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A Case for an Extension of Shiffrin's Thinker-Based Approach

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Abstract

In this paper, I derive a test for distinguishing between derogatory terms by expanding upon Seana Shiffrin's recent "thinker-based approach." Protection on her account extends to many forms of speech due to a connection between speech and an individual's development of autonomous thought. Shiffrin questions whether there is protection for corporate and commercial speech. The latter have a tendency to interfere with autonomous thought processes and do not clearly serve their development. I argue that these reasons for limitation serve as a basis for making nuanced distinctions for general regulation and applying this approach to controversies surrounding derogatory team names in sport. Many kinds of speech can be offensive and derogatory, yet I argue that only some may be said to be parasitic on communicative endeavors and legitimately fall outside free speech values as a result. Regulation should not be concerned with the content of speech, the manner in which certain words are spoken, or even the speaker's positive or negative intent. Instead, the focus should remain on autonomous mental development of speakers and hearers.

Keywords: freedom of speech, autonomy, social philosophy, thinker-based approach, derogatory speech

In June 2017, members of an Asian American rock band won the right to trademark their seemingly disparaging name, "The Slants." The band was previously denied by the US Patent and Trademark Office (PTO) to register their name due to the Lanham Act that prohibited any trademark that "disparage[s] . . . or bring[s] . . . into contemp[t] or disrepute" any "persons, living or dead."[1] However, despite the name's racist appearance, the band argued that the name itself was a form of political speech, a protest in the spirit of reclaiming a name that has been used to

[1] Matal, Interim Director, United States Patent and Trademark Office v. Tam, 582 U.S. ___ (2017). [Unless otherwise indicated, citations of *Matal v. Tam* below use pagination of the freestanding PDF of the Opinion of the Court.]

belittle and denigrate those of Asian ancestry. "We grew up and the notion of having slanted eyes was always considered a negative thing," frontman Simon Tam explained. "Kids would pull their eyes back in a slant-eyed gesture to make fun of us. . . . I wanted to change it to something that was powerful, something that was considered beautiful or a point of pride instead" (Chappell 2017). The win not only heralded a victory for the band and free speech advocates but for some sports fans as well. Having been long embroiled in controversy, the PTO had previously denied continued registration of the name "Washington Redskins" football team for continued registration due to the very same clause that denied The Slants their name on the grounds that it would "be disparaging to a substantial composite" of Native Americans.[2] The Redskins appealed their case and, in early 2018, the court vacated their judgment due to the ruling in *Tam*.

Although a comparison between these examples will form the background of this paper, it is not about the long history of disparaging names in sport or the constitutionality of the Lanham Act. Instead, I ask whether we can make principled distinctions between the names "Washington Redskins" and "The Slants" for the purposes of legally protected speech. Although I agree with the decision in *Tam*, the reasons given by the court for permitting the use of the name "The Slants" and the reasons I will give are quite different. In particular I will draw on Seana Shiffrin's (2011a, 2011b, 2014) recent "thinker-based" approach to free speech protection to draw out a distinction. Her account unites the interests underlying speech as the values associated with the "thinker." I suggest that this unification may also generate a space for potential regulation of derogatory terms based on equality of access to these values underlying the autonomous development.

My argument will develop as follows. I first analyze Shiffrin's thinker-based approach to free speech and highlight the conditions in which some speech may be regulated. On Shiffrin's view, because speech is required for the full autonomous development of one's mental capacities, abridgements of speech become infringements on the freedom of thought itself. I will extend her argument to show that, rather than promoting autonomous mental development, derogatory speech may be detrimental to the interests of the thinker despite the fact that such speech is protected on her account. In the following sections, I will suggest that some forms of derogatory speech are excluded from protection for the same reasons that Shiffrin sets out for lies and commercial speech. I will refine these reasons and introduce a two-pronged test to identify protected speech implicit in her account. I argue that regulation may be warranted if the speech not only offers little to assist autonomous mental development but also could potentially undermine that development for others and create what I call an asymmetrical burden in the access

[2] *Matal v. Tam,* 582 U.S. at 6.

to discursive resources. I will then further refine Shiffrin's approach using the notion of *parasitic speech* as well as considerations concerning *content* and *magnitude*. Both names in this analysis may be considered offensive and derogatory, yet only one could be said to be parasitic on communicative endeavors and legitimately fall outside free speech protection as a result.

1. The Thinker-Based Approach

Side by side there seems to be little that differentiates the names "Redskins" and "The Slants." Both are derogatory terms with long histories of offense. Despite the controversy, the football team's owner, Dan Snyder, relentlessly markets the slur on banners and sports paraphernalia out of professed Marylander fandom. Many argue in favour of the social legacy of the name, but its use is nevertheless to the detriment of Native Americans who generally do not endorse its dissemination or profit from the images it conjures. This provides a contrast with "The Slants," whose chosen tongue-in-cheek band name allowed them to "reclaim the term and drain its denigrating force."[3] Although the case was resolved on grounds of constitutionality, it nevertheless provides a prima facie reason to think that such reclamation projects are not harmful or as harmful as the "Redskins" due to the positive intent behind this particular act of naming. However, when the PTO denied Tam a trademark on the basis of the Lanham Act, they did not see the reclamation project as mitigating the force of possible denigration. The PTO came to this conclusion not because they thought the purpose behind the name was to demean or offend, but because it risked harming a substantial category of persons targeted by the term. I will argue in much the same manner even if I will ultimately come to a different conclusion. Both terms risk fundamental harms, but with appeal to Shiffrin's thinker-based account, I will argue that Tam's case is nevertheless protected speech.

The connection between free speech and autonomy is often made from the point of view of the audience in necessitating access to the facts and opinions of others. This is required in order to have the audience exercise their autonomy and decide for themselves what to think and believe. Shiffrin's 'thinker-based approach' is different. Her concern is not necessarily for a more substantive sense of autonomy as the ability to self-govern; rather, she focuses on the processes that encourage the development of such capacities. Thus, being an autonomous thinker also requires a free and unhindered ability to externalize one's thoughts within an open discursive environment. As the thinker is both a speaker and listener, freedom of speech should protect both interests due to the connection each has to autonomous mental development.

