The style of a mark: The scandal of free speech in *Matal v. Tam*

Sarah Burgess

> "The role of the government shouldn't include deciding how members of a group define themselves. That right should belong to the community itself …. Americans need to examine our system of privilege and the ways unconscious bias affects our attitudes. But that discussion begins with the freedom to choose our language."
>
> *Simon Tam*[1]

Introduction

The freedom to choose our language. What are the conditions and the effects of such a choice? Writing in the *New York Times* three days following his win in the United States Supreme Court decision *Matal v. Tam*,[2] Simon Tam argues that this freedom follows from the suspension of law's judgment in favour of allowing communities to give voice to and name themselves. A freedom less given by the law than opened by law's withdrawal, the ability of a community to choose their own language opens an avenue for critique that affords a view into the oppressive structures that lend meaning to our shared collective life. Moreover, this freedom grants members of a group some measure of participation in crafting an identity that "can be influenced by as well as influence the world around us".[3]

For Tam, this argument takes shape (perhaps surprisingly) in his legal battle over United States federal trademark laws. On 14 November 2011, Tam, the founder of a dance-rock band based in Portland, Oregon comprised entirely of Asian-American members, applied to register the trademark "The Slants". The United States Patent and Trademark Office [PTO] denied the application, however, because they claimed that the band's name violated the Lanham Act—the primary law governing federal trademark registration, meant to protect consumers by clearly identifying the source of goods and services and prohibiting the "misappropriation" of commercial marks by "pirates and cheats".[4] Since its passage in 1946, Section 2(a) of this Act has permitted the PTO to refuse registration of a trademark which "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[5] Relying heavily on *The Urban Dictionary*, the PTO concluded that "slant" is in fact a derogatory term that is "disparaging to a substantial composite of people of Asian descent"[6] and, as such, constituted an appropriate exception to trademark registration.

Tam subsequently sued the PTO, claiming that the disparagement clause of the Lanham Act violates his First Amendment right to free speech. According to Tam, the

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[1] Simon Tam "The Slants on the Power of Repurposing a Slur", *New York Times*, 23 June 2017. Retrieved from: https://www.nytimes.com/2017/06/23/opinion/the-power-of-repurposing-a-slur.html. [Accessed 6 May 2019].

[2] *Joseph Matal, Interim Director, United States Patent and Trademark Office v. Simon Shiao Tam*, 137 S.Ct. 1744 (2017).

[3] Tam, "The Slants on the Power of Repurposing a Slur".

[4] *In Re Tam*, 808 F.3d 1321, p. 1328 (Fed. Cir. 2015).

[5] Lanham Act, 15 U.S.C. §1052 (current version 2016).

[6] *In Re Tam,* 808 F.3d 1321, p. 1332.

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Sarah Burgess, "The style of a mark: The scandal of free speech in *Matal v. Tam*", pp. 36-49.

Asian-American band's use of the term "slants" was not intended as a slur, but as a speech act of re-appropriation in and through which they might reclaim "terms that were once directed at them as insults and [redirect] the terms outward as badges of pride".[7] The name of the band was meant to be a "vehicle for expressing [Tam's] views on discrimination against Asian-Americans".[8] The PTO's attempt to thwart that expression, therefore, amounted to an injury that violated the basic legal principles of free speech and ethico-political principles of equality: "It was as if because we were Asian, because we were celebrating Asian-American culture, we could not trademark the name the Slants."[9]

On 19 June 2017, the Supreme Court handed down its 8-0 decision in *Matal v. Tam,* addressing and ostensibly remedying Tam's claim that his right to choose the language to represent himself and his band had been violated. Supported by two different sets of arguments, the Court unanimously held that the disparagement clause of the Lanham Act constitutes a form of viewpoint discrimination and, as such, violates free speech protections guaranteed by the First Amendment of the Constitution.[10]

To come to this conclusion, the Court found that trademarks are, in fact, instances of private speech, not government speech, allowing their owners to demand free speech protections.[11] The Court then conceded that trademarks have an "expressive" function that exceeds a trademark's operation as a source identifier for goods. "Then, as now", Alito notes of the history of commercial marks, "trademarks often consisted of catchy phrases that convey a message."[12] Trademarks become not only referents of some product, but messages that articulate a specific viewpoint. For the Court, this is the primary problem with the disparagement clause: it gives the PTO the power to decide which viewpoints will offend and enables it to prohibit speech it deems offensive. The First Amendment cannot sustain such practices or power: "It offends a bedrock First Amendment principle: Speech may not be banned on that ground that it expresses ideas that offend."[13] Striking down the disparagement clause not only allows Tam to register The Slants, it removes the power of the PTO to make decisions about what messages are appropriate or necessary for the public to hear.

