hate speech codes in the interest of racial equality, the Author worries that such regulation can actually hinder the fight for racial equality by being turned against members of marginalized groups who seek to deploy disruptive language in their discourse of resistance and struggle for equality. To explore these issues, the Article discusses current social contests over the meaning of the Confederate Flag and the N-word, two forms of symbolic communication often associated with hateful thoughts and deeds. It examines whether their hateful histories are baked into the meaning of each, so that any use of either constitutes hate speech, or if their meanings are mutable and contestable. The Article links these questions to ones about the mutability and contestability of the words that make up the legal lexicon, many of which have also been associated with rank racial discrimination. Drawing on Wittgenstein, J. L. Austin, and George Lakoff, it outlines a social theory of meaning that affirms the radical agency of the legal lexicon—and indeed of all language—and counsels against blanket prohibitions on disruptive or transgressive forms of symbolic communication. It argues that the language of lawyers and laypersons alike lack fixed and frozen meanings and, therefore, even the vilest forms of symbolic communication can be put to novel, or even revolutionary, legal, political, and artistic uses.*

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## INTRODUCTION

Language . . . [is] an act with consequences.

—Toni Morrison<sup>1</sup>

Although the *Tinker* case arose from student activism on campus and addressed the limits of student expression, its importance in today's society extends also to the limits of open expression at public and private universities for students, faculty, and invited speakers. Symposium panelists discussed the impact of controversial speakers such as Milo Yiannopoulos and Richard Spencer, or Ben Shapiro and Ann Coulter, and many of the universities who have refused to allow certain guest speakers onto their campuses. Most of these controversial speakers have been characterized by their critics as conservative, right-leaning, right-wing, or reactionary firebrands who traffic in "hate speech." Some panelists pointed out that many students may not realize that "hate speech" is a protected form of speech. They further argued that the difference between an insensitive or offensive statement, a threat, and a hate crime is often overlooked.

Although, as a Critical Race Theory scholar, I have never been referred to as conservative or right-leaning, I have been accused of trafficking in "hate speech." The reason: for many years I have deployed "the N-word" in law review articles, speeches, lectures, presentations, documentaries, and social media. In fact, like Yiannopoulos, Spence, Shapiro, and Coulter, students and activists who deemed my use of the blood-stained epithet offensive, hateful, and even violent have vociferously denounced me and sought to have some of my presentations canceled.

The claim that any form of linguistic or nonlinguistic symbolic communication is inherently or irredeemably hateful or racist—a claim at the heart of many campus hate speech codes—resonates with important and longstanding debates about the nature of the legal lexicon. For word work is the bread and butter of lawyers and the beating heart of the law. But a question that my law students often pose to me, and that I at one time kept asking myself, is whether the heart of mainstream legal discourse is still beating in the sense of being an agent of social change, or, as some legal scholars contend,<sup>2</sup> whether the legal lexicon is so full of words with fixed and

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<sup>1</sup> Toni Morrison, Nobel Lecture (Dec. 7, 1993).

<sup>2</sup> Cf. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20–21 (1988) (explaining the implicit sexism of the "reasonable person" standard).

frozen meanings that its heart is at least languishing, or perhaps not beating at all. This question can be put more broadly: can *any* word or symbol in law and everyday public discourse be used to produce change, or instead do many carry fixed meanings that can only promote and protect entrenched power and the status quo? The beating heart of language is its agency, its ability to bring about change, but words and symbols with fixed meanings remain prisoners of their past and lack the agency to mint new meanings and midwife new worlds.

Two current debates—one over the meaning of the Confederate battle flag ignited by the Emanuel Nine murders, the other over the meaning of the N-word in popular culture and public discourse—chime with and shed light on this debate about fixed meanings in legal discourse. Some battle flag and N-word opponents contend that both forms of symbolic communication must be banned from public discourse as forms of hate speech because they carry certain indelible meanings, just as some legal scholars contend that legal discourse carries certain indelible meanings. But if words, symbols, and discourses carry fixed meanings, then any attempt to produce change through them is fraught with the danger of reproducing old, outmoded, and oppressive worldviews and ways of thinking. This is the NAACP's position on the N-word,<sup>3</sup> and it is the attitude of some legal scholars and law students toward the legal lexicon.

Viewing words and symbols as mere reflections of “ideas” in people’s heads leads some to regard them as mere tokens of “consciousness” that belong to the realm of “ideology.” This view relegates language to a minor role in social action, namely, to the role of a passive conduit through which creative energies flow but which is not itself a source of creative social change any more than a typewriter or word processor is a source of creative narratives in fiction writing. But whereas a typewriter cannot create a plot twist in an unfolding drama, a choice word can.<sup>4</sup>

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<sup>3</sup> See *infra* Part I.

<sup>4</sup> “These are the times that try men’s souls,” begins Thomas Paine’s first Crisis paper, part of a searing pamphlet series that helped spark the American Revolution. THOMAS PAINE, *The Crisis, in 1 POLITICAL WRITINGS OF THOMAS PAINE* 75, 75 (George H. Evans ed., 1839). Although the flame of revolutionary resistance was already alive when Paine’s pamphlets hit the streets of Philadelphia in 1776, many historians contend that his work “unified dissenting voices and persuaded patriots that the American Revolution was not only necessary, but an epochal step in world history.” Book *Common Sense (Paperback)*, BLUE WILLOW BOOKSHOP, <https://www.bluewillowbookshop.com/book/9781434101655> (last visited June 3, 2020). John Adams said: “Without the pen of [Paine],

This Article draws on Wittgenstein, J. L. Austin, and George Lakoff to outline a social theory of meaning that affirms the radical agency of language, which creates us at the very moment it is being created. We make history by making, contesting, and transforming the meaning of words and symbols. Meanings are not fixed; they are prizes in a pitched battle among social actors seeking to establish and maintain their social identities and promote their social interests. People form and transform communities and establish individual and social identities through social struggles over the meaning of words and symbols. A language with fixed and frozen meanings lacks the agency to generate new worlds. The heart of such language is no longer beating. But this Article will show that the language of lawyers and laypersons alike lacks fixed meanings and therefore its heart will keep beating as long as individuals continue to form social identities and advance social movements by contesting the meaning of words and symbols. Even the vilest forms of symbolic communication commonly called “hate speech” lack fixed meanings and hence can be put to novel legal, political, and artistic uses.

### I. THE NAACP N-WORD EULOGY

During its 2007 annual convention, the NAACP sought to purge popular culture and public discourse of the N-word by holding a public burial for it in Detroit, Michigan, on Freedom Plaza. The ceremony included a march by delegates from across the country through downtown Detroit, led by two Percheron horses pulling a pine box adorned with fake black roses and bearing the remains of the racial slur. NAACP National Board Chairman Julian Bond, Detroit Mayor Kwame Kilpatrick, and the young delegates who organized the funeral were cheered by hundreds of onlookers. “We gather burying all the things that go with the N-word. We have to bury the ‘pimps’ and the ‘hos’ that go with it,” said Mayor Kirkpatrick. The Rev. Otis Moss III, assistant pastor at Trinity United Church of Christ in Chicago, said in his eulogy of the word, “[t]his was the greatest child that racism ever birthed.”<sup>5</sup> The following official Obituary for the N-Word, written by Victoria Lanier, Erica McLaughlin, and Arielle Palmer, was read aloud at

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the sword of Washington would have been raised in vain.” Jill Lepore, *The Sharpened Quill*, NEW YORKER (Oct. 9, 2006), <https://www.newyorker.com/magazine/2006/10/16/the-sharpened-quill>.

<sup>5</sup> *NAACP Delegates ‘Bury’ N-Word in Ceremony*, NBC NEWS (July 9, 2007, 7:28 PM), [http://www.nbcnews.com/id/19680493/ns/us\\_news-life/t/naacp-delegates-bury-n-word-ceremony/#.Xh3flkdKiUk](http://www.nbcnews.com/id/19680493/ns/us_news-life/t/naacp-delegates-bury-n-word-ceremony/#.Xh3flkdKiUk).

the funeral in Freedom Plaza on July 9, 2007 and usefully illustrates the fixed meaning approach to language frequently adopted by those who reject *all* uses of any form of the N-word:

Born in America over 400 years ago, birthed to the unlikely couple Language and Hate, Nigger entered society to carry out his odium of black-skinned people. Christened by colonial settlers, Nigger packed his bags to find a comfortable, permanent home in America's Deep South. Although still in his early years, Nigger obtained widespread success in portraying ignorance, incompetence, and buffoonery as a direct relation to having dark skin. Nigger redefined what it meant to be black. A nigger could act and sing, but could not speak properly or effectively. He could smoke and dance but he could not read and be educated. Nigger developed a whole line of products to market to those who practice in the profession of racial hatred. He coined the following terms: Niggerlover—one who was sensitive in any way to blacks, Niggerlipping—to wet the end of a cigarette while smoking, Nigger Milk—as advertised in a 1916 advertisement which showed a black baby drinking from a bottle of ink. Nigger produced these and countless other inventions which proved favorable among those who wished to maintain their supremacy by demeaning blacks in America.

Finally, a group of intelligent and outspoken dark-skinned brothers and sisters decided to rebel against Nigger's dominance. As they formed the Civil Rights Movement, they fought against Nigger and his army of white supporters to reform society. Although he was almost killed during this time period, Nigger survived. Realizing it was inappropriate to blatantly continue his past message of white supremacy, "Nigger" changed his name to "Nigga" and assumed a new persona. Nigga, now disguised as an ally to black youth, could go undercover and position himself as a "link" to black unity. In the 1980s, Nigga was introduced to some new powerful partners with the rise of HipHop, and he gained popularity in the media, among comedians, rappers and other entertainers convincing black people that despite his hateful roots, to be the "Nigga" was to be "down for the cause", to be "cool" and was about 'keeping it real'. "Nigga" made it hard for young NAACP activists to fight the battle for freedom while remaining a part of the hip hop generation.

Although now in disguise, "Nigga" was recognized by those who remember his menacing consumption of the souls of their people. Nigga began to separate black youth from their proud history, and successfully encouraged youth of other races to join his campaign for [its] resurgence in demeaning the African-American race. Nigger sought to secure his place forever becoming synonymous with black people, even in the dictionary. The NAACP was triumphant in prevailing over Nigger's attempt to define himself as Nigger—a black person. However, Miriam [sic] Webster's Dictionary today says that the word's usage among blacks is quote "not always intended or taken as offensive", and Dictionary.com says that Nigger is "sometimes used among African-Americans in a neutral or familiar way." Young black people claimed "Nigga" as their own, while many proud racists,

once responsible for the word's popularity, and who are now banned from usage of the word, revel in the resurrection of their beloved friend.

Today, we will lay the word nigger to rest. We will no longer make "nigger" familiar or a part of our family. We will bury its offensive usage among people of all races, including African Americans. We will bury "nigger" next to his cousins, "jigaboo", "coon", "darkie", "pickanniny", "savage", "sambo", "mammy", "buckwheat", "boy" and "nappy headed ho". We promise to be more creative in our rap lyrics, more respectful to our ancestors, more diligent in our fight for freedom. As we bury the word nigger, we are inspired by 2nd Corinthians chapter 4 which says: We are troubled on every side, yet not distressed; we are perplexed, but not in despair; Persecuted, but not forsaken; cast down, but not destroyed; Therefore, we do not lose heart, though outwardly we are wasting away, inwardly we are being renewed day by day. Nigger has terrorized us, but he has not beaten us, we have overcome him and we celebrate the end of his existence in our community. We officially declare him DEAD! We will not revive, resurrect, or recover him! We will rebuke, resist, and revoke him in the name of pride and progress.