[3] *Matal v. Tam,* 582 U.S. at 1.

Speaking is valuable for autonomous development because it can facilitate a greater capacity to examine, criticize, and reflect, and tentative thoughts can be tested, revised, and confirmed in response to the reactions of other thinkers. Shiffrin provides several concerns related to the interests of the thinker, including the "development and regulation of the self" (Shiffrin 2014, 91). The "inner life" of the thinker is shaped and informed by dialogue, as "some thoughts may only be fully known to [oneself] if made linguistically or representationally explicit" (Shiffrin 2011a, 292). Speech may also assist moral agency insofar as this involves the "ability to take the perspective of other people and to respond to their distinctive features as individuals, including some of their mental contents" (Shiffrin 2014, 91). Thus, if we are "to pursue our interest in forming true beliefs about ourselves and our environment," the abilities to speak and to receive speech are both central to the development of autonomous thought processes (Shiffrin 2011a, 306). The value of expression and confirmation is central to Shiffrin's thesis as it generates the connective thread between valuing autonomy of thought and valuing freedom of speech as a result. I will refer to this mutually influential process as *self-reflexive expression.* I take this to be a means of expressing and confirming our nascent thoughts through verbal communication in a way that shapes one's mind.[4]

Shiffrin argues that forms of speech from political incendiary speech to artistic expression are all deserving of principled and foundational protection as all have value for the thinker due to promoting these diverse interests. However, she briefly mentions that while controversial forms of speech such as pornography, fighting words, or face-to-face hate speech initially remain protected under the thinker-based approach, this assertion comes with a few qualifications. She argues that such controversial speech may itself interfere with autonomous capacities because it "work[s] on us in ways that significantly obstruct or impair the exercise of responsible assessment and self-management"(Shiffrin 2011b, 437). Such speech would not be protected given that it works on the agent "in substantial ways that are not perceptible to them" (437). Responsibility as a listener is mitigated once these controversial forms of speech "resist or stymie otherwise competent, responsible, agents' reasonable efforts at effective methods of avoidance, reflection, assessment, and revision" (Shiffrin 2011b, 437–438). Yet, citing a need for a more comprehensive treatment, Shiffrin nevertheless withdraws from a full commitment to these possible limitations. I hope to provide a more comprehensive

[4] Other interests of the thinker not mentioned here include "a capacity for practical and theoretical knowledge," "exercising the imagination", "becoming a distinctive individual," "responding authentically," "living among others," and "appropriate recognition and treatment" (Shiffrin 2011a, 289–291).

treatment here by both clarifying and expanding on what it means for speech to interfere with another's autonomous processes and hinder self-reflexive expression.

The focus on the autonomous development of the thinker is important because it provides a means to unify and reframe the harms associated with derogatory speech under the umbrella of thinker-based interests. It is commonly thought that the state should not interfere with speech unless it does so to prevent harm (Mill 2011, 23). The harms of permitting speech are weighed against the associated costs that regulation could impose on the free marketplace of ideas. In the case of derogatory speech, these harms have included "physiological symptoms and emotional distress," restrictions on "personal freedom" and "sense of security," and even "attitudinal shifts" (Matsuda 1993, 24–25), including the risk of "contempt, or disrepute" mentioned within the Lanham Act's disparagement clause.[5] These harms are important, and as the paper progresses I will extend the conditions for limitation on Shiffrin's account by connecting these harms to the interests of the thinker. Derogatory speech can "stymie" one's mental development and undermine self-reflexive expression beyond the kinds of direct encounters Shiffrin briefly considers (Shiffrin 2011b, 437–438). Instead, it can generate wider harms for autonomous mental development in a manner not unlike her reasons for limiting corporate and commercial speech. If this argument holds, and derogatory speech can be shown to harm *qua* thinker in the ways I suggest, what results is a potential justification for regulation that does not require an appeal to a cost/benefit analysis invoking different values, interests, and harms. Instead, some speech may be regulated in regards to *equality of access* to the same value.

2. Corporate and Commercial Speech

One advantage of the thinker-based account is found within its ability to "render sensible the notions that non-press business corporate speech may be different and their protection may assume a weaker form, resting on context-dependent and instrumental foundations" (Shiffrin 2011a, 290). The externalization of corporate and commercial speech is not aimed at seeking confirmation and refutation through the process of self-reflexive expression but primarily functions to alter the desires of the audience and influence them for the purpose of economic gain. Moreover, unlike advocacy and deliberately false speech, there is an additional concern regarding its sincerity. Such speech has a greater tendency to be affected by the pressures of the competitive market, and hence any authenticity may only be incidental. The connection speaking has to autonomous development is not present.

In addition, Shiffrin argues that corporate and commercial speech is a corrupting force on the discursive environment and may justifiably be regulated to

[5] *Matal v. Tam*, 582 U.S. at 6.

prevent undue external influence on individuals' thought processes. The autonomous capacities of an audience in receipt of such speech are not necessarily benefitted due to the fact that such speech primarily seeks to persuade and play on the desires of its targets in service of market gain. Yet, as Shiffrin adds, this feature is not necessarily problematic on its own. Many kinds of advocacy speech, and even deliberately false speech, have similar persuasive functions while still potentially receiving foundational protection. Whether speech is intended to advertise, secure financial interests, or simply promote equal rights does not necessarily speak to other ways it may be valuable for the audience. After combining the interests of the speaker and listener, we see that corporate and commercial speech is problematic not just because it does not "reliably serve the interest of the thinker *qua* speaker," but because it also interferes with the interests of the "thinker *qua* listener as the recipient of such communications" by undermining the communicative environment (Shiffrin 2014, 99).