The decision was not only a victory for free speech rights, according to Tam; it also recognised the fundamental dignity of underrepresented communities by affirming the right to name themselves. He explains:

> "The battles about hate speech shouldn't be waged at the Trademark Office, decided by those who have no connections to our communities. Those skirmishes lead to arbitrary, inconsistent results and slowly chip away at the dignity and agency of oppressed people to decide appropriateness on our terms. A person's quality of life, opportunities and rights may hinge on that person's identity. Those rights should not hinge on the hunch of a government employee armed with wiki-joke websites."[14]

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[7] Brief for Respondent, *Lee v. Tam,* 582 U.S. (2017), pp. 1-2.
[8] *Ibid.* 1.
[9] Tam, "The Slants on the Power of Repurposing a Slur".
[10] *Tam,* 137 S.Ct. p. 1748.
[11] *Ibid.* 1758.
[12] *Ibid.* 1752.
[13] *Ibid.* 1750.
[14] Tam, "The Slants on the Power of Repurposing a Slur".

Two things are important here. First, Tam suggests that what is ultimately at stake in this case is the formation, constitution and recognition of identity. Beyond its commercial operation and economic impact, the trademark is primarily a mode through which one might name oneself or one's community. (The first album the band released following the case was titled "The Band Who Must Be Named".[15]) Second, this act of speaking oneself—one that seems to both generate and be founded in a sovereign voice (and body)—takes place outside the law. Embodied by individuals without ties to the communities they serve, law, for Tam, cannot be the appropriate scene in which decisions about speech can or should be made. It is only outside the law, in the community, that the structures of power within law are laid bare.

Despite Tam's certainty that the Court's ruling guarantees freedoms for underrepresented communities, legal scholars are more sceptical of its practical effects. Commentary about *Tam* has vacillated between various poles: "The case has been lauded as a victory by free speech advocates, while others have viewed it as a defeat of the power of the state to protect minority groups from hate speech."[16] Many concede that the Court's decision to find the disparagement clause unconstitutional was the right legal decision.[17] It addresses the arbitrary and vague standards used by the PTO to issue its decisions about trademarks. Not only were there no official guidelines about what kinds of trademarks constituted "disparagement" (or for that matter "immorality" or "scandal"),[18] the PTO's decisions created questions about whether there were principles being employed at all. In other words, the line between what could be trademarked and what could not was wholly unintelligible. For example, "the mark QUEER GEAR, for clothing, was registered, while the mark CLEARLY QUEER, also for clothing, was not successfully registered."[19] Littered throughout the commentary are lists of similarly confounding comparisons of trademarks that evidence the arbitrariness with which the PTO makes decisions, rightfully calling its legitimacy as an institution of law into question.[20]

Yet, even while supporting the ruling of the Court, many authors share their unease with the scope and the potential impact of striking down the disparagement clause. Acknowledging that the *Tam* case is "a case with favorable facts and a sympathetic party—a rock band using a term that was intended to empower, not to insult",[21] authors detail the unwanted and potentially harmful impact of the case.[22]

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[15] Mark Conrad, "*Matal v. Tam*—A Victory for *The Slants,* A Touchdown for the *Redskins,* but an Ambiguous Journey for the First Amendment and Trademark Law", *Cardozo Arts & Entertainment,* 36 (1), 2018, p. 121.

[16] Malik C. Edwards, "Nommo: Understanding the Power of Words, A Critique of *Matal v. Tam*", *North Carolina Central University Science & Intellectual Property Law Review,* 11(1), 2018, p. 50.

[17] See Conrad, "*Matal v. Tam*—A Victory for *The Slants*"; Andrew Lehmkuhl, "The Aftermath of *Matal v. Tam*: Unanswered Questions and Early Applications", *University of Cincinnati Law Review*, 87(3), 2018; Lisa P. Ramsey, "Free Speech Challenges to Trademark Law after *Matal v. Tam*", *Houston Law Review,* 56(2), 2018.

[18] See Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 111; Megan M. Carpenter and Kathryn T. Murphy, "Calling Bullshit on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks", *University of Louisville Law Review*, 49, 2010, p. 468.

[19] Carpenter and Murphy, "Calling Bullshit", p. 473.

[20] See *ibid*. p. 467; Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 121.

[21] Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 123.