Ashes to Ashes Dust to Dust If God won't have him The Devil Must.<sup>6</sup>

This is an eloquent send-off, but it turns out reports of the N-word's demise were premature. Countless times a day it rises like Lazarus to walk among us in popular culture, public discourse, and casual banter. Historically, both the battle flag and the racial epithet have been used to express anti-black beliefs and attitudes, but only the N-word has been widely appropriated by black artists such as The Last Poets, NWA, Ice Cube, Saul Williams, Tupac Shakur, dead prez, Nas, Jay Z, and Kendrick Lamar to also signal sympathy and political solidarity with other blacks (no critical mass of black artists have similarly inverted the historical meaning of the Confederate battle flag and used it to bond with other blacks). Inspired by these masters of N-word-laden oppositional discourse, I, too, have featured the N-word in my own Critical Race Theory work.<sup>7</sup>

But N-word abolitionists like the NAACP reject N-word-laden commentaries by performers and law professors on the "common sense" ground that the N-word has fixed or "inherent meaning." For them, a racially oppressive "ideology" or "consciousness" or "mentality"

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<sup>6</sup> Victoria Lanier, Erica McLaughlin & Arielle Palmer, *Obituary for the N-Word*, SOJOURNER'S TRUTH, Oct. 31, 2007, at 15 (transcribing a speech read aloud at the funeral in Detroit's Freedom Plaza), available at <https://www.thetruthtoledo.com/pdf/2007/103107pdf.pdf>.

<sup>7</sup> Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 9–10 (2014).

accompanies all its utterances. These lingual fundamentalists start with the undeniable premise that the N-word has virulently racist roots and draw the mistaken conclusion that *all* current uses and applications are tainted fruit of a poisonous etymological tree.<sup>8</sup>

## II. PHILOSOPHICAL AND FOLK MODELS SUPPORT NAACP'S FIXED MEANING APPROACH

Studies show that ordinary people without any technical expertise have theories—called *folk theories* or *folk models*<sup>9</sup>—about everything important to them, from how the physical world works<sup>10</sup> to “how we use words to refer to things in the world.”<sup>11</sup> A “folk theory,” as George Lakoff points out, “defines common sense itself”;<sup>12</sup> in his words, “we are all folk philosophers of language in that we have folk theories of reference.”<sup>13</sup> Paul Kay has shown that ordinary speakers of English hold the following folk theory of how we use words to refer to things: “words can fit the world by virtue of their inherent meaning.”<sup>14</sup> Put differently, it is common sense to think that words have “inherent meanings”—that is, meanings that competent speakers of a language know and make use of<sup>15</sup>—and that words refer to things and *kinds* of things by way of those meanings.<sup>16</sup> The word duck, for instance, *correctly* refers to the *kind* of creature in the world that corresponds to the word's established “inherent meaning,” namely, a bird with a broad, flat bill, short

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<sup>8</sup> From the perspective of lingual fundamentalists, a speaker or writer does not merely utter the N-word, he or she is uttered by it, for the word's inherent meaning colors the consciousness of all who use it. See Press Release, NAACP, NAACP Statement on Use of ‘N-Word’ at White House Correspondents’ Dinner (May 3, 2016), <https://www.naacp.org/latest/naacp-statement-use-n-word-white-house-correspondents-dinner/>.

<sup>9</sup> GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 118 (1987).

<sup>10</sup> *Id.* at 121–22 (citation omitted).

<sup>11</sup> *Id.* at 122.

<sup>12</sup> *Id.* at 121.

<sup>13</sup> *Id.* at 122.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 168.

<sup>16</sup> *Id.* at 172 (“Our *definitional* knowledge of words corresponds to the *essential* properties of the entities and categories that the words designate.”).



legs, and webbed feet.<sup>17</sup> All members of the category designated by the word “duck” share those characteristics.

This folk model of meaning neatly fits the NAACP’s N-word eulogy. For N-word eulogists, its inherent meaning derives from its historical use as a racial slur against blacks. Because of its history, the word inherently means an odious and contemptible black person in the eyes of whites, and includes in its “definition” blacks who are ignorant, incompetent, and given to buffoonery *by virtue of* their black skin.<sup>18</sup> For convenience, let’s say that the word simply means “Odious Black.” If the N-word’s inherent meaning then is “Odious Black,” under our folk theory of reference, the word only correctly refers to persons in the world of *that* kind, to persons who belong to *that* category, who correspond to *that* meaning, who satisfy *that* definition—to persons whose properties include being odious and black. The N-word cannot *correctly* be used to refer to, say, “black friends and neighbors and loved ones” because such persons, as objects of care and concern rather than odium and contempt, do not correspond to the inherent or true meaning of the word; they lack a property essential for membership in the N-word category. Accordingly, any effort by artists, academics, or activists to extend the range of application of the N-word to include “black friends and neighbors and loved ones” is doomed from the “common sense,” folk theory of reference expressed by the NAACP, because such new and sympathetic uses of the word contradict its inherent meaning, namely, Odious Black.

Philosophical theories that view meanings as ideas in the mind of the word user add further support to N-word abolitionists. John Locke was an early supporter of this common “ideational theory of meaning,”<sup>19</sup> maintaining in *An Essay Concerning Human Understanding* that “words in their primary or immediate signification stand for nothing but the ideas in the mind of him that uses them.”<sup>20</sup> Hobbes was another early supporter, declaring in *Leviathan* that “the general use of speech, is to transfer our mental

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<sup>17</sup> *Id.* at 167 (“Linguistic expressions get their meaning only via their capacity to correspond, or failure to correspond, to the real world or to some possible world; that is, they are capable of referring correctly (say, in the case of noun phrases) or of being true or false (in the case of sentences).”).

<sup>18</sup> *See supra* note 6.

<sup>19</sup> WILLIAM P. ALSTON, *PHILOSOPHY OF LANGUAGE* 22 (1964).

<sup>20</sup> JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 225 (A. S. Pringle-Pattison ed., 1924) (emphasis omitted).

discourse, into verbal; or the train of our thoughts, into a train of words.”<sup>21</sup> From this perspective, meanings are in our heads; they are mental happenings within the individual which accompany speaking and understanding language.<sup>22</sup> For instance, let’s assume that someone explains or introduces the N-word to someone else “by ostension,” that is, by pointing to the kind of person for which the word stands. Many words in everyday language are taught and learned in just this way—one person explains or introduces a word to another by pointing to an entity or process (a chair, table, fire, fight) and uttering the word. Accordingly, someone introduces or explains the N-word to another by pointing to an “Odious Black” and uttering it.

How does any later application of the word flow from this act of naming? According to supporters of the mental image approach to meaning, after the word is introduced in this way, whenever the word comes up again, it will call up an image or picture of the “Odious Black” in the mind. “Having the image is what understanding the word amounts to.”<sup>23</sup> The same holds for future applications of the word: the image determines its future uses. By enabling us to recognize objects of the right kind to be called by that word, the image dictates the use of the word and the use of the word flows from the mental image.<sup>24</sup> From this standpoint, people only really understand what we say if they manage to construct a picture in their heads like ours. Eminent philosophers and psychologists like Bertrand Russell<sup>25</sup> and E. B. Titchener<sup>26</sup> have supported this image theory of meaning. Under this approach, “meaning is a mental activity” that occurs inside the heads of private individuals, and words are mere public expressions of private thoughts and feelings and ideas, mere verbal manifestations of inner psychological states, mere reports and descriptions of the speakers subjective mental processes.<sup>27</sup> In the absence of an image or other mental happening within the individual,

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<sup>21</sup> IAN HACKING, *WHY DOES LANGUAGE MATTER TO PHILOSOPHY?*, 15 (Cambridge Univ. Press, 1975).

<sup>22</sup> DAVID BLOOR, *WITTGENSTEIN: A SOCIAL THEORY OF KNOWLEDGE* 6 (Columbia Univ. Press, 1983).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 8.

<sup>27</sup> RISHIKANT PANDEY, *SPEECH ACT AND LINGUISTIC COMMUNICATION* 37 (1967).

“words are mere counters, capable of meaning, but not at that moment possessing it.”<sup>28</sup>

If the meaning of the N-word either lies in the mental image of such an individual or in some other mental or psychological state that always accompanies use of the word, then N-word critics can argue that the word indeed does have a fixed and indelible meaning, namely, the image or other subjective mental state that always accompanies its use and understanding.<sup>29</sup> From this standpoint an oppressive mentality or consciousness always accompanies certain words in ways that make them useless or counterproductive as tools for producing real change. Viewed in this light, a speaker or writer does not merely utter the N-word, he or she is uttered by it, for the word’s inherent meaning colors the consciousness of all who use it.

### III. FEMINISTS, MARXISTS, FIXED MEANINGS, AND *INVASION OF THE BODY SNATCHERS*

These “common sense” and philosophical theories of how words work cause some of my law students who are dedicated to producing fundamental social change to worry about being “indoctrinated,” “brainwashed,” or “body snatched” in the process of learning to talk and think like a lawyer (in the science fiction classic, *Invasion of the Body Snatchers*, townspeople are turned into their emotionless, characterless doubles by aliens whenever they fall asleep). My students learn early that proper initiation into the law does not occur when they have memorized a raft of rules and legal principles, for creative courts frequently overturn old rules and principles and create new ones. Instead, they know they have been properly initiated when they can translate their experience and that of their client into the legal vocabulary, that is, into the lexicon of the law. But, if a certain outlook, mentality, consciousness, or ideology always accompanies certain words, vocabularies, lexicons, and discourses, then learning to talk and think like a lawyer may mean taking on an alien consciousness or world view—one at odds with the values, loyalties, and commitments the student embraced before the first day of class.

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<sup>28</sup> BERTRAND RUSSELL, *THE ANALYSIS OF MIND* 201 (George Allen & Unwin 1921).

<sup>29</sup> Furthermore, if a certain inner psychological state always accompanies the use and understanding of certain words and discourses, if such an inner state gives words their meaning, then the mental state conjured by the words may encompass more than a single image or picture but also a whole ideology or world view, say a bourgeois, false, or racist “consciousness.”

Statistics may seem to support their fears, for while roughly 25% of incoming law students express an interest in doing public-interest law upon graduation, less than 2% of graduates actually do.<sup>30</sup> There are many explanations for this dramatic difference between what students say they want to do before they learn to talk and think like a lawyer and what they actually do after they master the legal lexicon (crushing student loans, for instance), but still the suspicion lingers for some that learning to talk and think like a lawyer can cause a shift in social consciousness and personal convictions, say, away from public-interest concerns and toward those of corporate America and laissez faire free enterprise.<sup>31</sup>

As a first-year student, I shared similar misgivings about the language of the law. The incisive words of Audre Lorde—a thoughtful black feminist lesbian poet and social commentator—rang in my ears throughout my first year: *The Master's Tools Will Never Dismantle The Master's House*.<sup>32</sup> Because legal terms are tools and the legal lexicon is nothing but a toolbox full of words like “due process,” “criminal intent,” and “the reasonable person,” I construed her warning to be about the inherent limits of the tools of our

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<sup>30</sup> See John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of “Public Interest Drift” in Law School*, 51 U.C. DAVIS, L. REV. 1973 (2018); see also ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 48 (1992) (reporting on a survey finding that 70% of incoming Harvard Law School students expressed a preference for public-interest careers, but by their third year, only 2% planned to take what the authors defined as public-interest jobs); ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 3 (1989) (finding that the number of students at the University of Denver Sturm College of Law who planned to pursue public-interest careers declined from 33% to approximately 17% between the first and third years of law school); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 L. & SOC'Y REV. 851, 853–54 (1996) (finding that over half of the incoming University of Wisconsin law students surveyed were interested in jobs with an “explicit social reform component,” but upon graduation only 13% began their careers in legal aid, as a public defender, or in a non-profit organization); Craig Kubey, *Three Years of Adjustment: Where Your Ideals Go*, 6 JURIS DR. 34, 34 (1976) (finding that the number of U.C. Davis students who reported that a public interest job would be their first choice declined by 15% between the first and second years of law school).