If corporate and commercial speech can be limited for these reasons, then we might generalize the permissible grounds for regulation as a twofold process. Permissible regulation requires that the speech in question not only lacks value in assisting or facilitating communication as speakers *qua* thinkers but also "alter[s] the environment" in a way that harms and interferes with audiences *qua* thinkers as well (Shiffrin 2014, 98). Display of both of these characteristics justifies legal regulation on a thinker-based account, as the rationale for governmental abridgement would not be inconsistent with valuing the autonomous operations of the mind, but would be a means of supporting its development for all. The satisfaction of the two prongs can account for the risk of harm the slur might engender without losing sight of the value and/or danger it poses for other thinkers. It is my contention that while "Washington Redskins" satisfies both prongs of this two-pronged test, "The Slants" arguably fails to satisfy the first prong and should not be regulated as a result.

3. First Condition: Lacking Communicative Value

3.1. The Condition for Corporate and Commercial Speech

Corporate and commercial speech may be limited because such speech is unlikely to contain what I would call *communicative value*. To have communicative value is to be valuable to the process of self-reflexive expression or at least conducive to it. This interpretation seems compatible with Shiffrin even if it is not explicitly found in her work. The cautious stance towards commercial speech is warranted because market influences and other negative aspects "render more tenuous any charitable presupposition that such speech is sincere, authentic or the

product of autonomous thought processes" (Shiffrin 2014, 99).[6] Such speech does not sincerely aim at communication through dialogue. It aims at general manipulation (with advertising as one example), while also employing a worrying degree of resources to accomplish this goal. Thus, if we can point to aspects of derogatory speech that call the presumption of sincerity of communication into question in the same manner, there would be reason to think it could be open to regulation.

One problem is that the characteristic insincerity may not be readily evident in most forms of derogatory speech. Market pressures do not usually influence derogatory speech, nor does it directly aim at the kind of cognitive manipulation normally found in advertising. When someone shouts a nasty epithet, it may be the case that the speaker fully believes in and endorses his or her statements. Regulation of such speech would risk supressing racist, yet sincere, speech. The interests of the thinker include the interest in testing one's thoughts in the open discursive environment, and it is not clear why the speaker of such bigoted remarks should be denied opportunities for self-reflexive expression for themselves. Thus, on the face of it, the condition of sincerity extends to protect derogatory speech. I however will offer a different interpretation, but this will not be an ad hoc attempt to include derogatory speech. I will derive this interpretation from Shiffrin's own remarks concerning the exclusion of physical acts of expression. In particular, I suggest that some sincere acts of expression lack additional values that normally render speech worthy of protection. Thus, although I offer a reinterpretation of Shiffrin's condition, it is one that is at least consistent with and drawn from her account.

Sincerity, it would seem, is only a condition on Shiffrin's account because when speech is insincere, it no longer assists dialogue in a way that encourages self-reflexive expression. Speech on the thinker-based account is meant to be tentative, exploratory, and seeking confirmation or refutation. What is important about a sincere communicative act is that it involves not just the expression of my actual beliefs but sincerity understood as some degree of willingness to engage in dialogue. Not all acts of self-expression would count as sincere on this extended meaning of

[6] I mention a cautious stance because the external pressure renders only a tenuous but not guaranteed lack of communicative value. For instance, Shiffrin argues that "free speech doctrine in this domain should be open to and supportive of efforts by moral agents to expand the agenda of business enterprises beyond commercial profit into more morally responsive enterprises and, perhaps, to recognize exceptions to commercial speech regulation when its application would hamper morally motivated, responsive speech within the commercial domain" (Shiffrin 2014, 100).

the term, and Shiffrin excludes some forms of self-expression precisely on this basis. Despite casting a wide net of protection, Shiffrin argues that physical acts of expression may be regulated due to lacking communicative value. She argues that they are not tentative and exploratory acts that lend themselves well to the enhancement or maintenance of self-reflexive expression. A kiss or a punch to the nose may display the contents of the mind in a direct and sincere manner, yet they are not necessarily intended to express one's thoughts. Speech holds a privileged position not only due to its expressive capacity but through its virtue in serving cooperation, dialogue, and enhancing understanding of our environment and circumstances. If these are the interests *qua* thinker, then speech is special, not only because it can express what is in the speaker's mind, but because it facilitates these sorts of communicative ends. Shiffrin states, "Curtailments on speech represent a severe incursion on [these] interest[s] because speech provides unique modes of access to the contents of other minds" (2014, 114). Sincere speech is favored because it is conducive to self-reflexive expression when other expressive acts are not.

The first condition might then be tempered to require a looser understanding of sincere speech. To have communicative value, the speaker need not intentionally aim at communication as long the speech is conducive to, or at the very least not aversive to, self-reflexive expression. By extension, if derogatory speech functioned in a manner parallel to the physical and noncommunicative acts of expression, then the grounds for its protection would be provisional as well.

3.2. The Condition for Derogatory Speech

Derogatory speech may lack communicative value in ways Shiffrin does not consider. It would not be sincere in the extended meaning of the term. The effects such speech can have on autonomous development are consistent with her initial worry concerning the ways in which some speech may "resist or stymie" self-reflexive expression. Derogatory speech often stigmatizes and makes use of nonverbal symbols of hatred or contempt in a way that affects its communicative value (Brison 1998, 43). Using Susan J. Brison's terms, there is first the immediate impact of the speech that functions more like a "slap to the face than an invitation to dialogue" (43). So even if we allow that some tentative and exploratory communication may be intended in a slur, the victim's negative emotional response would itself seem to bar any potential communicative gain. According to Brison, such speech harms the intended victim by causing immediate emotional injury and, in some cases, "a suspension of reason" (48). Brison argues that assaultive speech "can prompt an instinctive 'fight, flee or freeze response' which precludes the possibility of a reasoned reply" (49). It lacks communicative value as a verbal attack that cognitively and affectively injures its victim, harming both target and the

prospect for genuine dialogue. When understood as an assault rather than an exploratory and communicative act, the speech itself has the immediate effect of undermining self-reflexive expression in a way that initially worried Shiffrin.