[22] As one former PTO director put it, "Probably the right legal answer, but it may become a bit of a classic 'be careful what you ask for.' Just as we're trying to 'lessen the polarization and crudeness' of

The immediate fallout of the case has challenged Tam's unqualified claim that the ruling will allow underrepresented communities to seek out dignity in self-definition. Because of *Tam,* Suzan Shown Harjo of the Cheyenne and Muscogee tribes lost standing to challenge the trademark of the "Washington Redskins" by the National Football League. After sixty years of protest against slurs directed at Native Americans used as mascots, logos, and team names, *Tam* provides no legal remedy (and no standing) for those who wish to challenge this harmful speech.[23] As well, since the Court's decision, at least seven applications for trademarks have been made for the N-word, and several more for the swastika symbol.[24] The by-product of recognising Tam's right to free speech is that it also effectively provides "protection for those who wish to trademark names intending to demean, caricature, or inject crude humor".[25]

As a rhetorical inquiry, this essay does not seek to pass judgment on the Court's decision—to assess whether its ruling was constitutionally sound. Instead, it examines these risks detailed by legal commentators—the risk that undesirable, hateful, or harmful speech will be introduced in public life without qualification and the risk that the absence of law's voice on such matters will leave those harmed no room to stand. It seeks to understand the conditions and effects of "the freedom to choose our language" in a way that might complicate Tam's imagination of this benign (and sovereign) freedom. This essay thus reaches beyond, without leaving behind, the concerns over how reclaiming slurs might challenge structures of address to enact change. It pushes us to understand what happens to law when it revokes its own power to limit speech (in the name of freedom). And, it demands that we think about what speech is and how it acts in and for law.

Such inquiries no doubt exceed the limits of this paper. But they do provide the context for a close reading of *Tam* as well as *Iancu v. Brunetti*—the recent Supreme Court case that addresses the "immoral and scandalous" clause of the Lanham Act. By closely reading the Court's logic in *Tam,* in the first section, we see how the Court transforms trademarks into viewpoints by reducing the work of speech to the creation and communication of a message. In doing so, it discounts the context in which the speech is addressed, the relationship between the speaker and hearer, and the style of the trademark. Without these elements, the Court can do nothing but disqualify its own power to address and regulate the speech of the marketplace. The second section responds to this disqualification by re-imaging style as the rhetorical mode of expression that might re-figure the relationship between the power of law and speech. Here, I argue that style constitutes not only the referent of the trademark, but also the scene on which the speaker and hearer employ the trademark, ultimately suggesting that style has the power to scandalise law's speech in a way that illuminates the conditions in which such speech becomes free.

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public discourse, I'm worried that this [ruling] may have something of a negative result." Quoted in Conrad, "*Matal v. Tam:* – A Victory for *The Slants*", p. 121.

[23] Victoria F. Phillips, "Beyond Trademark: The Washington Redskins Case and the Search for Dignity", *Chicago-Kent Law Review,* 92, 2018.

[24] Lehmkuhl, "The Aftermath of *Matal v. Tam*", p. 871.

[25] Conrad, "*Matal v. Tam:* – A Victory for *The Slants*", p. 123.

Marking the Mark

> "The privilege of 'free speech,' like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result […]. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part."
>
> *Learned Hand*[26]

The jurist and judicial philosopher Learned Hand postulates that free speech freedoms are bound by and to the purpose of speaking within democratic societies. Speech remains free insofar as it operates within an ethical (in the classical sense) rhetorical scene—a scene dedicated to persuasion in the service of the audience's knowing and knowledgeable judgment. Hand is clear that in such a scene words in themselves or by themselves have no meaning. It is instead in the relationship between the words, the "interpenetration" of words, that speech takes place before the law, giving meaning to the words in law. In taking (their) place, words—their meanings, relationships, and effects—reflect and refer to a particular constellation of speaker, hearer and setting. Without an ethical purpose in the midst of this triangulation, Hand reminds us though, the freedom of speech meets its limit.

What is fascinating in *Matal v. Tam* is that the Supreme Court appears to reverse or perhaps pervert Hand's formulation of free speech. The Court finds the limit of law—not speech—in the (unlimited) mark that not only can, but must, be spoken outside the reach of law. In what follows, I trace the logic of the Supreme Court in *Tam,* as well as *en banc* Federal Circuit Court *In re Tam* whose decision the Supreme Court affirmed. Reading across these two cases, I show that the Court refuses to address how speech operates, while claiming to uphold and honour liberal principles. When the Court withdraws law's force to regulate speech, however, this power is transferred to the marketplace where the value of speech becomes tied to its "use". The result, I contend, is not only that speech loses its capacity to critique social, historical norms, but also that the Court misunderstands its task of marking the mark.

Commenting on the aftermath of *Tam,* Mark Conrad notes that "it is safe to say that this question [of whether offensive trademarks will be allowed] is now based on business ethics and societal norms, rather than the law. The ruling seems clear: *Matal v. Tam* eliminates an important, if not crucial avenue for those aggrieved to challenge the offensive trademarks."[27] Conrad, here, points to what, for me, is the most striking thing about these two cases: the Court takes exception with its own power to say what can be said. It disqualifies law from addressing the injuries that speech may generate. We might note that, at first glance, this is not shocking as it is in fact a reflection of the judiciary's role in American liberalism. The Court appears to be conducting a primary task of law: deciding when the government's interests must be curtailed in the name of individual freedoms. The Court regularly limits its own power in order to allow communities and individuals to decide what is best said or done—the bedrock of everything from privacy protections to individual rights of association to gun

[26] *National Labor Relations Board v. Federbush Co.*, 121 F. 2d 954, 957 (2d Cir. 1941).
[27] Conrad, "*Matal v. Tam* – A Victory for *The Slants*", p 89.

ownership in the United States. In this way, what the Court has done in *Tam* ostensibly fulfils both the demand for and the promise of liberalism in a way that is consistent with its history.