<sup>31</sup> Reinforcing such concerns can be popular depictions of legal education in which, for instance, a crusty first-year law professor with a name like “Kingsfield” tells new first-year initiates that his class will transform their brains from mush to an organ that can think like a lawyer. See THE PAPER CHASE (Twentieth Century Fox 1973). Some understandably worry, however: “how much of that so-called ‘mush’ is me—my values, viewpoints, convictions, and passions? Along with my hat, coat, and other unnecessary things, how much of ‘me’ do I have to check with the attendant at the coat closet on my way to the classroom?”

<sup>32</sup> AUDRE LORDE, THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE (1984), reprinted in SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (2007).

trade—the language of the law. If ‘The Master’s House’ refers to American social structures built on the subordination of women and minorities (in other words, if this House represents racist patriarchy), it cannot be denied that the language of the law, including rights discourse or “rights-talk,” was deployed historically to privilege people to rape (a husband had a right to force intercourse on an unwilling and resisting woman, for instance, as long as they were married), slavery (a slave owner had a right to sell and beat his chattel), and Jim Crow (until *Loving v. Virginia*, my mom and dad did not have the right to marry in certain states). This language of legal rights did function for many years as a vital tool in the historical construction and maintenance of The Master’s House. Lorde asks, “[w]hat does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy?”<sup>33</sup> Her answer: “It means that only the most narrow perimeters of change are possible and allowable.”<sup>34</sup> She concludes that although the Master’s tools “may allow us temporarily to beat him at his own game, they will never enable us to bring about genuine change.”<sup>35</sup> One reason you cannot dismantle the Master’s house (resist his domination) with his own words is because those words themselves carry and reproduce *his* ideology, consciousness, mentality, values, outlook, or worldview. This warning about the inherent limits of the tools of our trade, our legal words and definitions, if true, is demoralizing to someone seeking to use the language of the law to challenge unwarranted privilege backed by precedent and tradition.

The claim that we can be trapped in a certain way of thinking about and looking at the world by our words and their inherent meanings can seem commonsensical.

Take the words used by economists, Freudian psychologists, and sociologists and try using them to explain the poverty and crime in South Central, Los Angeles, for instance—*supply and demand, marginal productivity, Pareto efficiency, utility function, and rational utility-maximizing egoist; id, ego, superego, projection, repression, psychological trauma, Oedipal complex; social stratification, status, roles, group, values, norms, institutions, race*.<sup>36</sup> It can seem that the very “ideas” policymakers can form about poverty and crime will be heavily influenced by their language, the words choosing the “ideas” the policymaker can form

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> LORDE, *supra* note 32, at 110–14.

rather than the policymaker first forming the “ideas” and then searching for the right words to express them.<sup>37</sup> These words seem to speak the policymaker (that is, direct her attention, channel her perceptions, and shape her ideas, consciousness, and outlook) as much as the policymaker speaks the words (that is, uses the words to express ideas or represent external reality). By the same token, some law students worry that an indelibly corporatist or liberal or conservative consciousness, mentality, or outlook may accompany talking and thinking like a lawyer. The legal lexicon brims with old words like “rights” and “duties” and “privileges”: are these ancient legal words and concepts indissolubly wedded to a certain way of looking at the world? Is legal discourse a lingual trap that cannot bring about lasting change?

This is the position taken by Leslie Bender in *A Lawyer's Primer of Feminist Theory*, where she argues that mainstream legal discourse—that is, “rights-talk”—in tort law is intrinsically connected to an egoistic male perspective and to male values.<sup>38</sup> In her words:

Tort law should begin with a premise of responsibility rather than *rights*, or interconnectedness rather than separation, and a priority of safety rather than profit or efficiency. The masculine voice of *rights*, autonomy, and abstraction has led to a standard that protects efficiency and profit; the feminine voice [of caring, context, and interconnectedness] can design a tort system that encourages behavior that is caring about others' safety and responsive to others' needs or hurts, and that attends to human context and consequences.<sup>39</sup>

Bender's claim that a certain voice, set of values, and viewpoint always accompany the word “rights” exactly parallels the claim that the N-word has an inherent meaning. Professor Bender's critique of rights-talk as the indelible expression of a certain world view or ideology or underlying

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<sup>37</sup> It might seem to follow from this view of words and discourse that a speaker or writer does not merely utter certain words, he or she is also uttered by them, for their indelibly oppressive meaning must negatively influence all who utter or hear them. It might seem that once words and symbols and discourses have been used to establish and maintain oppression, marginalization, and subordination, they cannot be used to fight that same oppression, marginalization, and subordination. In sum, it might seem that words with sorry histories can only summon and recycle those same sorry meanings, not take on radically new ones capable of producing profound social change. Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9 (2014) (describing how racialized language can be used as a metaphor to look at the intersectionality of morality, race, and class).

<sup>38</sup> Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 31–32 (1988) (emphasis added).

<sup>39</sup> *Id.*

intellectual edifice dates back to Karl Marx's attack on what the French Declaration of 1793 had taken as the fundamental rights of man, namely, the rights of liberty, property, security, and equality. As Marx put it:

None of the supposed *rights of man* . . . go beyond the egotistic man . . . that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in 3 with his private caprice.<sup>40</sup>

For Marx, rights-talk expresses bourgeois ideology, that is, such talk reflects the wish of the capitalist entrepreneur to be free from social limitations and social accountability—free from any duties of care and concern for the well-being of people he exploits.<sup>41</sup> For Marx, both *in content* and *in form* “rights” merely promote and protect the selfish interests of acquisitive individuals, and rights-talk merely reproduces an atomistic and egoistic world view.<sup>42</sup>

*In content*, the right of liberty, defined as the right to do anything that does not harm others, is a right rooted in separation from (rather than solidarity with) others.<sup>43</sup> My right of liberty gives me a fenced-off area of freedom from which I can exclude all others and within which I am privileged to invade the interests of others without doing anything the law will call a “harm” or “wrong.”<sup>44</sup> Through the atomizing lenses of my right to liberty, I look at others not as brothers or sisters or friends or neighbors but as limitations on my freedom. Viewing others as limitations on me leads me to feel hostility and resentment toward them. “The right of man to freedom,” says Marx, “is not based on the union of man with man, but on the separation of man from man.”<sup>45</sup> Property rights also erect a fence around each individual: “The right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independent of society,

<sup>40</sup> KARL MARX, ON THE JEWISH QUESTION (1843), *reprinted in* THE MARX-ENGELS READER 26, 43 (Robert Tucker ed., 1978) (emphasis added).

<sup>41</sup> Jeremy Waldron, *Karl Marx's 'On the Jewish Question,' in* NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 119, 126 (Jeremy Waldron, ed., Routledge 2015) (1987).

<sup>42</sup> *Id.* at 126–27.

<sup>43</sup> *Id.* at 127.

<sup>44</sup> *Id.*

<sup>45</sup> ERIC R. BOOT, HUMAN DUTIES AND THE LIMITS OF HUMAN RIGHTS DISCOURSE 93 (2017). He notes: “The freedom in question is that of a man treated as an isolated monad and withdrawn into himself. . . . It is the right to this separation, the rights of the limited individual who is limited to himself.” *Id.*

the right of selfishness.”<sup>46</sup> The right to equality merely assures that each individual enjoys these antisocial rights of personal liberty and private property without discrimination, “that each man shall without discrimination be treated as a self-sufficient monad.”<sup>47</sup> Finally, the right of security backs up these other self-regarding, atomistic, and asocial rights with guns and badges and “the concept of the police”—it puts the force of the state behind social relations and institutions rooted in egoism and so merely provides “the assurance of egoism.”<sup>48</sup>

*In form*, rights reflect and reinforce an individualistic ideology by assuming that the members of a society are perpetually ready to set at one another’s throats and need state-backed, and ultimately police-backed personal rights to repel one another (one wields rights as one would a sword and shield to fend off or eject trespassers and potential trespassers, those who will incessantly seek to encroach upon one’s fenced off area of personal freedom and private property). Finally, the abstract *form* of rights as neutral rules that treat everyone alike hides from view the dominance of haves over have-nots and the powerful over the weak. For instance, legal analyses of the rights and duties of people who make promises (the law of contracts) and people who injure others (the law of torts) pay no attention to underlying unequal distributions of wealth and power in America. Rather, as Richard Abel notes in his Marxist critique of Anglo-American tort law, the rightness of those unequal distributions is taken for granted and attention focused only on the changes in the status quo ante brought about by the accident or broken promise.<sup>49</sup> So, the abstract *form* and the bourgeois *content* of rights-talk conspire to make such talk the indelible expression of bourgeois individualism. Rights, in a word, always mean *bourgeois* rights—their form and content rob them of the power to promote unity over hostility, community over egoism, and solidarity over separation. It follows from this analysis that rights-talk cannot bring about real progressive social change. It

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Waldron, *supra* note 41, at 128 (quoting MARX, *supra* note 45, at 147).

<sup>49</sup> See Richard L. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 445–70 (David Kairys ed., 3d ed. 1998). By the same token, feminist and critical race theorists have pointed out that tort law reproduces gendered and racialized hierarchies despite its use of seemingly neutral rules and procedures. See, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010). Part of learning accident and contract and criminal law is learning the general irrelevance to legal liability of gross disparities in wealth and power between the parties to the dispute.



can only reflect and reinforce bourgeois ideology—bourgeois visions, voices, and values.

So, Feminists and Marxists reject rights-talk on the same fixed-meaning grounds that the NAACP critics reject the N-word. Like critics of rights discourse, critics of N-word-laden rap or spoken-word performances contend that both in *form* and *content* these profane racial utterances, these groupings of rule-governed racial epithets, reflect racist beliefs and reinforce a racist worldview. In *content*, critics suppose that N-word-laden performances have an inherently racist “meaning”—such talk is a reflection, however indirect and removed, of an underlying anti-black point of view. And they suppose that the profane, abusive, vulgar, and irreverent *form* of such talk echoes and reinforces the disrespect for black personhood in the content. So, in keeping with the implications of the analysis of rights talk, critics of the N-word can assert that the profane *form* and the racist *content* of N-word-heavy discourse conspire to make such talk the indelible expression of racist beliefs and attitudes. Its form and content rob it of the power to promote unity over hostility, community over animosity, and solidarity over separation. Accordingly, neither rights-talk nor N-word-laden discourse can contribute to progressive political discourse.

Fortunately for those of us professionally or personally committed to producing social change through words, symbols, and discourses, including hoary old lexicons with sickeningly sexist, racist, and homophobic histories, Lorde, Marx, Bender, and the NAACP are right in focusing our attention on language as an instrument through which power is exercised. But they are wrong in saying that certain words and discourses are inherently oppressive, self-abnegating, atomizing, or socially marginalizing and can only reflect and reinforce the status quo. They are right that there are many lethal discourses of domination and exclusion that thwart empathy, stall conscience, and preserve privilege, but words do not just link established or “fixed” meanings and corresponding references. Rather, social actors contest the meanings, references, and “correct” applications of words in the process of constituting their social identity and vindicating their social existence. What was an “incorrect” reference for a word yesterday can, abruptly or by degrees, turn into a “correct” reference today as social actors rally in support of a new application. Simply put, any words and symbols can be deployed as political tools for any cause; in the realm of political communication and public discourse, there are no fixed meanings. Look at the career of “queer” as a word, for instance. Once a hateful epithet, it now figures in a field of critical

theory called “queer theory” that emerged in the early 1990s out of the fields of queer studies and women’s studies and includes queer readings of texts and critical reflections on “queerness” itself. Viewing words and symbols and discourses as volatile political tools highlights their capacity to be detached from their roots and used subversively to generate new meanings, create new alliances, and produce profound change.

