

REDUX, SUCCESSFULLY DE-BOWDLERIZING THE TRADEMARK REGISTER OR ONE PERSON’S VULGARITY IS ANOTHER PERSON’S LYRIC

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“The difference between the *almost right* word and the *right* word is really a large matter. ‘Tis the difference between the lightning bug and the lightning.”²

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¹ Distinguished University Professor of Law, University of Toledo College of Law. The title of this article comes with apologies to Associate Justice John Marshall Harlan. *See* *Cohen v. Cal.*, 403 U.S. 15, 25 (1971). I would like to thank Professor Ann Bartow, Ms. Lauri Connolly, as well as the faculty and staff at the Franklin Pierce Intellectual Property Law Center, University of New Hampshire School of Law for a fantastic conference. I would also like to thank Professor Susan Richey who inspired both the original question and my love of trademark law.

² GEORGE BAINTON, *THE ART OF AUTHORSHIP* 87–88 (1890) (attributed to Samuel L. Clemens “Mark Twain”).

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INTRODUCTION

To revisit one’s prior scholarship is an opportunity to learn humility and to confess error; rereading my scholarship for this symposium achieved the first, and this article will accomplish the latter. In 2005, I wrote the *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law after Lawrence v. Texas*.³ The United States Supreme Court in *Lawrence v. Texas* had unambiguously articulated a new caveat to the rational basis test under the Fourteenth Amendment: “Our prior cases [made] propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”⁴ In other words, does mere moral disapproval (or immorality) standing alone ever serve as a rational basis for legislation?

³ Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law after Lawrence v. Texas*, 9 INTELL. PROP. L. REV. 188 (2005).

⁴ *Lawrence v. Tex.*, 539 U.S. 558, 576 (2003) (adopting Justice Steven’s dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting) (applying Fourteenth Amendment substantive due process analysis)). An alternative constitutional basis for this position was clearly articulated by Justice O’Connor in her concurring opinion in *Tam* applying the Equal Protection clause of the Fourteenth Amendment. See *Lawrence*, 539 U.S. 778–781; see also Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 90–93 (2003) (“[m]orality, standing alone, is not a sufficient basis for prohibitory legislation. Instead, the state must explain how behavior is harmful before it can make it unlawful.”).

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It was an open question then, and it is still open now; whether *Lawrence* articulates a paradigm shift that marks a robust limitation on the rational basis test—a limitation sturdy enough to extend the *Lawrence* doctrine outside the realm of legal concepts of individual dignity (or autonomy) and into the commercial marketplace in order to remove *mere* moral opprobrium without an actual injury as a constitutionally rational basis on which to regulate commercial conduct.⁵

To confess error, the *Semiotics* article had two themes. First, that section 2(a) of the Lanham Act was unconstitutional on fundamental First Amendment grounds. Second, even if section 2(a) survived a post-*Central Hudson* commercial speech analysis, it would fail because section 2(a) was unable to meet the standard for government regulation articulated by Justice Kennedy (for the Court) or Justice O'Connor (concurring) in *Lawrence*. Subsequently, in *Matal v. Tam*, the Court held that “this provision [the disparagement clause of section 2(a)] violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: “[s]peech may not be banned on the ground that it expresses ideas that offend.”⁶ The Court held that section 2(a) violated the Free Speech clause of the First Amendment under the intermediate scrutiny standard of review, so it did not decide whether marks were expressive or commercial speech.⁷ However, it did not address whether Justice O'Connor’s dicta in *Lawrence* applied in a commercial law context. I am pleased to note that the first issue was at least raised in an amicus brief before the Court.⁸ So on the second issue, the application of

⁵ Gibbons, *supra* note 3, at 188.

⁶ *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

⁷ *Id.* at 1764.

⁸ See Brief for First Amendment Lawyers Ass’n as Amicus Curiae Supporting Respondent, *Matal v. Tam*, 137 S. Ct. 1744 (2017), 2016 WL 7664489 at *18.

Lawrence outside the bedroom (or family law context), I am giving myself a “not yet (dis)proven.”