To read the Court's refusal of law's power through this lens, however, misses how the Court upends or risks its own foundations (in liberalism) as it misunderstands the critical capacity of speech. In both cases, the Court relies on viewpoint discrimination to justify its finding that provisions preventing trademarks which are "disparaging" are unconstitutional. The logical and rhetorical moves to transform a trademark's "speech" into a viewpoint—and to first even recognise the mark as speech—illuminates precisely how the Court does more than simply uphold individual freedoms by limiting the power of law. In *Tam,* the Court draws on a distinction between the commercial aspect of the mark and its "expressive" component. The Lanham Act defines the commercial purpose of the trademark in this way:

> "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others to indicate the source of the goods, even if that source is unknown."[28]

The commercial value of a trademark is its ability to act as a sign of the source of goods within a particular marketplace, referring back implicitly to a person or company who holds that mark. As outlined here, the commercial "speech" of the trademark is found in its (uncomplicated) referentiality: the mark is a direct sign of an already established and "fixed" referent. It provides an "informational function".[29]

The trademark's commercial use, confined to the marketplace, does not trigger First Amendment concerns for the Court. Free speech becomes an issue only when the "expressive" function of trademarks comes into play. This expressive speech occupies the attention of the Federal Circuit Court *In re Tam.* In Justice Dyk's opinion, concurring in part and dissenting in part, he suggests that some, but not all, trademarks act as "core political speech", rising to the level of first amendment protections.[30] For him, the distinguishing mark of this form of protected speech—one he wishes to extend to Simon Tam—is that it "reflects a clear desire to editorialize on cultural and political subjects."[31] Judge Moore similarly remarks that "[Simon Tam] advocates for social change and challenges perceptions of people of Asian descent. His band name pushes people. It offends. Despite this—indeed, because of it—Mr. Tam's band name is expressive speech."[32]

In short, expressive speech provides a message that offers more than information; it comes from and projects a critical attitude toward something in the world. It does something—editorialises or offends—*because of the message that it provides,* a message that seems bound to the intent of the one who holds the mark. The Supreme Court adopts this idea in *Tam*. Justice Alito remarks, "Companies spend

[28] Lanham Act, 60 Stat. 427 (1946) (current version 2016).
[29] *In re Tam,* 808 F.3d 1321, p. 1365.
[30] *Ibid.*
[31] *Ibid.* 1373.
[32] *Ibid.* 1338.

huge amounts of money to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words."[33]

Important here is that across various courts the character of expressive speech depends not on the way it is expressed—what we might name the style of the mark—but instead on the content that is created. The words of the trademark are merely (transparent) mechanisms for delivering the ideas. As Alito marvels at the very thought that we might squeeze a message from so few words—it is very expensive!—we see the Court's uncoupling of the words (and the work these words do) from the message itself. Placing the work of these words aside allows the Court to make two sets of arguments. First, the presence of a message trumps the commercial function of the trademark: "it is always a mark's expressive character, not its ability to serve as a source identifier, that is the basis for the disparagement exclusion from registration."[34] As Moore points out, "that the speech is used in commerce or has a commercial component should not change the inquiry when the government regulation is entirely directed to the expressive component of speech."[35] Even though later she claims that commercial speech and expressive speech are "inextricably intertwined",[36] commercial speech is transformed from words that signify to the context in which expressive speech takes place. The trademark's signifying function becomes secondary, a meaningless context, for what is important: the announcement of a message.

Second, and following from the first, the Court's focus on the message of the trademark invokes the issue of viewpoint discrimination. In *Tam,* Justice Kennedy explains that "the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed …. Within that category [of disparagement], an applicant may register a positive or benign mark but not a derogatory one."[37] What the Court cannot allow according to its reading of the First Amendment is for the government to become the gatekeeper of "good" messages. The clauses barring disparagement, immorality and scandal do more than simply prohibit categories or topics or groups of people that can be discussed.[38] They prohibit particular messages from being heard and mandate what Kennedy calls "happy talk"—speech that only articulates a positive message and, as such, exceeds a call for non-discrimination.[39] Trademarks—especially those that have the potential to offend or injure—then cannot be regulated, the Court argues, because the government cannot have a say in which messages are made public. As the Court reminds us in *Tam,* "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'."[40]