#### IV. A SOCIAL THEORY OF MEANING: WITTGENSTEIN, AUSTIN, AND LAKOFF

The commonsense, fixed-meaning, folk theory of how we use words to refer to things in the world highlights the way words can be great devices for transmitting factual information. But in his famous paper, *The Meaning of a Word*, Austin asks, “[w]hy do we call different [kinds of] things by the same name?”<sup>50</sup> Why do people use the same word for very different “senses?” For instance, why do we use the word “mother” to refer to kinds of mothers—including birth mothers, donor mother, surrogate mothers, adoptive mothers, foster mothers, and step mothers (and mother of invention, mother of vinegar, and den mother)—or the word “game” to refer to many different kinds of games, some competitive, others not, some that are all luck, others that are all skill? A commonsense, but mistaken explanation would be that the kinds of things named by the same word are similar in some way, that they share something in common—they form a “classical category”<sup>51</sup> on the basis of what they all have in common and the name applies to this category.

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<sup>50</sup> J.L. AUSTIN, J.O. URMSON & G.J. WARNOCK, *The Meaning of a Word*, in PHILOSOPHICAL PAPERS 56, 69 (3d ed. 1979).

<sup>51</sup> Our everyday folk theory of what it means to belong to a category is that “things are categorized together on the basis of what they have in common.” Accordingly, if my son says, “Dad, there’s a duck on our front porch,” I instantly *know* three things about that creature if my son “correctly” referred to it and his statement is “true”—I know the shape of its bill, the length of its legs, and the morphology of its feet. I know this because these shared properties define the category and all members share them. By the same token, if my son says, “Dad, there’s a triangle on our front porch,” I may not know the size, color, or texture of that entity, but I know with certainty that it has three sides and interior angles adding up to 180 degrees. I know this because the category “triangle,” like the category “duck,” can be viewed as what George Lakoff calls a “classical category,” that is, a category defined by the common properties of its members. LAKOFF, *supra* note 9, at 161 (“Classical Categorization: All the entities that have a given property or collection of properties in common form a category. Such properties are necessary and sufficient to *define* the category. All categories are of this kind.”); *id.* at 8–18 (stating, e.g., “the classical theory that categories are sets defined by the common properties of objects,” “Categories are Classical,” “if there are common properties, those properties form a classical category, and the name applies to

Austin torpedoed this commonsense view by pointing out that the different senses of a word frequently do not have properties in common.<sup>52</sup> To illustrate his point, I will use the word “mother,” for instance. There is no common set of properties shared by all the following kinds of mothers: those who give birth, those who donate an egg, those who give birth but did not donate the egg, those who lack any genetic or birth connection but who are the legal guardian and nurturer, those who lack any genetic or birth connection but who are paid by the state to nurture, and those who lack any genetic or birth connection but who are current wives of the fathers. As Lakoff says, “[t]he concept mother is not clearly defined, once and for all, in terms of common necessary and sufficient conditions.”<sup>53</sup> Thus, the word “mother” has noncentral *extended senses*—birth, donor, surrogate, adoptive, foster, step—and a central *prototypical* sense, namely:

[A person] who is and always has been female, and who gave birth to the child, supplied her half of the child’s genes, nurtured the child, is married to the father, is one generation older than the child, and is the child’s legal guardian.<sup>54</sup>

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this category.”). For a word to correctly refer to a member of a classical category, the entity referred to must be just like every other entity in the category in some relevant way, setting the stage for strong inferences and deductions. What is so attractive about this theory of how we use words to refer to different *kinds* of people, places, and things is that if words have established meanings and correct references, they are great devices for transmitting factual information.

<sup>52</sup> Austin noticed for words the same kinds of things that Wittgenstein noticed for concepts. Wittgenstein pointed out that many of our everyday, ordinary conceptual categories, like the familiar category *game*, are not classical since there are no common properties shared by all games—not all games have competition or winners and losers (e.g., ring-around-the-rosy), not all involve more than one person (e.g., solitaire), not all involve luck (chess), not all involve skill (plugging a slot machine). LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31–32 (G. E. M. Anscombe trans., 1958). Instead, what makes *game* a category, observed Wittgenstein, are the “*family resemblances*” among its members—both basketball and ping pong involve competition, skill and athleticism; both basketball and poker involve competition and skill; both poker and solitaire involve cards and entertainment; and so on. *Id.* at 32 (emphasis added). Like family members, games are similar to one another in lots of different ways. *See id.* (noting that “games form a family”) (internal quotation marks omitted). A little reflection reveals that a great many categories we use in everyday and political communication are not classical but constructed and based on family resemblances, that is, many (like the category *game*) are structured around prototypes rather than (like the categories *duck* and *triangle*) around common properties. Austin extended this same sort of analysis to the study of words themselves and the category of senses that can be named by the same word. The N-word, too, as we will see, has many different senses, and the category of senses named by the N-word is not a classical one defined by the common properties of its members but rather it is a socially constructed one.

<sup>53</sup> LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*, *supra* note 9, at 76.

<sup>54</sup> *Id.* at 83.

In this case there are a variety of “principles of extension” from the central or prototypical sense to noncentral extended senses—some based on giving birth, some on genetics, some on social, cultural, and legal factors.<sup>55</sup> In the end, the mother category, like most other categories in ordinary public discourse, is one whose contours and membership depend on social conventions rather than shared properties. And then there is metaphorical speech, the mother of all ambiguities and much invention.

Lakoff calls categories like “mother” *radial*, as opposed to classical, categories. In his words, “[a] radial structure is one where there is a central case and conventionalized variations on it which cannot be predicted by general rules.” A key characteristic of a radial category like mother is that the prototype or central case does not and cannot determine which subcategories (for instance, which candidates for the “mothers” designation) can properly or correctly belong to the category. As Lakoff notes, “[t]here is no general rule for generating kinds of mothers.”<sup>56</sup> By the same token, there is no general rule for generating kinds of people to whom the N-word can refer. Because the extended senses of the N-word need not share anything in common with the prototypical sense of the word, the senses do not form a classical category—based on what they all have in common—to which the word applies. Rather, the senses of the N-word are simply culturally and politically determined and have to be learned rather than logically deduced. In a word, the N-word category is *radially structured*. The boundaries of radial categories can be extended by social actors in imaginative, creative, and unpredictable ways. The career of a word in political communication and public discourse, its developmental arc over time, cannot be logically deduced from its origins. Just as, in the words of Oliver Wendell Holmes, “[t]he life of the law has not been logic: it has been experience,” we can say the life of ordinary language, too, has been not logic but experience.<sup>57</sup> And

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<sup>55</sup> Another way a word develops different senses is through *chaining* within a category. “Another case is where I call *B* by the same name as *A*, because it resembles *A*, *C* by the same name because it resembles *B*, *D* . . . and so on. But ultimately *A* and, say, *D* do not resemble each other in any recognizable sense at all. This is a very common case: and the dangers are obvious when we search for something ‘identical’ in all of them!” AUSTIN ET AL., *supra* note 50, at 72.

<sup>56</sup> LAKOFF, *supra* note 9, at 84.

<sup>57</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). WITTGENSTEIN, *supra* note 52, at 8 (“Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets and uniform houses.”).

a major part of the experience that shapes the meaning of language, a major mechanism or principle of extension for senses and concepts, is a word's political usefulness in helping unify individuals and create social identities.

Finally, let me lay to rest the other primary basis for believing that a certain oppressive consciousness, mentality, or worldview always accompanies certain words and symbols, namely, the theory that meanings are in our heads, that they are mental happenings within the individual that accompany speaking and understanding language, that they are ideas in the mind of the word users, and that “[h]aving the image is what understanding the word amounts to”<sup>58</sup>—in short, let me put to rest the “ideational theory of meaning.”<sup>59</sup> Wittgenstein emphatically declared that “nothing is more wrongheaded than calling meaning a mental activity.”<sup>60</sup> Instead, he located word meanings outside the heads of speakers—in the function that words have as “signals” passed back and forth between people in the course of purposeful and shared activity.<sup>61</sup> Wittgenstein coined the term “language-game” to emphasize “the fact that the *speaking* of language is part of an activity, or of a form of life.”<sup>62</sup> One famous language-game he describes involves a builder, called *A*, communicating with his helper, *B*.<sup>63</sup> The game nicely illustrates the different ways that words carry meaning or function in shared, purposeful activity; it also nicely shows how unnecessary it is to look for the meaning of language in “mental pictures” or “subjective thoughts, beliefs, intentions” or any other mental activity that accompanies talking and understanding. *B*'s job is to pass *A* stones of various kinds—bricks, slabs, columns, etc.—when *A* shouts “brick” or “slab” or “column.” Words like “red” and “blue” are given a role in the game, so *A* can shout “red slab,” and *B* will pass slabs of a certain color. The game could be developed to have conventions about word order, so that if *A* said “slab, column, brick,” this means that *B* is to bring them in a definite order. Signs that function like numerals could be introduced. *B* could memorize the alphabet and, when *A*

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<sup>58</sup> BLOOR, *supra* note 22, at 7.

<sup>59</sup> WILLIAM P. ALSTON, *PHILOSOPHY OF LANGUAGE* 64 (1964).

<sup>60</sup> WITTGENSTEIN, *supra* note 52, at 171.

<sup>61</sup> *See id.* at 72–73 (describing “words” as “signal[s]” of one’s “mental state,” not “a description” thereof) (internal quotation marks omitted); BLOOR, *supra* note 22, at 22 (delineating Wittgenstein’s views on “linguistics” within his work *Blue and Brown Books*).

<sup>62</sup> WITTGENSTEIN, *supra* note 52, at 11; *see also* BLOOR, *supra* note 22, at 22 (describing Wittgenstein’s “language-game[s]” as delineated in *Blue and Brown Books*).

<sup>63</sup> WITTGENSTEIN, *supra* note 52, at 3–6.

shouts “d slabs!,” *B* could chant the letters a, b, c, d, and bring a slab for each letter. Words that act like proper names (that is, represent unique entities rather than kinds of entities)<sup>64</sup> could be added to the game. Thus, there could be a mark “H” on the hammer that *A* uses. When *A* shows *B* the mark, *B* fetches the object marked “H.” Finally, words like “this” or “there” could be used in the course of pointing to things and moving them about.

This language-game or discourse through which *A* communicates with *B* is a complete system of communication as far as Builders and Helpers are concerned—and each verbal signal has its own function. For instance, the words “slab” and “brick” function in their language-game very differently than the words “here” and “there” or “red” and “blue” or the numerical signs “a,” “b,” “c,” and “d.” Put differently, the words “slab” and “brick” are different kinds of tools in their shared activity than the words “here” and “there.” As Wittgenstein puts it, “[t]hink of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-driver, a rule, a glue-pot, nails and screws. The functions of words are as diverse as the functions of these objects.”<sup>65</sup> Once we see clearly that different words function differently in mediating a shared activity like building something, we also see clearly that words can only be understood in terms of how they are woven into those patterns of shared activity—we see clearly that they can only be understood in terms of the role they play in language games. “Only in the stream of thought and life do words have meaning,” says Wittgenstein.<sup>66</sup> The stream of life that pulses through a language-game—the shared and purposeful activity that the game makes possible—creates meanings or “uses” for the words in the game. “For a *large* class of cases—though not for all—in which we employ the word ‘meaning,’” he says, “it can be defined thus: the meaning of a word is its use in the language.”<sup>67</sup>

Thus, the meaning of the N-word is its use in language, and since its uses are many, its meanings are many.