As a student, I studied Section 2(a) of the Lanham Act, which prohibits the federal trademark registration of marks that are scandalous, immoral, or disparaging.⁹ Unlike the prohibition on scandalous, immoral, and disparaging marks, section 2(a)'s other justifications for denying a trademark registration appeared to have at least arguably sound trademark policy or commercial law justification. In other words, they represent commercial morality in contrast to the personal morality condemnation of scandalous, immoral, and disparaging marks.¹⁰

Banning marks from federal registration because they were immoral, scandalous, or disparaging seemed to present crucial First Amendment implications. I raised my hand, and I asked about the First Amendment. When a student brings up the First Amendment in an intellectual property class, usually the professor answers the question by articulating some limitation on, or exception to, the grant of the intellectual property right that putatively carves out the constitutionally required breathing room for free speech to flourish.

Here, the proffered explanation, that the federal government did not want to clutter up the trademark register with offensive marks, sounded like a justification based in mere moral disapproval.¹¹ Or, the government, did not want to give its imprimatur to these marks through federal

⁹ 15 U.S.C. § 1052 (2012).

¹⁰ In this context, commercial morality is used in the sense of policies that support fair competition and discourage unfair competition. See RESTATEMENT (FIRST) OF TORTS div. 9, pt. 1, ch. 35, intro. note (1938) (“But the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.”).

¹¹ See *In re McGinley*, 660 F.2d 481, 486 (C.C.P.A. 1981); *In re Tam*, 785 F.3d 567, 583 (Fed. Cir.), *vacated on reh'g en banc*, 808 F.3d 1321 (2015).

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registration.¹² I was told, despite the fact that the merchant cannot get federal registration on an offensive mark, the merchant can still use it without registered federal trademark protection or could obtain common law (or state) trademark protection. The right to use the designation without any trademark protection or whatever rights that either the common law or state law offered was sufficient to allay First Amendment concerns raised by section 2(a). I did a quick Westlaw search, and I determined that the answer was correct (“conventional wisdom”), but I was not sure the existing scholarship was sound as a matter of either constitutional law or trademark policy.¹³

Seven years later, *Lawrence v. Texas*, the so-called “sodomy case,” was decided. I had read *Lawrence* because I was invited to present at a program on gender and the law, and I was curious what the holding in *Lawrence* would mean for the gender presumptions (both explicit and implicit) in intellectual property law.¹⁴ Broadly read, *Lawrence* rejects morality as a ground for regulating human behavior.¹⁵

¹² *In re Tam*, 785 F.3d at 584.

¹³ After running a broad query in Westlaw’s ALL CONTENT database (lanham /s act /s 2(a) /p first /s amendment & DA(before 1998)), the author discovered that at that time there were seven law review articles on the topic of section 2(a), the majority of which focused on the challenges to the REDSKINS trademark, and only one article on the comprehensive issues of immoral, scandalous, and disparaging marks. See Theodore H. Davis, Jr., *Registration of Scandalous, Immoral, and Disparaging Matter under Section 2(a) of the Lanham Act: Can One Man’s Vulgarity be Another’s Registered Trademark*, 54 OHIO ST. L.J. 331 (1993).

¹⁴ See, e.g., 15 U.S.C. § 1052(c) (2012) (presuming that the president of the United States would be male). See generally Irina D. Manta, *Reasonable Copyright*, 58 B.C. L. REV. 1303 (2012); Dan L. Burk, *Do Patents Have Gender*, 19 AM. U. J. GENDER SOC. POL’Y AND L. 881 (2011); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL’Y AND L. 551 (2006).

¹⁵ See Huhn, *supra* note 4, at 90–93.

Lawrence brought me full circle to the question that nagged me for years: the statutory prohibition on registering immoral, scandalous, or disparaging marks. So, I sought to translate *Lawrence* from the connubial into the commercial.¹⁶ I did this to explore the possibility of commercial laws eventually being focused more on economic harms and not commercial (personal) morality.¹⁷

I. STICKS AND STONES: BUILDING A COMMODIFIED NEGATIVE IDENTITY

Around the time that I was thinking through the potential scope of *Lawrence*, trying to pull threads of thought together from several different disciplines (among them constitutional law, semiotics, and of course trademark law), I learned about the application for a federal registration by the San Francisco Women’s Motorcycle Contingent (SFWMC) of the designation “DYKES ON BIKES.”¹⁸ The SFWMC is a lesbian motorcycle club which leads many gay pride parades as a symbol of “LGBT pride, defiance, liberation and empowerment.”¹⁹ SFWMC has been described as “fiercely independent and self-reliant in the DIY and feminist traditions and [has] been studied as a social

¹⁶ I have been unable to find any cases citing *Lawrence* that do not involve some aspect of sexuality or family life. Perhaps the closest example to a commercial application of *Lawrence* involves sex-toys. *See, e.g.*, *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 361 (5th Cir. 2008); *Williams v. King*, 420 F. Supp. 2d 1224, 1250 (N.D. Ala. 2006). Courts in the sex-toy context have rejected the application of *Lawrence*. *Reliable Consultants, Inc.*, 538 F.3d at 361; *Williams*, F. Supp. 2d at 1250.