Protecting the message of a trademark as a viewpoint, however, undermines the relationship between the speaker and hearer that Hand suggests provides the

[33] *Tam,* 137 S.Ct. p. 1760.
[34] *In re Tam,* 808 F.3d 1321, p. 1338.
[35] *Ibid.*
[36] *Ibid.*
[37] *Tam,* 137 S.Ct. p. 1766.
[38] *In re Tam,* 808 F.3d 1321, p. 1335.
[39] *Tam,* 137 S.Ct. pp. 1764-1765.
[40] *Ibid.* 1764.

necessary conditions for understanding the meaning of the words we speak. The Court's focus on the message, in various ways, strips the expressive function of the trademark of all three. For Alito,

> "The disparagement clause denies registration to any remark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."[41]

There is here a curious, but telling, turn of phrase: "Giving offense is a viewpoint." By the Court's own logic, that which gives the offence is the message itself. *It* does the work of articulating an idea that others might experience in a negative way. What disappears first in this equation is the speaker. While the Court references Tam's right to reclaim his identity by appropriating and re-signifying a slur,[42] his identity is a false anchor for his right to free speech. Because it is the message that matters for legal protection, the identity of the speaker is irrelevant when the expressive function and the signifying function of the trademark have been severed. (The Washington Redskins continue to own the trademark that portrays a slur against Native Americans without claiming the identity of an indigenous person.) It is also the case though that the primacy of the message—the object of free speech protections—discounts the role of the hearer in the creation of the message. Explaining that the disparagement clause cannot be considered neutral because "Section 2(a) does not treat identical marks the same" since "[a] mark that is viewed by a substantial composite of the referenced group as disparaging is rejected", the Federal Circuit Court reasons that the disparagement clause is invalid *because* it "turns on the referenced group's perception of a mark".[43] Viewpoints are protected in spite of the audience. The hearer is figured only as a passive addressee of the message, asked simply to bear either the benefits or burdens of the expression. Her relationship, contrary to what Hand suggests, is to the message, not the speaker. The primacy of the message, its role as the object of the free speech protections, not only de-contextualises the scene of address in and through which the message is created and articulated, it divorces the message from the ways in which it operates in relation to both speakers and hearers on this scene.

In the Court's argument, the absence of a rhetorical sensibility is profound. The disjunction of words from messages, speakers from hearers, forms of address from their scenes results in an unpredictable and unnuanced account of *what* speech means precisely because the Court does not address *how* speech works, how it operates to both signify and critique (in so few words). The Court's refusal of a rhetorical perspective, that is to say, results in a loss of metaphoricity that ultimately undercuts the very foundations of law. Kennedy traces this loss towards the end of his opinion in *Tam*:

> "Justice Holmes' reference to the 'free trade in ideas' and the 'power of … thought to get itself accepted in the competition of the market', … was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real

[41] *Ibid.* 1749.
[42] *Ibid.* 1750.
[43] *In re Tam,* 808 F.3d 1321, p. 1337.

> marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government."[44]

The Court reverses its logic here. To protect the expressive nature of the trademark, the Court rendered its commercial function as the context for the speech, making it irrelevant to the question at hand. But, once recognised and protected by law, the expressive function of the trademark is returned to its scene where its use in commercial contexts becomes regulated by the forces at work there. The shift between the marketplace of ideas and the marketplace is seamless for the Court. The only distinction is that the marketplace is "more than a metaphor"; it is "real"—and conveniently outside the reach of federal law. The Court effectively then uses the expressive nature of speech to justify the message's commercialisation.

Matal v. Tam, as a result, enables the conditions in which the power to regulate speech is thus transferred from law to the marketplace. As Kennedy notes at the end of his opinion,

> "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."[45]

Law, here, is figured as the fundamental threat to speech and to those who wish to offer minority opinions. Its judgment can re-double the injury for those whose views are prohibited. For the Court, there is "safety" in the "free and open discussion in a democratic society"—a safety that apparently prohibits the kind of injury the law might inflict. Yet, there is a slip in this logic. The regulation of trademarks does not land in a wide context of social and political debate where we hope that truth and justice rise to the top in sustained, reasonable debate. It populates instead a commercial context in which speech is regulated according to neoliberal principles that determine how best the mark might be "used". I do not mean to suggest that the Court's decision alters speech, submitting it for the first time to neoliberalism and its forces. The definitions and practices of trademarking are steeped in an economic language that at once subsumes and makes intelligible social experience. My point, rather, is that in the name of liberalism, the Court suspends the force and potential of law to regulate, or even address, speech. In doing so, the appeal to liberalism becomes a ruse, a cover for the neoliberalisation of speech itself. Trademarks take their value from their use in a marketplace that "incentivises" or "disincentivises" them according to what would be best for the market.[46] The expressiveness of the speech that the Court wishes to protect means little, then, unless it can be used to sell and brand goods.