Shiffrin nevertheless includes derogatory speech under the umbrella of thinker-based protections due to the fact that speech is open to revision in a way physical harms are not. Even though derogatory speech would seem to "resist or stymie" self-reflexive expression in its immediate effects, the possibility for "assessment" and "revision" would not be fully foreclosed (Shiffrin 2011b, 437–438). She claims that, even when speech may immediately subordinate or humiliate, it remains a "work-shop like space" that is reversible or at least amendable and which preserves a measure of self-reflexive expression (Shiffrin 2011a, 306). An apology, retraction, or clearer articulation can mitigate harm. She states, "One cannot preface one's punch with 'maybe' or 'consider the possibility' and thereby make the assault less of a punch in the way that prefatory remarks will qualify a proposition subsequently articulated so that it becomes less than a full-blown assertion" (306). The risk of stifling potential self-reflexive expression and the possibility for revision are, for Shiffrin, enough to warrant derogatory speech's place among protected speech acts.

Indeed, Shiffrin's response is common in American jurisprudence. Traditionally, the courts have recognized some speech, including deliberate falsehoods, as being of low "constitutional value."[7] Yet, persons are only liable for such statements when specific intent or negligence can be shown. The idea is that if low-value speech was open to regulation, this could alter the discursive environment by producing a "chilling effect."[8] Fearing liability, persons would be hesitant to speak when unsure of the veracity of their statements, which may result in a loss of valuable speech. Thus, distinctions on the basis of intent have been thought to offer strategic protection against this potential chill and to encourage good faith, but possibly false, statements.

The problem, as I will now argue, is that the traditional focus on intent to mitigate potential chill only applies to restriction and does not account for the ways in which the permitted speech might produce similar effects. The PTO was correct in asserting that there are harms associated with derogatory speech that occur regardless of whether the speaker "has good intentions underlying its use of a term."[9] I will however reframe these harms that evade distinctions based on intent as specifically harms *qua* thinker. There are competing claims to autonomous development that follow from what Alex Brown calls a "nuanced principle of

[7] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–341, 350 (1974).
[8] Wieman v. Updegraff, 344 U.S. 183, 196 (1952).
[9] *Matal v. Tam*, 582 U.S. at 6.

autonomy," which recognizes that "laws/regulations/codes that constrain uses of hate speech can garner direct support from the goal of shielding autonomous human beings from undue influences" (Brown 2015, 60). In what follows, I will show how derogatory speech might chill the discursive environment in a way that should satisfy the second prong of Shiffrin's test. It will subsequently be possible to compare potential loss of valuable speech using the same metric for comparison with or without regulation.

4. Second Condition: Altering the Environment

4.1. The Condition for Commercial Speech

In *Tam,* the court suggested that regulations imposed by the PTO ran contrary to the spirit of free speech protections by targeting a specific viewpoint. The disparagement clause of the Lanham Act allowed for trademarks that were either benign or positive but barred those that could be considered derogatory. In Justice Kennedy's opinion, it was argued that "by mandating positivity, the law here might silence dissent and distort the marketplace of ideas."[10] Regulation undermines autonomous development of audiences by unacceptably sanitizing the discursive field and "alters the environment" by limiting available viewpoints.

Shiffrin's apprehensions concerning the effects of commercial speech are similar in their concern for autonomy, but broader in their reach. She is not only concerned with the deprivation of a viewpoint but with how the environment would be corrupted with the unregulated dissemination of certain kinds of harmful speech. Of commercial speech Shiffrin writes:

> Of course, thinkers may have an interest to access corporate speech because corporate and commercial speech may report information about one's given environment; but, in other circumstances, the point of corporate speech, as well as other commercial speech, is to *alter* the environment, e.g., to manufacture desire, not to report information. (Shiffrin 2014, 98)

Commercial speech, she argues, has the power to subvert and destabilize the discursive environment as the central site of thought formation. Such speech "scrambles and distorts the channels of communication deployed by the sincere" (Shiffrin 2014, 126).

Indeed, much of the same can also be said of lies, on Shiffrin's account. She argues that, like commercial speech, lies also lack foundational protection because "the lie interferes with the aims and function of a free speech culture" by undermining "our ready, reliable ability to transmit our mental contents" (126). Lies

[10] *Matal v. Tam,* 582 U.S. at 3 of Justice Kennedy's Opinion.

encourage falsehoods in the discursive arena, while commercial speech, with access to a worrying degree of resources and social power, detrimentally alters the environment by flooding it with what may only be contingently true and designed to manipulate the listener. If derogatory speech can be shown to have similar debilitating effects on the discursive environment, then regulation of such speech may too be warranted by appeal to these broader interests of the thinker.

4.2. The Condition for Derogatory Speech

Regulation is warranted for lies and commercial speech if the unregulated dissemination of the speech "alters the environment" in a way that substantially impedes autonomous mental development. This consideration raises the question of whether lies and commercial speech are the only forms of speech that requires regulation to maintain the communicative enterprise. To this extent, Shiffrin's conception that the full development of the mind requires "fair access to public fora for expression" (Shiffrin 2011b, 418) may be too idealistic in its implicit claim that fair access. Here, I depart from her account as my interpretation of what constitutes fair access will expand what forms of speech may be regulated and include what she otherwise considers protected. Using speech act theory, I argue that derogatory speech encourages an environment that asymmetrically burdens autonomous mental development. I will draw on the work of Mary Kate McGowan (2012), Miranda Fricker (2007), and Rae Langton (1993) to explain why derogatory speech potentially harms those targeted qua thinkers and hence "alters the environment" in a way relevant for Shiffrin. I propose that when stereotypes are used and promoted through the use of slurs, they enact certain moves in the language game that result in lesser credibility for those targeted by the slur and diminished access to the "public fora" (Shiffrin 2014, 98). Like corporate and commercial speech, derogatory speech similarly "scramble[s]" and "distort[s]" the "channels of communication" when left unchecked (126). If these harms can be recognized with regard to lies and commercial speech, they should also be recognized for derogatory terms.