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<sup>64</sup> A proper noun or proper name is a noun representing a unique entity (such as London, Jupiter, John Hunter, or Toyota), as distinguished from a common noun, which describes a class of entities (such as city, planet, person, or corporation).

<sup>65</sup> WITTGENSTEIN, *supra* note 52, at 6.

<sup>66</sup> LUDWIG WITTGENSTEIN, ZETTEL 31e (G.E.M. Anscombe and G.H. von Wright, ed., Univ. of Cal. Press 1967).

<sup>67</sup> WITTGENSTEIN, *supra* note 52, at 20; BLOOR, *supra* note 22, at 24. Most simply, we do not express ideas with language, we do things with words—words are social acts with social consequences and understanding words is knowing how to do certain things with them.

Drawing on this insight that the meaning of a word is its use, I will now draw on the work of J. L. Austin to show that one of the most potent uses of words in our collective stream of life is as *performatives*, especially as *political performatives*. The N-word can be a political performative, the word “rights” can be a political performative, indeed, any form of linguistic or nonlinguistic symbolic communication can be a political performative. When old words and symbols are used as political performatives, they can take on radical, even revolutionary, new meanings.

#### V. PERFORMATIVES: VERBAL ACTS WITH SOCIAL CONSEQUENCES

In his aptly titled book, *How to Do Things with Words*, J. L. Austin bolsters Wittgenstein’s insight that social function, purpose, and use—not a speaker’s subjective mental state—determine the meaning of words. Austin distinguishes between “statements” (of fact) and other kinds of sentences that look like “statements” but are not at all what they seem. He calls these sentences that look like “statements” (of fact), but play a completely different role in our language-games, “performatives.”<sup>68</sup> He points out that, for a long time, philosophers assumed that a “statement” can only “‘describe’ some state of affairs, or to ‘state some fact,’ which it must do either truly or falsely.”<sup>69</sup> The sentences “it is raining outside” and “George W. Bush was the 42nd President of the United States” are clearly “statements” by this definition—both utterances state facts and are either true or false. The function of a “statement” is to transmit true or false information about the world from one person to another. But where does this leave words and sentences and utterances that neither describe anything nor state a fact, common words and sentences like “I do” (take this person to be my lawful wedded spouse) spoken at a wedding, “I name this ship the *Queen Elizabeth*” spoken when “smashing the bottle against the stem” of a ship, “I give and bequeath my watch to my brother” written in a will, and “I bet you [ten dollars] it will rain tomorrow.”<sup>70</sup> As Austin observes, when I say these words, I am not stating, reporting, describing, or asserting facts—I am performing *acts*. In appropriate circumstances, no matter what mental reservations I feel,

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<sup>68</sup> J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 4–6 (Oxford Univ. Press 1962) (reproducing the William James Lectures delivered at Harvard University in 1955).

<sup>69</sup> *Id.* at 1.

<sup>70</sup> *Id.* at 4–5.

uttering the words “I promise to do or to refrain from doing” or “I do” bind me to another person. And a married man who says the words “with this ring I thee wed” to a woman who is not his wife during an official second marriage ceremony while still married *by those very words* becomes a bigamist no matter how thoroughly he convinces us that his heart and mind were not in his utterance.<sup>71</sup> The act of marrying, like the acts of promising, betting, and bequeathing (to mention just a very few) must be described as ‘saying certain words,’ rather than as performing any mental or psychological action “of which these words are merely the outward and audible sign.”<sup>72</sup> In the

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<sup>71</sup> *Id.* Words like “I do” and “with this ring I thee wed” might indeed dwell within me (depend on my mental, emotional, or spiritual state) *if* they simply described or reported what was in my heart or mind or spirit as I spoke them. *See id.* at 9 (noting, of “performative utterance[s],” that “the outward utterance is a description, *true or false*, of the occurrence of [one’s] inward performance”). That is, *if* they simply described or reported the occurrence of a mental, emotional, or spiritual act within me—an act that either did or did not happen as the words were spoken, making the words “I do” either true or false—then their meaning depends on my mental, emotional, or spiritual state. *See id.* at 10–11 (recognizing situations where one’s “utterance,” or the “promise” made, is “not implemented” because it is made without the intention of fulfillment). From this perspective, I only mean what I say when my words accurately reflect my inner thoughts and feelings. *See id.* at 9–11 (describing the role of intentionality as it relates to the binding impact of one’s utterances). Thus, under this approach, the words “I do” are a “statement” (of fact) about a mental, emotional, or spiritual act that I perform as I say them. *See id.* at 10–11 (delineating the potential effect of “performative utterance[s]” on the promises inherent in one’s commitment to marriage). If I say the words outwardly while inwardly refusing to perform the mental or spiritual act, then the words “I do” do not accurately describe my mental state as I utter them—in a word they are a lie, a misrepresentation of my true inner state. *Id.* at 10–11 (illustrating the potential for a promise “given in bad faith” or one which will “not be implemented”). My failure to perform the mental or spiritual act as I uttered the verbal formula might then prevent the bond from truly being formed. *But see id.* at 11 (noting that when one promises something but inwardly does not intend to fulfill his or her commitment, the promise “is not . . . *void*, though it [may be] given in *bad faith*”). Accordingly, a man could apparently marry two women but challenge a bigamy charge by saying that in the second marriage ceremony, when he said “I do,” he was “lying”—as Austin notes, he could say that “my tongue swore to, but my heart (or mind or other backstage artiste) did not.” *Id.* at 10 (citing Hippolytus 1.612). By the same token, I could say “my tongue (or typewriter or ball point pen) swore to, but my heart and mind did not” when I uttered (in speech or writing) the words “I promise to.” *See id.* at 11 (describing that “the person uttering the promise should have a certain intention” to be bound by her “word[s]”). If what truly binds me is my will and not my words, then without being bound I could raise my hand to signal a bid at an auction while inwardly thinking and feeling “I bid not” or I could say to a Vegas bookie “I bet 100 dollars” while inwardly thinking and feeling “I bet not.” *But see id.* at 11 (noting that one who makes a “bet” made without the intention of honoring such nonetheless promises, at least outwardly, to fulfill such obligation). It may be easier to imagine uttering a verbal formula while thinking and feeling the opposite of what the formula says by imagining that you just learned how to say “I bet” in a foreign language, say French, and uttered that French phrase while inwardly thinking in English “I bet not.”

<sup>72</sup> *Id.* at 13.



appropriate circumstances, to marry, promise, bet, or bequeath is simply “to say a few words.”<sup>73</sup> The meaning of the sentences “I do,” “I promise,” and “I bet” lies not in what they say but in what they *do*—namely, bond and bind individuals. Despite any mental or spiritual reservations we may harbor, when we say “I promise” or “I do,” as Austin observes, “*our word is our bond.*”<sup>74</sup> An utterance like “with this ring I thee wed” does not report or describe the fact that we are marrying, it constitutes the act of marrying—the act of marrying is largely a verbal act performed by ‘*saying certain words.*’<sup>75</sup> More than just words, such utterances are also deeds—they are “verbal acts.” Austin calls these “verbal acts” “*performative sentence[s]*,” “performative utterances,” or simply “performatives.”<sup>76</sup> Calling such words “performatives” is apt because they actually perform an action and are “not normally thought of as *just saying something.*”<sup>77</sup>

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<sup>73</sup> *Id.* at 7–8.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> *Id.* at 13.

<sup>76</sup> *Id.* at 5–7, 12–13. Because performatives like “I do-promise-bid-bet-bequeath-and-christen” are not “statements” (of fact) about the speaker’s intentions or inner psychic condition, the meaning of these performatives does not depend on any hidden happenings in the head of the speaker. *Id.* at 6 (demonstrating that “utterances” as such are “[n]either true [n]or false”). Rather, the only meaning these verbal acts have sits in plain view, residing in the way speakers and listeners *use* them, in the actions users perform with them, and in the ways the performatives function as “signals” passed back and forth between people in the course of purposeful and shared activity. *Id.* at 6–7 (describing “performatives” as “the performing of an action . . . not just saying something”). Furthermore, the meaning of these performatives, their range of use and application, can be hotly contested, as we saw in the same-sex marriage debate, which can be framed as a debate over whether utterances like “with this ring I thee wed” can perform the same bonding action for same-sex couples as it could for straight ones, that is, whether same-sex couples can be included in the meaning of marriage.

<sup>77</sup> AUSTIN ET AL., *supra* note 50, at 7 (emphasis added). Lawyers call performative utterances in written instruments the “operative language.” *Id.* Thus, the operative words in a deed conveying real property might be “sell” and “convey”—in some states, these are the statutory operative “words of conveyance” for property title conveyance. *See generally, e.g.,* COLO. REV. STAT. §§ 38-20-101 to -209 (2018) (using operative words like conveyance in the state statute on liens for personal property). A deed is not a valid conveyance of real property without these “words of conveyance.” *See, e.g.,* COLO. REV. STAT. § 38-10-106 (2018) (explaining that no estate or interest in lands can be conveyed without a deed or conveyance in writing). Words like “sell” and “convey” in a document serve to effect the transaction—they perform an action—while all the other words (names of parties, description of property, and statement of consideration) merely report facts and set the stage. *See* AUSTIN ET AL., *supra* note 50, at 7 (“[W]hereas the rest of the document merely ‘recites’ the circumstances in which the transaction is to be effected.”) (footnote omitted).

Also, under the Federal Rules of Evidence, performative utterances are treated very differently than “statements” and “assertions” (of fact). The hearsay rule, FED. R. EVID. 802, prohibits the use of “statements” (of fact) made outside of court to prove that the facts described or reported in those

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statements really did happen. FED. R. EVID. 802; FED. R. EVID. 801. For instance, suppose a prosecutor wants to prove that an accused killer shot the deceased victim. It would be perfectly proper for the State to call, as a witness, Bill, to testify under oath that he was at the scene of the crime and observed the accused shoot the victim. However, it would violate the hearsay rule for the State to call, as a witness Jack, to testify that he was not at the scene of the shooting, but Bill told him that he (Bill) was at the scene and observed the accused shoot the victim. To put it in the sometimes-cumbersome phrasing of the law, the hearsay rule prohibits the use of an out-of-court statement like Bill's to prove "the truth of the matter asserted" (i.e., that the accused indeed was the shooter). FED. R. EVID. 802. In other words, Bill's statement (of fact) to Jack about what he saw, like any statement or assertion of fact, is either sincere or insincere. If Bill was being sincere when he made the statement to Jack, his statement *tends* to prove that the accused did in truth shoot the victim (the reason even the most sincere assertions of fact only *tend* to prove the existence of the facts asserted is because honest people make mistakes in perception, memory, and narration all the time). But, if Bill was lying about the facts (maybe he was not at the scene or was but did not get a good look or got a good look but wants to frame the accused), his statement *in no way* tends to prove that the accused was the shooter—in legal parlance, his assertion (of fact) in no way tends to prove "the truth of the matter asserted." And the risk that Bill is lying increases if he did not make the statement (of fact) under oath and subject to cross-examination. We want to know that Bill's statements (of fact) honestly express his sound perceptions and memories before we allow Jack to repeat those statements in a courtroom as some proof that the accused did "the matter asserted." Accordingly, assertions of fact like those Bill made to Jack cannot be repeated in court to prove that the accused shot the victim, that is, "to prove the truth of the matter asserted."