The Court thus commercialises the expressiveness of speech, undermining its own claim that it acts to secure the possibility of public debate. To be clear, I am not worried that the law fails to fulfil its promise to realise liberalism. I am not trying to return law to its proper liberal roots in the hope of re-building its sovereignty. Instead, I simply want to illuminate how it is that the Court, in the name of liberalism, fundamentally misunderstands its task in relation to the question of speech. As the

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[44] *Tam,* 137 S.Ct. p. 1768 (citations omitted).
[45] *Tam,* 137 S.Ct. p. 1768.
[46] *In re Tam,* 808 F. 3d 1321, p. 1342.

Court defines it, an application for a trademark asks the government, sited in administrative law, to decide whether or not the mark is appropriate, to decide whether speech is allowed or not. The Court makes clear that the law's recognition of a trademark does nothing to transform or alter the mark. The justices insist that the government does not "dream up" the mark, nor does it claim ownership over the trademark once it has been registered.[47] "When the government registers a trademark", Justice Moore explains in the lower court decision, "the only message it conveys is that a mark is registered."[48] The trademark, the mark of the mark, appears as an act of law that holds no power; it cannot constitute, transform, or express. Law's imprimatur comes almost too late and with little force, accompanied ultimately by the question of its worth. After all, one can use a mark—without any legal regulation whatsoever—even if it is not legally trademarked. My argument—one that will be fully detailed in the next section—is that the Court misses how its mark on the mark is a form of recognition in which the Court is called to recognise not only *that* the mark refers to a source, but also *how* it refers to this source. That is, the Court fails to fully understand how the style of the mark, how it refers, helps us to re-imagine the power of law in the face of the demand for free speech.

Re-imagining the Scandalising Potential of Style

A week following the two-year anniversary of its decision in *Matal v. Tam*, the Supreme Court announced its ruling in *Iancu v. Brunetti*.[49] This case challenged the "immoral and scandalous" clause of the Lanham Act's Section 2(a), and addressed Erik Brunetti's claim that free speech protections should apply to the trademark for his clothing line "FUCT".[50] The PTO had reasoned that "FUCT is the past tense of the verb 'fuck', a vulgar word, and is therefore scandalous."[51] With *Tam* as settled law, it was expected that the Supreme Court would (easily) agree that the immoral and scandalous clause constituted the same kind of viewpoint discrimination found in the disparagement clause. The majority did, in fact, do just this. Justice Kagan, writing the Opinion of the Court, noted that the–

> "Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those that aligned with conventional moral standards and those hostile to them; those inducing nods of approval and those provoking offense and condemnation."[52]

Treating the "immoral" and the "scandalous" as "overlapping" and thus synonymous terms, the 6-3 majority struck down the clause, replicating the logic of *Tam.*

The justices in the dissenting opinions, however, flinched when they imagined that there would be no law barring the most vulgar or profane trademarks. Unlike in *Tam,* several of the justices in this case were unwilling to relinquish all of the law's

[47] *Tam,* 137 S.Ct. p. 1758.
[48] *In re Tam,* 808 F.3d 1321, p. 1346.
[49] *Iancu, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office v. Brunetti*, 588 US (2019) (slip opinion).
[50] Brunetti had employed the name since the founding of the clothing line in 1990. He applied for the trademark in 2011 and was denied.
[51] *In re Brunetti,* 877 F.3d 1330, p. 1337 (Fed. Circ. 2017).
[52] *Brunetti,* 588 US (2019) (slip opinion) (Kagan).

power to limit the worst kinds of speech.[53] Justice Breyer, for one, argued that "[a]n applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation."[54] Justice Sotomayor made a more specific argument, with which Breyer himself joined. She agreed with the majority that the bar on immoral trademarks constituted a form of viewpoint discrimination and was thus unconstitutional, but she refused to read the prohibition on the immoral and the scandalous as a single clause:

> "[W]hile the majority offers a reasonable reading of 'scandalous', it also unnecessarily and ill-advisedly collapses the words 'scandalous' and 'immoral'. Instead, it should treat them as each holding a distinct, nonredundant meaning, with 'immoral' covering marks that are offensive because they transgress social norms, and 'scandalous' covering marks that are offensive because of the *mode in which they are expressed.*"[55]

Although dismissed by the Opinion of the Court,[56] Sotomayor suggests that there is, in fact, a way to read the law to address the style of the trademark—in her words, the mode of expression—rather than the message that is offered. The difficulty, however, is that she equates the mode of expression with vulgarity and profanity, failing to differentiate how "bad words" are a problem of style rather than their content. Her silence on this matter is literal. At two points in her opinion, she refuses to speak the words that could be prohibited according to their mode of expression, relying instead on the reader's imagination to figure out "the small group of lewd words or 'swear words that cause a visceral reaction, that are not commonly used around children and that are prohibited in comparable settings'."[57] Ultimately, though her turn to the mode of expression might provide a way out of what she understands as the "coming rush to register such scandalous trademarks—and the Government's immediate powerlessness to say no", she reverts back to a set of content-based judgments that arise in particular situations—bad words we do not speak in front of the kids—foregoing a richer understanding of how style affects (and potentially effects) the rhetorical situation.