Names are speech acts, which constitute the act of naming or referring. But they can also constitute several speech acts simultaneously and also have numerous *perlocutionary effects.* Epithets and slurs may offend, injure, or cause others to subordinate as the direct effect of the speech. Speech can also be constitutive of certain *illocutionary acts*. For example, saying "I do" in a marriage ceremony may constitute the act of marrying when spoken in the right contexts by the right person. The illocutionary force (or what the speech does) in this instance concerns the act the speaker intends to do by performing the speech act or illocution. Here, it is the act of marrying. Following Mary Kate McGowan (2012), we may argue that although

each name may constitute an act of naming or referencing, it also has the unintended illocutionary force to enable discrimination.

According to McGowan, some speech may alter the discursive environment by enacting detrimental "permissibility facts." These facts establish or change the rules within a particular social practice. For example, a standard exercitive might be when an owner of a restaurant says, "Employees must wear closed toes shoes." The force of this statement is derived "via the exercising of the speaker's authority over the realm in which the enacted permissibility facts preside" and establishes what is and what is not permissible thereafter (128). The owner is able to enact the rules within the restaurant in a way an employee uttering the same phrase cannot. The exercitive force may be implicit within a statement or indirect in the way it is phrased, but it nevertheless depends on the authority of the speaker. When certain moves are made in a particular context, they enact changes within the activity. These moves may be as formal as the rules to hockey or as informal as the exchanges within a conversation. For instance, when the puck is dropped, hockey players are now permitted to take different positions in the same way as speaking of my children makes it permissible to speak of your own in the language game (133).

McGowan proposes that there are some exercitives that deviate from this standard. What she labels "covert exercitives" are moves within a norm-governed activity that are able to achieve the same effect as a standard exercitive, yet without the standard authority (140). These exercitives can trigger "the norm-governed nature of the activity in which the utterance is a move" (141). Arguably, the slur may function as a covert exercitive that not only licenses the use of associated stereotypes when the slur is spoken but also further permits the use of the slur itself. By being used as something so benign as a band name, the slur is made all the more acceptable for general use within public discourse. Thus, covert exercitive might normalize and proliferate the use of derogatory stereotypes and other attached connotations.[11]

The way covert exercitives enact permissibility facts and license stereotype-promoting moves within social interactions is relevant to the process of self-reflexive expression because of the effect on how those targeted by the stereotype may be perceived thereafter. The thinker is seeking a good interlocutor to potentially confirm his or her beliefs. In ideal situations, we could afford lengthy observation of others to determine a trustworthy interlocutor. In practice, however, that is not always feasible. In everyday situations, trustworthiness is determined by what Miranda Fricker calls "working indicator properties" to judge the credibility of a speaker (Fricker 2007, 114). Indicator properties are linked to stereotypes, which are widely held associations between groups and particular attributes. These

[11] I will say more on this sort of normalization further on in the paper.

stereotypes become markers of a speaker's credibility that can have an immediate impact on how the hearer perceives the speaker.

Those targeted by the slur are, as a result, subject to what Rae Langton terms widespread "perlocutionary frustration" (Langton 1993, 318). The speaker may succeed "in performing the intended illocution," but in the cases of credibility deficits and licensed stereotypes, she often "fails to achieve the intended effect" (318). Yet Langton also notes that inability to achieve the intended effects of speech is "a common enough fact of life: one argues, but no one is persuaded; one invites, but nobody attends the party; one votes, hoping to oust the government, but one is outnumbered" (315). As a feature of everyday discursive interaction, it is questionable whether freedom from such frustration can rightly be requested of others. If a sympathetic ear were required, then it would seem that very few of us ever have the opportunity for such engagement, even when our credibility remains intact. The problem we encounter here is not simply that perlocutionary frustration obtains but that it does so in an unequal manner. The lack of credibility accorded to targeted persons challenges the values underlying freedom of speech by undermining equal access to the kind of mental development the right to free speech is meant to protect. This does not mean that those who are subject to such perlocutionary frustration are guaranteed to lack the tools for autonomous mental development but that they face an *asymmetrical burden* in its achievement. In this case, there may be subcultures that facilitate self-reflexive expression, but the access to and generation of these pockets of discursive freedom is not equally available to all thinkers, partially due to the kind of derogatory speech prevalent in the environment.[12] Thus the traditional worry concerning limitations on the discursive environment can be transformed into a concern over unequal access to this resource.

Although initially given to target commercial speech and lies, my argument shows that the thinker-based approach can extend beyond what Shiffrin envisioned. Regulation would be concerned with fair and equal access to participation in free speech values. The two conditions, of communicative value and altering the

[12] The deficits that result from perlocutionary frustration are larger than I am focusing on one here. Other effects may include epistemic injustices. Fricker defines "hermeneutical injustice" as "the injustice of having some significant area of one's social experience obscured from collective understanding owing to structural identity prejudice in the collective hermeneutical resource" (Fricker 2007, 155). Unequal relations of epistemic power may not only disregard corrective speech, but also work against its initial articulation and place a further asymmetric burden on those targeted. The lack of public voices perpetuates the cycle of such hermeneutical injustice.

environment, provide a means to balance the concerns of self-reflexive expression with those of a sanitized discursive environment. Even if regulation might cause a chill, the risk would at least not be in service of speech that would otherwise undermine the same concerns for others. Yet I think this point can be pushed further. In the following section, I will elaborate on ways the two-pronged test may be qualified as to mitigate the potential chilling effect of regulation. In particular, I argue for additional qualifications on the two prongs with the aim of safeguarding self-reflexive expression, while also minimizing harms to the discursive environment.