However, there is absolutely no hearsay problem under the Rules of Evidence with Jack repeating the words of Bill in court if Bill's words were "With this ring I thee wed" rather than "the accused shot the victim." Other out-of-court words by Bill that Jack can repeat in court without a problem include: "I promise," "I bet," "I christen," "I bequeath" or any other performative utterance. Jack can freely repeat and quote these out-of-court utterances in court because Bill's words are verbal acts rather than factual reports or descriptions of reality. A statement (of fact) like "it is raining outside" transmits information about the world that can be true or false and about which the speaker could be lying. But a verbal act like "with this ring I thee wed" does not report the fact that we are marrying, it constitutes an act; simply put, the act of marrying is largely a verbal act performed by "*saying certain words.*" AUSTIN ET AL., *supra* note 50, at 12–13 (emphasis in original). By the same token, to say in response "I do" is to consummate a morally and legally significant act. Accordingly, unlike "statements" and "assertions" (of fact), verbal acts cannot be true or false—"we do not speak of a false bet or a false christening," for instance. *Id.* at 11. Because the sincerity of the speaker of performatives is irrelevant to their binding effect, the sincerity worries that keep out "statements" (of fact) as hearsay do not keep out verbal acts. Of course, if the words "I promise," "I bet," or "I do" merely describe some inward mental or spiritual action "of which these words are merely the outward and audible sign," they would qualify as "statements" or "assertions" (of fact) about the speaker's inner condition and constitute hearsay. But the words "with this ring I thee wed" are not hearsay because they are not "statements" (of fact) about the speaker's mental state—they may look like statements of fact, but their meaning lies in their *social use*, not in any images, pictures, thoughts, beliefs, ideas, or desires within the speaker that accompany their social use. As Wittgenstein stressed, language-games are a "form of life" in which words are deeds and understanding words boils down to knowing how to do things with them.

## VI. A POLITICAL THEORY OF MEANING

This brings us to the most important questions of this analysis: what makes a performative word or symbol “political” and what social action does such political communication perform? In what sense can words like “rights” and the N-word constitute political performatives? There are two common reductive conceptions of politics that obstruct a clear view of the creative role performatives play in politics. The first is that politics is something that occurs only in the state. Given the massive amount of money that goes into national, state, and local elections, and the media attention lavished on these “horse races,” it is easy to see why many people view politics as a contest that happens only in designated places like voting booths, congressional chambers, city councils, governors’ mansions, and the White House.<sup>78</sup> Accordingly, dictionaries commonly define politics as “[t]he art or science of government or governing, especially the governing of a political entity, such as a nation, and the administration and control of its internal and external affairs”<sup>79</sup> and political science as “the study of the processes, principles, and structure of government and of political institutions.”<sup>80</sup> Call this the *state model of politics*. Under this model, politics in contemporary America can easily be equated with representative government and a representative political system. “No taxation without representation” qualifies as a paradigmatic political slogan under this approach.<sup>81</sup>

The second views political activity as a contest over the power to make the rules of the game and to determine the distribution of goods and services and taxes and jobs—a contest over who gets what, when, and how.<sup>82</sup> Call this the *spoils model of politics* (as in “to the victor go the material and decisionmaking spoils of victory”).

But “say it loud, I’m black and I’m proud” cannot qualify as a political slogan under the spoils model because it makes no claim on resources or

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<sup>78</sup> Jennifer Fitzgerald, *What Does “Political” Mean to You?*, 35 POL. BEHAV. 453, 462–63 (2013). In this study of ordinary people’s ideas of what “political” means, the highest percentage, 87%, considered tax cuts a political issue. Coupled with the study’s finding that many people think “politics means anything related to government bodies,” especially representative ones, for many “no taxation without representation” would be readily recognized as a political statement. *Id.* at 467.

<sup>79</sup> *Politics*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

<sup>80</sup> *Political Science*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

<sup>81</sup> See *supra* note 80 and accompanying text.

<sup>82</sup> HAROLD D. LASSWELL, THE POLITICAL WRITINGS OF HAROLD D. LASSWELL (1951).

decisionmaking authority. Nor can it qualify as political communication under the state model because it does not focus on “[t]he activities or affairs engaged in by a government, politician, or political party.”<sup>83</sup> It is a political performative, but what is its politics?

To move beyond these narrow *state and spoils models of politics*, I will start with a bare minimum, stripped down definition of politics purely in terms of power. Politics concerns power. But while power is the point of politics (and the object of political theory), power takes many forms. Anything that can produce or resist social change is a form of power, including money, social status, tradition, and the barrel of a gun. Yet in democratic nations, social change has been produced, and power has been effectively wielded, by unarmed socially marginalized and poor people without tradition on their side. So, there is a kind of power in democracies that can prevail over guns, money, and entrenched privilege, and that is the power of numbers—of individuals working together as a collective social actor to achieve a common project. Workers movements, the civil rights movement, the women’s movement, and a host of successful conservative social movements attest to the power of numbers in a democracy to produce (and resist) social change.<sup>84</sup>

Numbers alone mean nothing. Numbers without unity, solidarity, and collective identity carry little weight in a democracy. In a democracy, political power consists critically in the formation of the “us” and the “them” which make collective social action possible. So, the most basic political question in a democracy is: what forces create commitment, unity, and solidarity among individuals? What factors can unify and bond individuals in a democracy? What forms of communication constitute political forces just as much as guns and money and elective offices? Words and other communicative symbolism play a decisive role in the process of creating our political identities and our contests. Indeed, words, symbols, and discourses play as big a role as a person’s status as an African American, woman, immigrant, worker, or business owner.

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<sup>83</sup> *Politics*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

<sup>84</sup> Colin Hay, *Divided by a Common Language: Political Theory and the Concept of Power*, 17 POL. 45 (1997) (stating that “[p]ower is probably the most universal and fundamental concept of political analysis,” that Terrence Ball describes power as “arguably the single most important organizing concept in social and political theory,” and that “[q]uite simply, power is politics, politics is power.”) (internal citation omitted).

It is common to hear that people form social identities and bond together in collective action due to “common interests.” A social structure that places one group of individuals dominant over another—white over black, men over women, rich over poor, or any relationship between the dominant and the subordinate group—we can call a vertical relationship. This vertical relationship also defines the horizontal relationships among members of each group. Thus, blacks, women, and the poor have “true” or “common interests” by dint of their common subordination to whites, men, and the rich respectively.<sup>85</sup> In other words, the vertical structure of domination and subordination creates a corresponding horizontal structure of “common” or “objective” or “exogenous” or “true” interests among all those in the same social position. Under the “true” or “common interests” theory of unity among individuals, “common interests” give an alliance of individuals a collective identity and common consciousness, and, consequently, anyone who does not think and act in harmony with his or her “true” or “common interests” is self-abnegating and has “false consciousness.”<sup>86</sup>

The “common interests” model of bonding, solidarity, and politics is half right, since sharing a relation to a structure of social domination or privilege provides a vital basis for unity, and since common life experiences, especially the shared experience of a common oppression, subordination, or exploitation can be an important basis of much political bonding. But common life experiences are far from sufficient bases for bonding and solidarity within a group. The “common interests” model ignores the force of words and symbols in the formation and maintenance of people’s social and political identities. Vertical and horizontal relationships do not necessarily thrust identities on people; men and women choose their individual and collective identities—a physically disabled, African American, lesbian senior citizen who is a devout Muslim could choose any of seven horizontal relationships as the one most important to her personal and social identity. She could also talk about “intersectionality” and claim all seven identities, or she could decline the invitation to claim any of them, defining herself instead primarily as an environmentalist or animal rights advocate or robust individualist who refuses to define herself in terms of any social category or to engage in any unified social action. Whatever her choice of

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<sup>85</sup> By the same token, thanks to their common position in relation to a subordinate group, whites have “common interests” in relation to blacks; men have them in relation to women; the rich have them in relation to the poor.

<sup>86</sup> Steven Lukes, *In Defense of “False Consciousness,”* 2011 U. CHI. LEGAL F. 19, 19, 22–23 (2011).

social identities and political projects, it will only very partially be dictated by the position she shares with others in the social structure.

Closer to home, take me: like many people, I am in both dominant and subordinate groups. Vertically, I am in a dominant class and gender but subordinate race. Thus, in my dominant social positions, I have horizontal relationships with people in high tax brackets and with men; in my subordinate social position, my horizontal relationships are with blacks. I can easily multiply my vertical and horizontal relationships: light skinned vs. dark skinned, straight vs. gay, Christian vs. Muslim, able-bodied vs. physically disabled, citizen vs. undocumented worker, English speaking vs. non-English speaking, mentally healthy vs. mentally ill, and so on. Include intersectionality as an additional irreducible form of domination and subordination and there are endless permutations, endless layers of horizontal structural relationships on which individuals could base their identity and political activity. Further, once a collective social actor, an “us,” comes into existence, there are many centrifugal forces—the many internal divisions and conflicting perspectives based on these differences of gender, class, religion, and the rest—threatening its unity and cohesion and hence its power.<sup>87</sup>

Thus, a multiplicity of “us and them” divisions is possible in any society. “Not every possible interest group is an *organized* interest group and not every organized interest group earns or keeps the loyalty and commitment of all its potential members. Thus, collective social actors or collective social identities are the outcome of social struggles over identity and community, not the expression of social structures.<sup>88</sup>

## VII. POLITICAL PERFORMATIVES

Individuals use political performatives to create and transform communities and to establish individual and collective identities. Most

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<sup>87</sup> See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 17 (1997). I discuss this issue in great detail in another piece. See Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 12–13 (2014).

<sup>88</sup> Therefore, the “common interests” approach to politics and collective action is incomplete. It ignores questions of how social actors choose from an often vast menu of possibilities any particular horizontal structural relationship, or set of such relationships, by which to define themselves. It ignores, in other words, questions of how people forge and maintain bonds with others in any given horizontal structural relationship—how they create individual and collective identities.

simply, political performatives are words, symbols, and discourses that perform the social action of bonding and unifying individuals into collective social actors, the ultimate source of power in a democracy. Political performatives are tools<sup>89</sup>—linguistic and nonlinguistic forms of symbolic communication—people use to forge the unities that make collective action possible. Political performatives acquire their force through their ability to unite people in action.<sup>90</sup>

Words like “I pledge allegiance” epitomize *linguistic* bonding performatives, which in a democracy like ours may create multiple affiliations because individuals may pledge loyalty to multiple (sometimes even competing) groups. The same words in the context of a cult of personality in totalitarian states would leave much less room for the creation of multiple political identities.

Examples of nonlinguistic political performatives that perform the same social bonding action as pledges of allegiance include American and Confederate flags, personifications (Uncle Sam), monuments (Mount Rushmore, the Statue of Liberty, Confederate memorials), melodies (purely instrumental versions of the Star Spangled Banner, America the Beautiful, Dixie), and even follicle fashion.

Unabashedly nappy and self-affirming, big Afros in my youth represented the gravity-defying antithesis of the wind-flapping-in-your-hair white standard of beauty by which many black people’s full lips, broad noses, kinky hair, and dark skin were deemed inherently ugly.<sup>91</sup> Many world cultures shared this negative view of natural black features, and many black Americans internalized Euro-centric beauty standards, frequently referring to straight hair as *good* and their own naturally nappy variety as *bad*—fit only for lye and presses and weaves and relaxers. Thus, those who donned big *naturals* took so-called *bad hair* and contested its negative social meaning,

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<sup>89</sup> See WITTGENSTEIN, *supra* note 52, at 6 (“Think of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-driver, a rule, a glue-pot, glue, nails and screws.—The functions of words are as diverse as the functions of these objects.”); *see also id.* at 20 (“[T]he meaning of a word is its use in the language.”).