This concluding section takes up Sotomayor's project of articulating how the mode of expression might re-figure the relationship between the power of law and speech. The challenge she poses is to imagine the mode of expression, or style, as something that at once allows law to provide a scene in which those who are injured (by speech) might make a claim to justice, while also performing a critique of the (law's) violence directed toward the inventive capacity (of its own) speech. That is, I ask: How might style be both a generative and critical force before the law?

The answer to this question requires that we understand style as the operations of a performative speech act—the work that links conditions, message and perlocutionary effects of speech together. Style, we might say, becomes scandalous, not in the Court's sense as that which shocks or offends the truth, but in the way that it makes a scene—that is, a scene of address that positions speakers and hearers in relation to social norms in an effort to alter these norms. Style thus reveals *how* speech

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[53] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor).
[54] *Brunetti,* 588 US (2019) (slip opinion) (Breyer).
[55] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor).
[56] *Brunetti,* 588 US (2019) (slip opinion) (Kagan).
[57] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor). Throughout the briefs and oral arguments, the Court asked that the name of the clothing brand not be repeated needlessly.

takes place, offering a view into which contexts are foreclosed, which speakers are silenced, and which hearers are dispossessed of their right to make a claim before law. By returning to the problem of what it means to reclaim a slur, I show that such an account of the style of speech de-stabilises the sovereign power of the law without removing its potential to serve as the site in and through which individuals can make a claim to speak critically in the name of justice.

In its broadest definitions, style can be understood simply as "the way in which we do something".[58] There is a tendency to read this definition, however, as if one of two things were true. First, some presume that style is something that can be controlled, mastered or originated by a subject with an intent to accomplish some end. While for certain notions of style—those associated, for example, with fashion—this assumption rings true, for an understanding of the style of the trademark (and speech more generally) treating style simply as the (transparent) mechanism or tool might miss the complex ways speech refers and offers a message. Second, the broad definition of style seems to uphold a distinction between what is done and how it is done. This distinction, to some extent, has appeared as "one of the most widely recurring claims made about style" suggesting that "it deals with signs but not their referents, with image but not substance".[59] Both of these readings seem to replicate the problem that we see in the Court's understanding of the style of speech in *Tam* and *Brunetti*, albeit in different ways. On the one hand, the Court reads Tam's trademark through his intent; the judges attribute the mark to his claims about why he formed the band and the social justice work he intends to do with it. On the other hand, the Court's focus on the message enables the judges to disregard style altogether as they uncouple referentiality and expressive functions of the sign.

To avoid such a problem, I define style as the work of the performative, the rhetorical operations in and through which speech acts constitute their own referents. Style, that is, is how the performative constitutes the action it names. J.L. Austin's account of the performative, now a touchstone of rhetorical theory, defines utterances as performative insofar as: "A. they do not 'describe' or 'report' or constate anything at all, are not true or false: and B. the uttering of the sentence is or is a part of, the doing of an action, which again would not *normally* be described as, or as 'just,' saying something."[60]

For Austin, how the word is said—including not just the language itself, but the context in which the speech takes place, the sincerity of the speakers engaging in the talk, and the appropriate audiences—constitutes the referent of the speech. In his famous example, during a marriage ceremony, when "I do" is spoken, the speech is the constitution of the vow as there is no vow prior to or outside of the speech itself toward which the speech might point.[61] For all of Austin's efforts though to lay down the grammatical rules that would allow us to recognise a performative speech act, he does little to explain *how* the performative constitutes its referent in the appropriate scene so that speech can be read as doing the thing it says.

If we return to *Tam,* we begin to see that style is *how* the performative works. Consider what is at stake in the trademark for Tam. He claims that using the slur "the