5. Qualifications

5.1. First Prong: Essentially Communicative Speech

Shiffrin acknowledges the ways in which speech may be considered low value, but her worry is that regulation could supress the speaker's ability to "try on an idea" in a noncommittal way (Shiffrin 2014, 115). However, I would question whether regulation would necessarily suppress the speaker's access to revision and exploration of thought if the regulated speech were merely *derivative* of one's communicative purposes. That is, if Shiffrin's argument is that the value of self-reflexive expression protects derogatory speech, we can still ask whether the speech needs to be derogatory to achieve this value. If not, then we may be able to add an additional caveat to the first prong: communicative value requires that questionable speech be *essentially communicative*. It may be the case that the slur is merely *parasitic* on the whole communicative act in a way that I will now explain.

Consider lies and other forms of deception. On Shiffrin's account these speech acts receive little foundational protection not only due to their effects on the discursive environment but also because when a lie is told, "the responses to one's speech that one receives do not help one hone one's self-understanding, because they are not responses to sincere, if tentative, representations of oneself" (2014, 145). Lies on this account are justifiably regulated insofar as they "do not *directly* participate in the values underlying freedom of speech" (153; emphasis mine). I would argue that much derogatory speech displays a similar, indirect connection to these sorts of communicative ends, which renders its value on these terms rather low.

Speech may provide a "unique mode of access to the contents of other minds," yet not all forms of speech are *essentially communicative* expressions (113). Shiffrin acknowledges that there are some regulations of "nonessentially communicative expression" that do not impede the ability to engage in self-reflexive expression (114). She states:

> Restrictions on my ability to express my anger through violence do not preclude my transmitting my anger through communicative means: by saying

> I'm angry, detailing my complaints, or depicting the emotional maelstrom through words, images, or sounds. (Shiffrin 2014, 114)

If Shiffrin allows that physical acts and emotional outbursts may be restricted—because such acts are not only aversive to communicative ends (as discussed previously) but also not essential for communication—then there is reason to think the same may be said of derogatory speech. Punching someone to reveal one's anger is *parasitic* on the communicative act just as much as engaging in derogatory speech may not be necessary to make the speaker's point. Derogatory speech may be merely parasitic on the communicative act insofar as it does not play an essential role in achieving what the speaker intends to communicate. I believe this holds even if there are aspects of slurs and epithets that may not be as easily captured by further dialogue. Perhaps the use of a slur may be the only way to directly convey racially motivated anger. While this could be true, I doubt that one's access to reflexive expression would be thwarted entirely as regulation would require rewording instead of restriction. The concerns of the thinker involve being able to express the contents of one's mind and, given the potential aversive effects, not necessarily the ability express those concerns elegantly and succinctly.

Another concern might be that refining the communicative condition to exclude parasitic speech could unfairly limit artistic works, as they may be hyperbolic and go above the bare minimum of what is communicatively necessary. Yet artistic necessity may also be communicatively necessary if the speech is necessary to preserve the integrity of work as a whole.[13] Historical, cultural, or even character accuracy may permit the use of slurs and other derogatory terms in film or print for instance. Yet I should also stress the importance of having dual conditions. That is, even if the questionable speech were considered parasitic, the impact on the discursive environment would also need to be considered prior to any demand for regulation, which may simply call for a rephrasing of the problematic material in the end.

Perhaps a clearer example of parasitic speech might be the use of derogatory speech within political campaigning. While speech connected to this essential element of democracy would seem to be of great communicative importance, the approach would nevertheless allow some degree of regulation. For instance, political campaigns may include arguments against immigration that affect the discursive environment dramatically. Yet these arguments would need to stop short

[13] A clearer example of parasitic speech beyond artistic flourish might be exploitative films and forms of violent and degrading pornography. In either case, the questionable content would be gratuitous while also posing significant harm by potentially enacting permissibility facts that license similar degradation or violence.

of the kind of denigration via slurs and epithets that have become all too common as of the last American presidential campaign. We can question the communicative necessity of portraying whole groups of people as "rapists," "criminals," and "animals" (Davis and Chokshi 2018). There may be aspects of political speech that are parasitic to what otherwise may be a highly valuable communicative enterprise as a whole. The qualification of parasitic speech then suggests a very precise regulation that would urge revision over an outright censorship.

5.2. Second Prong: Specific Alterations in the Environment

While the notion of parasitic speech refines the first condition of this approach, I believe we can be more specific with the second condition concerning the environment as well. Here, I would like to qualify the second prong by introducing considerations of *content* and *magnitude* when considering the harm *qua* thinker the speech may cause the discursive environment. Considerations of content would target particular identity categories—including race, gender, class, sex, and sexual orientation—due to their general pervasiveness and ability to widen an asymmetrical burden to self-reflexive expression. The stereotypes and enacted permissibility facts attached to these categories can "track" a person through all spheres of life and "social activities" (Fricker 2007, 157). Even if it is possible that one may be harmed by other nonsystemic identity categories, including specific regional or professional stereotypes, regulation may primarily or even exclusively target speech stigmatizing more pervasive and wide-ranging identity categories.[14]

Speech concerning identity categories nevertheless should raise an alarm but not fully satisfy this condition until the magnitude of the impact of the speech is considered as well. On one hand, and as a practical matter, private conversations would serve as an unlikely target for regulation given the decidedly minimal impact on the discursive environment. I could angrily yell, "Leave me alone!" to a friend and close off dialogue in a way that is generally aversive to communicative ends, yet my doing so would not disrupt the communicative environment to a great enough scale to raise worries about distortion.[15] Public speech on the other hand might more reasonably impact the environment in detrimental ways and be subject to more extensive regulation.[16] Thus, in applying similar principles to the two-pronged test, we can modify the claim to read as follows: if it is reasonable to assume that the

[14] Examples may include domain specific stereotypes such as being a continental philosopher in a department dominated by analytic philosophy.

[15] This statement would also not be parasitic as its illocutionary purpose would be to have the friend leave me alone.