¹⁷ *See, e.g.*, *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015-17 (5th Cir. 1970) (imposing a standard of commercial morality in a trade secret case).

¹⁸ U.S. Trademark Application Serial No. 78/281,746 (filed July 31, 2003).

¹⁹ *Dykes on Bikes*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dykes_on_Bikes (last visited July 28, 2018).

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phenomenon as a “complex, multilayered form of consumption-related cultural resistance that raises awareness of social injustice and discursively informs social meanings in everyday life outside the festivals.”²⁰ SFWMC is appropriating a pejorative—a formerly disparaging term and then changing the emotional valence to one of empowerment.²¹

DYKES ON BIKES as a mark wove together with my thesis regarding the robustness of *Lawrence*, as well as my long-term discomfort with the prohibition of a federal registration for scandalous, immoral, or disparaging marks.²² DYKES ON BIKES made an excellent example because it potentially contained both a scandalous and a disparaging justification for its denial. As I noted in the *Semiotics* article, in the United States, scandalousness often carries connotations of sexual immorality.²³ Further, queer or non-heterosexual normative sexuality is especially suspect under the rubric of scandalousness or disparaging because these terms often carry with them a connotation of sexuality.²⁴

²⁰ *Id.*

²¹ If section 2(a) of the Lanham Act is ever reborn, I would suggest that we look to copyright law’s conceptualization of transformative, and by analogy, ask what the original communicative purpose the term served and if the new use (communicative goal) was the same as the old solely to disparage or scandalize then maybe further trademark analysis is required. *Cf.* *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006). On the other hand, if the appropriator is giving the term a new meaning or purpose, then it should presumptively fall outside the ambit of section 2(a)’s prohibition on registration. *Cf. id.*

²² While this article, focuses more on the DYKES ON BIKES mark in its analysis, the *Semiotics* article focused on the designation QUEER in its analysis in an attempt to be more gender neutral and inclusive. *See* Gibbons, *supra* note 3, at 189.

²³ *Id.* at 188.

²⁴ *See In re McGinley*, 660 at 486 (scandalous is “shocking to the sense of propriety, offensive to the conscience or moral feelings or calling out for condemnation.”); *In re Runsdorf*, 171 U.S.P.Q. 443, 444 (T.T.A.B. 1971) (“vulgar,” “lacking in taste, indelicate, morally crude.”). The

In her initial office action, the trademark examiner cited five references from online dictionaries that supported an inference that the term *dyke* was offensive slang regarding lesbians.²⁵ Interestingly, the examiner’s second cited reference noted that the term is “now probably used positively by gay women to describe themselves.”²⁶ The applicant responded with expert affidavits, published examples of the positive empowering meaning of the term *dyke*, and personal statements that supported their contention that “[w]ithin the lesbian, bisexual, and transgender (LGBT) communities ‘dyke’ evokes pride, empowerment, self-reliance, women’s power, and gender equality.”²⁷

The examiner issued the final office action denying trademark registration with citations to numerous dictionaries.²⁸ In her office action using form USPTO language, the examiner—with what I assume was

modern trend is to reject an allegation of homosexuality as defamation per se. *See, e.g.,* Yonaty v. Mincolla, 97 A.D.3d 141, 142 (N.Y. App. Div. 2012) (recognizing a societal change in the views of gay and lesbian individuals); Holly Miller, *Homosexuality as Defamation: A Proposal for the Use of the “Right-Thinking Minds” Approach in the Development of Modern Jurisprudence*, 18 COMM. L. & POL’Y 349, 353 (2013) (historically an allegation of “homosexuality” was per-se defamatory). I am using the term *queer* in this article as a shorthand for sexual or gender identities that are not stereotypically heterosexual. *See* Gibbons, *supra* note 3, at 188 n. 8; *see also* *Queer*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Queer> (“Queer is an umbrella term for sexual and gender minorities who are not heterosexual [or] not cisgender.”).