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[58] Barry Brummett, *A Rhetoric of Style*, (Carbondale: Southern Illinois University Press, 2008), p. 1.
[59] *Ibid.* 7.
[60] J.L. Austin, *How to Do Things with Words,* (Cambridge: Harvard University Press, 1962), p. 5.
[61] *Ibid.*

slants" allows him to "re-claim" the term, changing its meaning—its referent—in the process. "Re-claim" is a bit of a misnomer, however. As Cassie Herbert explains, "[c]ontrary to what the name of the project seems to imply, reclamation projects aren't an attempt to 'take back' a term the target group once had control over; it is rarely the case that the group had this kind of linguistic control of the term."[62] The project of reclamation is thus not just a change in ownership over the term. It is an attempt to re-signify the meaning by re-constituting the referent, the scene in which that sign might be used, and how the word might affect those who hear it (its perlocutionary effects). For Tam, the message of the "slants"—one that he claims expresses his pride in being Asian-American *while* revealing the discrimination he faces—is not separate from the way the trademark identifies its source. He claims that the band "toured the country, promoting social justice, playing anime conventions, raising money for charities and fight stereotypes about Asian-Americans by playing bold music …. In fact, our name became a catalyst for meaningful discussions with non-Asians about racial stereotypes."[63] The referent of the trademark is not just the band, but a band who is engaged in critical social practices that challenge the use of racial slurs and stereotypes. Reclamation is performative then in that it not only challenges who can speak the term, but also the ways its use re-sets the scene of address in which speech is made intelligible. "Reclamation projects", Herbert points out, "are a form of social protest, one which is explicitly discursive in nature …. This relies on changing the discursive conventions connected to the term so that a hearer can appropriately take up the speech in which the term is deployed."[64]

The speech that the Court wants to protect, but perhaps does not know how, is speech that does the work to expose *how* language expresses its message in relation to its speakers, hearers, and the context in which the speech becomes intelligible. It is clear that not all trademarks do the work of critique in the same way Tam advocates, nor should they have to in order to be registered. But what is clear is that paying attention to the style of speech, the way that the trademarks signify, might offer the Court a way for the law to distinguish between those trademarks that deserve the protection of the First Amendment and those that do not. This distinction would require the Court, however, to understand how the style of a trademark—and of all expressive speech—is more than a mechanism of communicating a message. It is the movement of a trope that allows the performative to constitute its referent *and claim the scene in which that referent might become intelligible.* For all the ways the Court ignores style, when a hint of it does appear across the various opinions, it appears as a concern for rhetorical tropes. In Justice Dyk's opinion *In re Tam,* he hints that it might be possible to distinguish between purely commercial trademarks and expressive speech if we see parody as a rhetorical device that signals expressive language.[65] As a trope, parody mimics in order to illuminate how the accepted or historical use of a particular concept or word figures the scene of address in which the speaker and hearer of that word relate.

In this way, I claim, the style of speech (and of trademarks in particular) is the tropic movement that makes the scene in which the referent becomes intelligible and

[62] Cassie Herbert, "Precarious Projects: The Performative Structure of Reclamation," *Language Sciences*, 52, 2015, p. 131.
[63] Tam, "The Slants on the Power of Repurposing a Slur".
[64] Herbert, "Precarious Projects", p. 131.
[65] *In re Tam,* 808 F.3d 1321, p. 1337.

positions those on scene in order to hear. Style, then, is not simply a mechanism through which we might express some message. As the turn of the trope, it asks us to account for the way language works to claim a particular scene. This scene renders speech meaningful in the relationship between the speaker and hearer, both positioned by the norms of recognisability at play on the scene. For law, this means that style can issue a challenge to the norms that the law (as a scene) provides. That is, to understand that style makes (and in the case of speech that re-claims, re-makes) the scene of address suggests that speech has the capability to scandalise law. Law does not provide *the* scene in which speech operates. There is truth to the idea that most decisions about speech belong in the public sphere. But, when the Court removes itself from any scene disqualifying itself from speaking to or on speech itself, when it cannot imagine ways in which it might be interpellated into a scene when other scenes are foreclosed or speakers and hearers misrecognised, it misunderstands how the law acts as interlocutor in scenes not of its own making. It misses how speech, especially critical speech, can expose not just the harms of language in everyday life, but also the way that law harnesses and deploys those harms in its own language. It can reveal how law's style can be "a powerful reinforcer of hierarchy".[66]

The ability of speech to scandalise the law, however, is not to claim that all speech (and all trademarks) will do this work. If style works to create a scene, to position speakers and hearers, then there will be configurations and scenes that the Court may find untenable in light of certain democratic principles and some they will find wholly workable. In this context, the force of the law comes not from its sovereign power to rule, but from its ability to expose the ways in which speech "swerves".[67] That is, law's force comes from the recognition of the contingency of any speech act, including its own. To find the potential in this contingency is to understand that the scene of speech has never been fully rooted for all time, never fully settled. It demands recognition and, in doing so, calls the law to respond to a desire for the freedom to choose our own language that might call the law's foundations into question.

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[66] Barbara Johnson, "The Alchemy of Style and Law", in Austin Sarat and Thomas R. Kearns (eds.), *The Rhetoric of Law*, (Ann Arbor: University of Michigan Press, 1994), p. 262.
[67] Hayden White, *Tropics of Discourse: Essays in Cultural Criticism,* (Baltimore: Johns Hopkins, 1978), p. 2.