[16] Although some argue that repeated private conversations normalize the use of the slur and could in fact be more harmful in the long run (see Butler 1997).

speech harms the autonomous mental development by targeting pervasive identity categories to a great enough magnitude and lacks features that would otherwise be valuable for this pursuit, then there is little reason for extending protection.[17]

Overall, we see that derogatory speech may enact disadvantageous permissibility facts without adding much to the discursive arena. Yet the worry concerning the potential chilling effect remains in place. For instance, this approach does not temper regulation of deliberately false speech on the basis of intent, which may lead to a speaker's hesitancy in contributing to the discursive environment. However, this would perhaps only lead to caution involving deliberately false speech that is of considerable magnitude, pertains to particular identity categories, and is parasitic; and this strikes me as justifiable. Perhaps we should be more restrained in such instances. That is, when our speech reaches a wide audience, pertains to something as important as certain identity categories, and can be said in a less detrimental way (that does not involve outright restriction), then I think a case for caution can be made and added hesitation justified.

6. Putting It All Together

So what does this two-pronged test mean for our initial question concerning the difference between the uses of the two derogatory names? First, let us consider the reclamation claims made in *Tam* and ask whether the name satisfies the two conditions. I will suggest that the band name, despite having good intentions behind its usage, may nevertheless enact permissibility facts that licence stereotyping and further derogation.

Even if the band's name is part of a reclamation project, it remains inherently "precarious" and can result in distortion due to the audience's expectations (Herbert

[17] The focus on content and magnitude might at first raise problems for speech like political "dog whistles" (seemingly innocuous speech that employs coded words or phrases that may take on additional or different meaning when spoken to a target group). There may be a question of magnitude given that the true meaning of the speech is not widely known. Yet given that the concern is autonomous mental development, the issue is not simply with the kinds of words used but with how those words are used in a way that undermines such development. So if the speech impedes mental processes in the same manner as an epithet and slur, there may be room for some degree of regulation if the circumstances warrant. For instance, it may be the case that something like the "Pepe the Frog" meme (a meme associated with white supremacy originating out of the website 4chan) could be open to regulation if it is used only to arouse neo-Nazi sentiment, if it is not artistically or communicatively necessary, and if the communication of this meme will reasonably impact autonomous mental development of others.

2015, 136). As Cassie Herbert argues, this is because those seeking to reclaim slurs and epithets often do so in contexts where "hearers will not yet have the non-oppressive discursive norms to govern uptake they give the speech act" (136). Any rehabilitative change in meaning would require the larger community to ensure success. There is no guarantee that the word would be taken without derogation and, even when it is, the detachment from the negative connotations may not be widespread enough to mitigate the associated harms.

Indeed, citing Wilfrid Sellar's categorizations of moves made in certain language games, Lynne Tirrell (2012) identifies the act of naming as a kind of entry move that either initiates the game or establishes the participation of the speaker. For instance, when a name for a child is chosen, this process puts the name "into the game, as it were, and forges a connection between the child and what is said about her" (Tirrell 2012, 209). Usually the naming process allows the name to be "baptized" into a fresh usage, so why should a slur carry the baggage of the racial term? It may be true that the act of naming establishes new references, but it can also enact permissibility facts that may license derogation contained in the slur or promote the stereotypes it conjures. The fact of the matter is that the racially charged name is not just any name. The allusions drawn from these deeply socially embedded names, or even general terms, are ubiquitous and over-determine the associated meaning. If I named my son "Hitler," the negative reaction I would get from family (and nearly anyone I met) would be severe despite the naming process being considered an entry point into the language game so to speak. I would argue that the degree to which a name is embedded in social frameworks determines whether the name marks it as an entry or is simply participatory. For names that have few social connotations, there is relative freedom to create new significations, whereas others participate in an already over-determined social context.

For "The Slants," the name doubles as a slur and remains embedded within a game that is already in progress despite engaging in a positive reclamation project. This is also perhaps why the traditional focus on intent in American jurisprudence is inappropriate, as it does not track these sorts of harms. The name may incur detrimental permissibility facts just as much as accidentally shooting a puck in one's own goal would not stop the opposing team from being awarded a goal. It makes use of a term targeting a particular identity category and may reasonably be of considerable magnitude depending on the band's success.

Moreover, as a name, the slur may even be particularly detrimental. A slur functioning as a name could be said to be more damaging than a slur spoken with vitriol or intent to injure because of the way it contributes to the normalcy of the term and enacts increased permissibility. Names do not wear their harm on their sleeves but allow the discriminatory connotations to recede into the background when spoken. The slur as a name may help to disguise its covert exercitive force

without necessarily addressing the negative stereotypes it may conjure and further condition. While the reclamation project at least attempts to draw attention to the denigration, it may still advocate normalcy without any guarantee that the communities in which the name is spoken will necessarily detach the associated stereotypes and denigration. The second prong may be satisfied because there is no reason to think the reclamation project would be successful and may negatively alter the environment, creating unequal access despite the best of intentions.

The above analysis shows that the PTO is correct in its analysis that the fact that the "applicant may be a member of that group or has good intentions underlying its use of a term" does not mitigate potential harm.[18] I have shown the use of a slur to be harmful *qua* thinker by how it affects the discursive environment, but I have not yet mentioned how it relates to the first condition. Tam contended, even if the use of the term was not part of a reclamation project, the use of name itself as a trademark was expressive. The use of the name was neither noncommunicative in itself nor a parasitic communication. The majority opinion states that Tam argued that

> many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. . . . The name "The Slants" not only identifies the band but expresses a view about social issues.[19]

Thus, if we ask if the band name is essentially communicative, the answer would arguably be a 'yes.' It is essential to the communicative endeavour and would be fundamentally changed if a substitute were given. Indeed, any substitute would need to be just as derogatory to achieve the same intended communicative end. There would be no reclamation project without the use of the particular term. Due to the expressive quality of the name and the internal necessity the specific term carries in this project, the use of the name should be protected despite the potential harm it could engender.