<sup>90</sup> Austin identifies a performative as a type of speech act that has a “force” (what he calls an illocutionary force) rather than a traditionally conceived “meaning” in the sense in which meaning is equivalent to sense and reference. AUSTIN, *supra* note 68, at 100.

<sup>91</sup> Andre-Naquian Wheeler, *The Radical Politics Behind Afros*, VICE: I-D (July 7, 2017, 5:50 PM), [https://i-d.vice.com/en\\_us/article/zmn454/the-radical-politics-behind-afros](https://i-d.vice.com/en_us/article/zmn454/the-radical-politics-behind-afros); Chime Edwards, *The Impact of the Fro in the Civil Rights Movement*, ESSENCE (Feb. 10, 2015), <https://www.essence.com/holidays/black-history-month/impact-fro-civil-rights-movement/>.

inverting and transvaluing nappyness into a sensuous nonlinguistic form of discursive bonding exactly equivalent to linguistic ones like *Black is Beautiful* and *Say it loud, I'm black and I'm proud*. Both the Afros and the slogans were forceful bonding performatives used by black people in the mid-to-late 1960's to create alliances of loyal and committed individuals capable of producing social change through unified social action. Accordingly, Black Power proponents of that era routinely uttered big Afros as part of their oppositional political discourse, including members of the Black Panther Party and iconic political activist Angela Davis.

Black power proponents who donned afros and used follicle fashions to protest undemocratic subordination were far from the first “radical” Americans to use the symbolic bonding power of fashion to fight illegitimate assertions of power. That honor and distinction goes to the very first postcolonial Americans (or proto-Americans, if you will), namely, the revolutionary Philadelphia militiamen, who in the mid-1770s resisted putting on conventional uniforms, preferring instead hunting shirts, which they said would “level all distinctions []” within the militia.<sup>92</sup> In so doing, they were both struggling over the meaning of symbolic communication and using the symbolic force of fashion to bond together.<sup>93</sup> This American political tradition of using the bonding force of fashion to rally resistance to illegitimate assertions of power recently produced another forceful nonlinguistic performative—namely, the hoodie. This article of clothing was worn by black 17-year-old Trayvon Martin on the occasion of his fatal shooting by neighborhood watchman George Zimmerman, who claimed to reasonably believe that Martin posed an immediate threat of death, serious bodily injury, or “forcible felony.”<sup>94</sup> After the killing, students, pundits, and

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<sup>92</sup> GREGORY T. KNOUFF, *SOLDIERS' REVOLUTION: PENNSYLVANIANS IN ARMS AND THE FORGING OF EARLY AMERICAN IDENTITY* 38 (2004). It is very possible that pre-colonial Native Americans also used fashion to fight illegitimate assertions of power.

<sup>93</sup> See ERIC FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 66 (2005) (explaining that the demand for cheaper uniforms, like the hunting shirt, derived from class differences and sought to neutralize distinctions within the militia).

<sup>94</sup> Linton Weeks, *Tragedy Gives The Hoodie A Whole New Meaning*, NPR (Mar. 24, 2012, 5:44 AM), <https://www.npr.org/2012/03/24/149245834/tragedy-gives-the-hoodie-a-whole-new-meaning>; Katherine Boyle, *Trayvon Martin's Death Has Put a Spotlight on Perceptions About Hoodies*, WASH. POST (Mar. 25, 2012), [https://www.washingtonpost.com/lifestyle/style/trayvon-martins-death-has-put-spotlight-on-perceptions-about-hoodies/2012/03/24/gIAwQ6gaS\\_story.html](https://www.washingtonpost.com/lifestyle/style/trayvon-martins-death-has-put-spotlight-on-perceptions-about-hoodies/2012/03/24/gIAwQ6gaS_story.html); Elizabeth Flock, *Trayvon Martin 'Million Hoodie March': A Short History of the Hoodie*, WASH. POST (Mar. 22, 2012),



politicians donned hoodies to stand in solidarity with victims of racial profiling and to bond with others who saw a miscarriage of justice in the failure of police to properly investigate the shooting or charge Zimmerman.<sup>95</sup>

The Confederate battle flag controversy ignited by the Emanuel Nine murders illustrates the performative role of flags in creating and transforming communities.<sup>96</sup> The “us” the American flag originally stood for did not include blacks, who, according to the Supreme Court’s 1857 *Dred Scott* decision, could never become citizens of the United States and “had no rights which the white man was bound to respect.”<sup>97</sup> The “us” and “them” of the American flag before the Civil War was the same “us” and “them” of the original Confederate flag: no Confederate flag was necessary before that war because the Stars and Stripes already stood for an “us” of white American citizens and a “them” of black noncitizens and chattel slaves. It took 600,000 dead men in a cataclysmic race war to transform the American flag into an emblem that includes black folk in its “us” of American citizens.

It took another struggle—the Civil Rights Movement—to make the “us” of the American flag still more racially inclusive. After the Supreme Court’s 1896 *Plessy v. Ferguson* decision, which made separate-but-equal the law of the land,<sup>98</sup> the American flag stood for a racially segregated “us,” especially for pro-Jim Crow Americans; the flag stood for an “us” of white first-class American citizens and a “them” of black second-class citizens. In the 1950s and 60s, many American citizens embraced the Confederate battle flag in order to unify and rally a segregationist “us” against an integrationist

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[https://www.washingtonpost.com/blogs/blogpost/post/trayvon-martin-million-hoodie-march-a-short-history-of-the-hoodie/2012/03/22/gIQAeGCnTS\\_blog.html](https://www.washingtonpost.com/blogs/blogpost/post/trayvon-martin-million-hoodie-march-a-short-history-of-the-hoodie/2012/03/22/gIQAeGCnTS_blog.html).

<sup>95</sup> See, e.g., Eyder Peralta, ‘Million Hoodie March’ Planned in New York to Protest Killing of Trayvon Martin, NPR: THE TWO-WAY (Mar. 21, 2012, 5:34 PM), <https://www.npr.org/sections/thetwo-way/2012/03/21/149092286/million-hoodie-march-planned-in-new-york-to-protest-killing-of-trayvon-martin> (“As part of the campaign, organizers have also asked people to upload pictures of themselves wearing hoodies.”).

<sup>96</sup> See, e.g., Phil Helsel, Mitt Romney Joins Call for Confederate Flag to Come Down After Shooting, NBC NEWS (June 20, 2015, 10:05 PM), <https://www.nbcnews.com/storyline/confederate-flag-furor/romney-joins-call-confederate-flag-come-down-after-shooting-n379161> (discussing the response from politicians after the Charleston shooting which was motivated by racial animus and reporting that the perpetrator of the murders had posted images of himself online holding the Confederate flag).

<sup>97</sup> *Scott v. Sanford (Dred Scott)*, 60 U.S. (19 How.) 393, 407 (1856).

<sup>98</sup> *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896) (holding that the “enforced separation of . . . races” did not violate the Constitution).

“them.”<sup>99</sup> Legislative decisions during these years to feature the battle flag in the redesign of state flags across the South appear, *at least in part*, to be responses to SCOTUS desegregation decisions like *Brown v. Board of Education* (1954) and other federal pressures to desegregate. Before the Civil War there was no need for a separate Confederate flag to stand for slavery—because the American flag itself already stood for that. Likewise, before the Civil Rights Movement there was no need for a separate Confederate flag to stand for segregation—because Old Glory itself already stood for that. At two crucial turning points in the history of American race relations, as citizens and lawmakers sought to expand the “us” represented by the American flag to be more racially inclusive, other citizens and lawmakers rallied around some version of the Confederate flag in support of a narrower, more exclusive “us.”

Many groups and individuals fly the American and Confederate battle flag together, as if they do not stand for competing conceptions of “us.” One can contend that the two flags do not stand for contradictory conceptions of “us” if he or she can show that the battle flag can mean something other than support for segregation or white supremacy—something such as, say, Southern pride. A 2013 YouGov poll found that while more Americans overall saw the battle flag as a symbol of Southern pride than of racism, many more Democrats than Republicans and many more blacks than whites viewed it as a symbol of racism.<sup>100</sup> Confederate battle flag critics use the symbol to isolate a “them” of segregationists and white supremacists and to mobilize a racially liberal and inclusive “us.” Many battle flag supporters say they use the same symbol to distinguish an “us” of folk *with* Southern pride from a “them” of folk *without*. Some other battle flag supporters, such as the KKK, use the emblem to isolate a “them” of inferior blacks and to mobilize a racially illiberal and exclusionary “us.”<sup>101</sup> Because no words or symbols

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<sup>99</sup> See, e.g., Becky Little, *Why the Confederate Flag Made a 20th Century Comeback*, NAT'L GEOGRAPHIC (June 26, 2015), <https://www.nationalgeographic.com/news/2015/06/150626-confederate-flag-civil-rights-movement-war-history/> (explaining that the Confederate flag began reappearing in the 1950s, as the Civil Rights Movement gained popularity and momentum).

<sup>100</sup> Katie Jagel, *Southern Pride or Symbol of Racism?*, YOUGOV (Oct. 17, 2013, 10:36 AM), <https://today.yougov.com/topics/lifestyle/articles-reports/2013/10/17/confederate-flag>.

<sup>101</sup> See *id.*; Peter Moore, *Most Americans, North and South, Disapprove of Flying the Confederate Flag*, YOUGOV (June 25, 2015, 3:57 PM), <https://today.yougov.com/topics/politics/articles-reports/2015/06/25/most-americans-disapprove-confederate-flag>; Linley Sanders, *What the Confederate Flag Means in America Today*, YOUGOV (Jan. 13, 2020, 1:00 PM), <https://today.yougov.com/topics/politics/articles-reports/2020/01/13/what-confederate-flag-means-america-today>.

have indelible meanings, many different claims can be made about the battle flag's meaning. These conflicting claims set the stage for today's impassioned political struggle over the Confederate flag, whose meaning is not inherent or fixed and frozen but rather is a prize in a pitched conflict among groups attempting to describe their social reality, constitute their social identity, and vindicate their social existence.<sup>102</sup>

So, rather than social groups being produced by their "common interests," social actors produce *themselves* through their political performatives—their flags, anthems, monuments, books, plays, movies, marches, protests, and parades. Our political communication does not just reflect "our interests," it creates "our interests"; it does not just reflect who we are, it creates "us." Races, ethnicities, genders, classes, ages, workers, and LGBT persons, as collective social actors with collective social identities, are produced by these forms of political communication. Our sense of common interests reflects the successful deployment of political performatives. That words like African Americans, Muslims, women, and LGBT can evoke a sense of community, loyalty, and commitment to a common purpose reflects generations of social conflict over words and meanings and discourses that identify a common position in a social structure.