²⁵ Office Action for U.S. Trademark Application Serial No. 78/281,746 (mailed Feb. 20, 2004).

²⁶ *Id.* at attachment 2 (citing Allwords.com).

²⁷ Paper Correspondence Incoming for U.S. Trademark Application Serial No. 78/281,746 (mailed Aug. 23, 2004).

²⁸ Office Action for U.S. Trademark Application Serial No. 78/281,746 (mailed Oct. 28, 2004). The exchanges between the examiner and the applicant could be described as a battle of the dictionaries a rough total of 13 (examiner) and affidavits with samples of contemporary use and understandings (applicant).

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unintended irony or arrogance—informed a lesbian civil rights group that “[a] *reasonable person of ordinary sensibilities* would consider this reference [DYKE] offensive or objectionable because has been used as a derogatory or offensive term for lesbians.”²⁹ One may conclude that the SFWMC (and by analogy its members) was not “reasonable” or did not have “ordinary sensibilities.”³⁰

In essence, the trademark application denial now became the government scarlet letter of disapproval of a queer identity expressed in the term DYKE.³¹ This position regarding the social, if not legal effect of an office action, is contentious. It is sometimes the position of the USPTO (and arguably by extension the U.S. government) that the grant or denial of a trademark is not the grant or denial of a governmental imprimatur.³² This position is undoubtedly legally correct—at least theoretically, but whether it truly reflects a public understanding of the law and the emotional impact of federal registration and the ® symbol is questionable. For example, the U.S. government has on occasion taken the inconsistent position that trademark registration was government speech.³³ A reasonable trademark applicant or anyone reading the office action

²⁹ *Id.* (emphasis added).

³⁰ See *Williams*, 420 F. Supp. 2d at 1250 (*Lawrence's* “striking focus on human dignity and the stigma imposed by [anti-sodomy] laws . . .”).

³¹ *Gibbons*, *supra* note 3, at 246–48.

³² See *in re Tam*, 785 F.3d at 584–85 (citing *in re Old Glory Condom Corp.*, 26 U.S.P.Q.R.2d 1216, 1219–20 n.3 (“the registration of a trademark is not a governmental imprimatur . . . that a mark is a ‘good’ one in an aesthetic, or any analogous sense.”)).

³³ See *In re Tam*, 808 F.3d at 1345–46 (rejecting Government contention that trademarks were government speech). *But see In re Tam*, 808 F.3d at 1375 (Dyke, J., concurring in part and dissenting in part) (“the use of the ® symbol or a phrase the mark is registered with the USPTO giving proof to the public that the government has in some sense approved the mark.”).

denying a trademark application as immoral, scandalous, or disparaging may not be aware that the office action is a mere recitation of formulaic language that is used in all section 2(a) rejections. It could be understood under its own terms and by the express language used in the text as an expression of the government’s value judgement on the applicants proposed mark, and by extension on the applicant or the applicant’s group.

The real irony here is that the USPTO does not allow its trademark register of other registrations to be cited as precedent that a term is not scandalous or disparaging.³⁴ The USPTO had granted: “Crippled Old Biker Bastards,” “Biker Bitch,” “Whore,” and “Evil Pussy” as well as “TechnoDyke,” “Homo Depot,” “Queer Shop,” “Queer Eye for the Straight Guy,” and “Queer as Folk.”³⁵ According to many dictionaries, even as of today,³⁶ the term “queer” is also “offensive.”³⁷ However, the USPTO was willing to grant federal recognition to the use of “queer” as an element of

³⁴ See *In re Nett Designs, Inc.*, 236 F.2d 1339, 1342 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); see also 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:126.50 (5th ed. 2017) (“The fact that an examiner in the past may have imprudently granted a registration in similar circumstances is not a reason for the present Examiner, the Board or a court to perpetuate the mistake so that it spreads like a virus, eventually eroding the reliability and integrity of the federal register.”).

³⁵ K. Alex Ilyasova, *Dykes on Bikes and the Regulation of Vulgarity*, INT’L J. OF MOTORCYCLE STUD. (2006), http://ijms.nova.edu/November2006/IJMS_Artcl.Ilyasova.html.