Could the same argument be made for the "Washington Redskins?" Supporters have typically argued to keep the name using reasons of sentimentality, community entitlement, and/or football tradition. Yet, as we saw in *Tam*, how the term is intended is not always how it is taken, nor does it insulate it from the negative effects. The harms concerning normalization and perpetuation of the stereotype may even be clearer in this case than in *Tam*. Indeed, one study

[18] PTO quoted in *Matal v. Tam*, 582 U.S. at 6.
[19] *Matal v. Tam*, 582 U.S. at 24.

suggested that when those who are not the objects of stereotypic depictions were primed with exposure to a Native American sports mascot, the results indicated, even if the intent of the depiction "may have been to honor and respect, the ramification of exposure to the portrayal is heightened stereotyping of racial minorities" (Kim-Prieto et al. 2010, 547). Other studies argued that there is a significant concordance between negative biases towards Native American mascots and Native American people (Chaney, Burke, and Burkley 2011). The use of such mascots may even make these matters worse because further studies showed that those with prejudiced attitudes tended to stereotype more aggressively after being exposed to such imagery (Burkley et al. 2017). The name was also normalized on T-shirts and chanted in stadiums without those using it being aware of the possible denigration. After all, many grew up using the term, so what could be the harm? It is just the name of a team. This degree of normalization almost fully disguises its covert exercitive force as ordinary without even the added positive intention to reclaim. Indeed, the harmful effects may alter the environment in ways that may undermine equal access to self-reflexive expression of the target group. The content of the team name refers to a particular identity category while also having a rather large magnitude of persons affected due to its being a national team. The slur could lead to an asymmetrical burden in participating in the discursive environment. The second condition may be satisfied, but can the first?

I would argue that the name "Redskins" is not essentially communicative in a way that satisfies the first prong of the approach. Perhaps for some individuals the name conjures intense feelings of fondness with memories of tailgate parties and afternoons with the family, rather than the demeaning stereotype. It is possible that the aim is to sincerely honour rather than denigrate. Many fans insisted that the name was a sign of respect and even touted dubious opinion polls to suggest that most Native Americans were not even offended by the term (Cox, Clement, and Vargas 2016). But if honour is indeed the purpose, could extending honour be accomplished by less damaging means? When asking whether it is essentially communicative, there seem to be many ways in which the communicative act of honour could be satisfied without partaking in destructive stereotypes. This could involve renaming the team to something that does not contain the negative associations and may even involve a collaboration of communities to achieve this end. Extending honour, engaging in community pride, or feeling sentimentality do not seem dependant on the particular name. Thus, the name itself may be parasitic, and regulation would not pose a great enough risk to self-reflexive expression to permit the more general, but equal, harms to self-reflexive expression associated with stereotypes. The two-pronged test is likely to be satisfied, and hence legal regulation of this speech is justified.

7. Conclusion

In the end, the legality of the Redskins' trademark followed from the decision in *Tam* about the constitutionality of the Lanham Act. The two cases are nevertheless importantly different in the kinds of harms they engender *qua* thinker. Shiffrin's account provides a metric to compare how best to support the interests of the thinker in general by asking (i) whether the speech has essential communicative value and (ii) what effects the speech has in creating an asymmetrical burden in achieving self-reflexive expression. Derogatory speech in some instances may be able to satisfy these dual criteria, yet it is unclear as to whether Shiffrin would welcome this extended interpretation and whether she is fully wedded to protecting such speech as a couple of her remarks seem to suggest. Perhaps the fact that we can extend her account to reach beyond the kinds of protections Shiffrin envisions can be best read as a critique of her account. The extension could become a reductio that takes advantage of the exceptions she provides for lies and commercial speech. Yet I would like to resist this conclusion and close this paper by suggesting why Shiffrin herself should accept my proposed interpretation.

The fact that regulation could extend to derogatory speech is not a problem that needs repairing. I would argue that it is instead indicative of what T. M. Scanlon calls an "important strength" of her account (Scanlon 2017, 140). He praises the reach of her account due to its ability to "push at the boundaries" of current free speech protection to perhaps show that other rights such as access to education and freedom of association are connected to free speech values (140). He continues, "It is a virtue in an account of the interests underlying free-speech rights that it provides a basis for pushing these rights beyond their current understanding" (140). Likewise, if speech really does have this value that Shiffrin attributes to it, then this should encourage looking at all avenues in which this fundamental value may be undermined, which could include the effects of derogatory speech. After all, as Shiffrin argues, "Explicitly making the thinker the central figure of free speech . . . may make a difference as far as what dangers and threats to free speech present themselves as salient" (Shiffrin 2011a, 299). I have attempted to make the use of derogatory terms more "salient" by revealing the potential "dangers and threats" *qua* thinker by recognizing a more nuanced principle of autonomy that seems to be at work within her treatment of lies and corporate and commercial speech. My argument—that enacted permissibility facts and accompanying credibility deficits due to derogatory speech justify legal regulation of speech—is not an argument purely about consequential harms; rather, it is an appeal to the same "illicit" and "non-transparent" ways in which "rational processes may be circumvented" that deeply concern Shiffrin (2011a, 302). The harms qua thinker in this instance may be more diffuse but not more so than seen with lies and commercial speech. Limitations on derogatory speech are also thus compatible with her concern, not to

"focus predominantly on whether regulations affect the message of an association, but on whether regulations interfere with the ability of associations to function as sites of mutual cognitive influence" (309). I have aimed to present the argument not in terms of comparable yet distinct harms and values in competition with those underlying autonomous thought formation but as an argument concerning equal access to these sites for development. I have attempted also to temper the risk to personal limitation and chill on the environment with a few qualifications that may not fully combat this worry but nevertheless restrict its reach.

Overall, although it is not clear whether Shiffrin would welcome my proposed extension, I hope to have given reason she might want to. The argument stays true to the interests a person has *qua* thinker, even if it draws different conclusions as to where these interests may be undermined. The aim is not to suppress distasteful content or necessarily prevent certain effects of derogatory speech; instead, we can recognize that if such speech has these effects, then it raises a question of equality of access. Regulation may thus be warranted by appeal to the same values underlying free speech protections.

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