Like a flag, the word "right" often functions as a political performative, a way of distinguishing between "us" and "them" and unifying "us" in social action. Rights discourse does not reflect an atomistic worldview or any other underlying intellectual edifice. While it cannot be denied that the discourse of rights has been (and is still being) used to legitimate social and economic inequality,<sup>103</sup> major advancements for racial minorities, women, same-sex

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<sup>102</sup> See Katie Jagel, *Southern Pride or Symbol of Racism?*, YOUgov (Oct. 17, 2013, 10:36 AM), <https://today.yougov.com/topics/lifestyle/articles-reports/2013/10/17/confederate-flag>; Peter Moore, *Most Americans, North and South, Disapprove of Flying the Confederate Flag*, YOUgov (June 25, 2015, 3:57 PM), <https://today.yougov.com/topics/politics/articles-reports/2015/06/25/most-americans-disapprove-confederate-flag>; Linley Sanders, *What the Confederate Flag Means in America Today*, YOUgov (Jan. 13, 2020, 1:00 PM), <https://today.yougov.com/topics/politics/articles-reports/2020/01/13/what-confederate-flag-means-america-today>; see also Radley Balcko, *We Should Treat Confederate Monuments the Way Moscow and Budapest Have Treated Communist Statues*, WASH. POST (June 26, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/06/26/we-should-treat-confederate-monuments-the-way-moscow-and-budapest-have-treated-communist-statues/>; Jessica Taylor, *The Complicated Political History of the Confederate Flag*, NPR (June 22, 2015), <https://www.npr.org/sections/itsallpolitics/2015/06/22/416548613/the-complicated-political-history-of-the-confederate-flag>.

<sup>103</sup> Slave owners had property rights in black bodies. U.S. CONST. art. IV, § 2, cl. 3. Hotel owners had a right to refuse service to blacks under Jim Crow. A. K. Sandoval-Strausz, *Travelers, Strangers*,

couples, and workers<sup>104</sup> have come out of social struggles over “rights.” Calling a liberty or social interest a “right” enhances the ability of social actors to label illegitimate assertions of power and thereby to pinpoint and arraign a “them” and rally a democratic “us.” Uttering the word “right” can serve the same purpose as unfurling a flag—it helps bond individuals and, by shining a light on unwarranted privilege, provides a framework for group demands. The discourse of rights is simply a mechanism for the formation of group action and its force lies entirely in its ability to unite people in action.

My dad, for instance, captured in the Warden’s own law books the very verbal weapons he successfully wielded against the Governor and State of Ohio. After teaching himself the vocabularies of constitutional law and criminal procedure, he wielded “bourgeois” rights-talk—old words like habeas corpus and due process—against the State of Ohio, fiercely contesting the meaning of these words with prosecutors and Attorneys General in writs and oral arguments before state and federal tribunals until finally he won his appeal in the Sixth Circuit Court of Appeals in the case of *Armour v. Salisbury*.<sup>105</sup> The district attorney whose misconduct provided the basis for his appeal did not retry him and he was fond of saying from that day forward that he “found the key to the jailhouse door in the Warden’s own law books” and “made his frozen circumstances dance by playing to them their own melody.”

Thinking about “rights” or any other bit of language in terms of fixed inherent meanings asserted by feminist legal theorists like Professor Bender trivializes the creative role of words in political communication and the creative power of *any* words to acquire and create new meanings. In political battles, just as the howitzers, cannons, missile launchers and other artillery captured from the enemy in a revolutionary war can be among the most powerful weapons in the arsenal of freedom fighters, the words of oppressors can be among the most powerful weapons in the legal and political vocabulary of people resisting oppression. Because words lack fixed,

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and *Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53, 77 (2005). Today, payday lenders have a right to charge interest rates that shock the conscience of many. See Bill Fay, *Payday Lenders and Loans*, DEBT, <https://www.debt.org/credit/payday-lenders/> (last visited Jan. 26, 2020).

<sup>104</sup> See ERIC HOBBSAWM, WORKERS: WORLDS OF LABOR 309 (1984) (“There is absolutely no doubt that the poor, the working people and the potential or actual members of labour movements spoke the language of *rights* (and still do) . . .”) (emphasis in original).

<sup>105</sup> 492 F.2d 1032, 1037 (6th Cir. 1974).

essential, true, real, or inherent meanings,<sup>106</sup> words are weapons that can be captured from and turned against adversaries. This logic applies to rights discourse as surely as it does to all words and symbols in ordinary language and political communication.

Which brings us at last to the word many view as the linguistic equivalent of the Confederate battle flag and epitome of hate speech, namely, the N-word. Historically, and still to this very day, both the N-word and the battle flag did (and still do) in some settings performs the social action of distinguishing and distancing an inferior black “them” from a superior white “us”—and in this role it is one of the most violent and blood-soaked verbal acts in the English language. Blacks, too, sometimes deploy the N-word against other blacks as an act of “lateral denigration,” as in black comedian Chris Rock’s notorious “I love Black People, but I hate n\*gg\*s!” put down, where lovable “Black People” means respectable blacks and “n\*gg\*s” means contemptible ones.<sup>107</sup> But unlike the Confederate battle flag, which generally has not been appropriated by African Americans as part of their public discourse, the N-word—as the NAACP N-word eulogy pointed out—has also been adopted by black writers, artists, entertainers, and ordinary citizens and put to a variety of positive uses.<sup>108</sup> For instance, some politically engaged black rappers like Kendrick Lamar, Earl Sweatshirt, Tupac Shakur,<sup>109</sup> Nas,

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<sup>106</sup> To briefly recapitulate the social theory of meaning we have drawn from the work of Ludwig Wittgenstein, J. L. Austin, and George Lakoff: Meaning does not determine use, use determines meaning—meaning is created by acts of use. BLOOR, *supra* note 22, at 25. Political performatives are just one illustration of this larger lingual truth. Because use determines meaning, and because uses change as people’s purposes, needs, and circumstances change, the established or “inherent” meaning of a word does not determine its future uses and applications. Except in technical, scientific settings, word meanings are never fixed and frozen. See LAKOFF, *supra* note 9, at xi (comparing competing views on meaning within cognitive science and explaining that, even in scientific settings under the “new view,” word meanings are mutable).

<sup>107</sup> *Chris Rock: Bring the Pain* (HBO television broadcast June 1, 1996).

<sup>108</sup> See *Obituary for the N-Word*, *supra* note 7.

<sup>109</sup> For instance, reviled and revered rapper Tupac Shakur bonded with black criminals by expressly linking “brothers,” “n\*gg\*s,” and “criminal gangstas” or “G”s in the following hook to his solidarity dirge, *Life Goes On*:

“How many *brothers* fell victim to the streets?  
Rest in peace, *young nigga*, there’s a heaven for a *G*  
Be a lie if told you that I never thought of death  
*My nigga*, we the last ones left . . .”

2PAC, *LIFE GOES ON* (Death Row Records 2001) (1996) (emphasis added). That is, some use the N-word to establish an “us” of folk socially denigrated by non-blacks but who nonetheless love each other dearly.

Ice Cube, and Jay-Z use the N-word as a political performative to bond with the very same black criminals Rock used it to push away from. Other black poets (see, for instance, National Poetry Slam Champion Saul Williams' poem "Sha-Clack-Clack") and writers frequently use the N-word as a general term of solidarity and fellowship.<sup>110</sup> And in my sphere of social activity, legal scholarship, I have used the N-word to distinguish between an "us" of blacks who stand in solidarity with black criminals while seeking to promote reconciliation, restoration, and redemption in criminal matters and a "them" of people who are chary of sympathy for black criminals and who seek to "otherize" them in matters of blame and punishment.<sup>111</sup> Deploying the N-word in certain settings can serve the same purpose as unfurling a flag—it can help bond individuals and, by shining a light on unwarranted privilege or unjust subordination, provide a vehicle for social solidarity and framework for group demands. In its N-word eulogy, the NAACP found such positive applications of the word just as objectionable as the negative ones because of the word's negative ("Odious Back") inherent meaning.<sup>112</sup> Thanks to our earlier discussion, we can now plainly explain to NAACP N-word eulogists and lingual fundamentalists why their fixed-meaning anti-N-word argument, though steeped in "common sense" and supported by respected philosophers and progressive writers, misses the point. The meaning of the N-word is simply its different uses in overlapping spheres of social activity.<sup>113</sup> They are right about the N-word, and so are we.

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<sup>110</sup> SAUL WILLIAMS, *Sha-Clack-Clack*, on SLAM: THE SOUNDTRACK (Epic Records 1998), available at <https://www.youtube.com/watch?v=ojDKI8JxfLs>.

<sup>111</sup> Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 9 n.3 (2014). In certain settings the word enhances my capacity to label a particular kind and source of injustice (namely, unwarranted attempts to otherize and morally condemn black criminals), and thereby to isolate a punitive eye-for-an-eye "them" and to mobilize a less punitive and less retributive "us."

<sup>112</sup> See *Obituary for the N-Word*, *supra* note 7.

<sup>113</sup> The value of the N-word as a political performative, as a mechanism for the formation of group action, depends entirely on its ability to unify and bond social actors—performatives are effective or ineffective, forceful or weak, not true or false. The N-word has proven to be an extremely forceful political performative defined by its various uses in a series of overlapping discursive language games; the content of the N-word is simply the constellation of uses to which it is regularly put. Recall Wittgenstein's instruction to "[t]hink of the tools in a tool-box." WITTGENSTEIN, *supra* note 52, at 6, 20. In terms of this metaphor, in some of its uses the N-word functions as a saw and axe that splits and divides, in other uses it functions as a glue pot and clamp for bonding individuals together, in still other uses it may function more like a flashlight that focuses attention on unwarranted moral judgments. "The functions of words are as diverse as the functions of these

Whether the social and political utility of a given use or application of a word or symbol outweighs its social and political costs can always be debated for any word or symbol. I happen to think the N-word's political utility (especially in the hands of thoughtful black poets and writers and performers) outweighs its social disutility at this time, but in any case, the issue of whether one form of symbolic communication or another should be used in political communication can never be resolved simply by appeals to fixed or inherent meanings.

### CONCLUSION

"These are the times that try men's souls," begins Thomas Paine's first Crisis paper, part of a searing pamphlet series that helped spark the American Revolution.<sup>114</sup> Although the flame of revolutionary resistance was already alive when Paine's pamphlets hit the streets of Philadelphia in 1776, many historians contend that his work "unified dissenting voices and persuaded patriots that the American Revolution was not only necessary, but an epochal step in world history."<sup>115</sup> John Adams said: "Without the pen of [Paine], the sword of Washington would have been raised in vain."<sup>116</sup> As historian Eric Foner rightly notes, Paine's mastery of the political art forges political identities *through* transforming the meanings of words:

One of the keys to social change is change in the nature of language itself, both in the emergence of new words and in old words taking on new meanings. ...[Thomas] Paine helped to transform the meaning of the key words of political discourse...[Paine helped] to promote revolution by changing the very terms in which people thought about politics and society.<sup>117</sup>

A core thesis of this article has been that, because they have no intrinsic connection to any ideas, beliefs, or attitudes, words, like tools, may be borrowed or stolen. Indeed, like weapons in a revolutionary war, some of the most effective words are captured from and turned against adversaries.

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objects[] . . . [and] the meaning of a word is its use in the language." *Id.* And this foundational insight applies with equal force to all forms of symbolic communication.

<sup>114</sup> THOMAS PAINE, *The Crisis*, in 1 POLITICAL WRITINGS OF THOMAS PAINE 75, 75 (George H. Evans ed., 1839).

<sup>115</sup> PAINE, COMMON SENSE (PAPERBACK), POLITICS AND PROSE, <https://www.politics-prose.com/book/9781434101655> (last visited June 29, 2020).

<sup>116</sup> Jill Lepore, *The Sharpened Quill*, NEW YORKER (Oct. 9, 2006), <https://www.newyorker.com/magazine/2006/10/16/the-sharpened-quill>.

<sup>117</sup> Eric Foner, *Tom Paine and Revolutionary America*, xv, xvii (Oxford University Press, 1976).

And this logic applies to every word and symbol in ordinary language and political communication—to make history, men and women must often make and remake language.