³⁶ *Id.*

³⁷ See *Queer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/queer> (last visited July 30, 2018).

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a mark.³⁸ These examples are evidence of the arbitrariness of the USPTO's enforcement of section 2(a) of the Lanham Act.³⁹ The DYKES ON BIKES story did have a happy ending. In 2006, the SFWMC won the struggle to federally register the mark DYKES ON BIKES.⁴⁰

II. WILL BREAK MY BONES: THE POWER OF NAMING

The power to name is the power to define, to control, and to shame.⁴¹ A trademark is not just a symbol of quality, but it also (re)defines the essence of a product. Sometimes a marginalized group may adopt the status symbols of the dominant class; for example, a New York City street gang that only wears Ralph Lauren trademarked products.⁴² But more often, marginalized

³⁸ See Gibbons, *supra* note 3, at 224 n.181 (showing the inconsistency of the PTO in allowing the use of the term "QUEER" as part of a mark). See also *In re Tam*, 808 F.3d at 1372 n.7.

³⁹ See *In re Tam*, 808 F.3d at 1372 n.7. This inane or insane level of inconsistency regarding registration among semantically equally offensive terms seems to be a universal problem among trademark offices. See T. Dinesh, *You Can't Always Say What You Want: Can Freedom of Expression/Speech Co-exist with the Refusal to Register Trade Marks that are Offensive to Morality and Public Order?* 9 (2016) (master's thesis, University of Oslo).

⁴⁰ See *McDermott v. S.F. Women's Motorcycle Contingent*, 240 Fed. App'x 865, 866 (Fed. Cir. 2007).

⁴¹ See Loren Graham, *The Power of Names: In Culture and in Mathematics*, 157 PROCEEDINGS OF THE AMERICAN PHIL. SOC'Y 229, 229-30 (2013); Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POL. SCI. Q. 83, 83 (1991).

⁴² See, e.g., *The New York Gang That Only Wears Ralph Lauren*, THE GUARDIAN (JULY 27, 2011, 12:00 PM), <https://www.theguardian.com/lifeandstyle/2011/jul/27/new-york-gangs-ralph-lauren>; *Paris Is Burning (film)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paris_Is_Burning_\(film\)](https://en.wikipedia.org/wiki/Paris_Is_Burning_(film)).

groups adopt negative designations in a search for semiotic sovereignty—the ability to control the designations (descriptors) that define the group.⁴³ One may describe this in part as capturing a free-floating signifier. A *negative identity* (historically such as dyke, queer, or the *N*-word) is “THE ASSUMPTION OF A PERSONA that is at odds with the accepted values and expectations of society.”⁴⁴ Some individual members of the group will reject this negative identity and then conform to dominant cultural norms.⁴⁵ Others will reject the dominant cultural norms and embrace a so-called negative or deviant identity descriptor.⁴⁶ This may result in an attempt to own or control the stereotypes associated with the negative identity without adopting potentially undesirable behavior patterns.

A defining characteristic of the post-colonial era is for marginalized groups and individuals to embrace their cultural, racial, linguistic, gender, or sexuality differences and to proudly cry out “I am what I am!” as the first step in developing self-sufficiency and pride.⁴⁷ Professor Erick H.

⁴³ See *Gerald v. Locksley*, 849 F. Supp. 2d 1190, 1246 (D.N.M. 2011) (discussing the *N*-word and its uses).

⁴⁴ See *Negative Identity*, THE FREE DICTIONARY.COM, <https://medical-dictionary.thefreedictionary.com/negative+identity>. *Negative* in this context does not represent a moral judgment instead it represents a position of polarity *vis-à-vis* the majority or a dominant group.

⁴⁵ An excellent example of this class, racial, or ethnic passing or the various *pseudo*-medical or scriptural based forms of conversation therapy used by some individuals to change innate characteristics to conform to a societal or religious norm. See *Conversion Therapy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Conversion_therapy (last visited July 28, 2018).

⁴⁶ See *LGBT Social Movements*, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_social_movements; *ACT UP*, WIKIPEDIA, https://en.wikipedia.org/wiki/ACT_UP (last visited July 28, 2018).

⁴⁷ See generally ERIC OBERLE, THEODOR ADORNO AND THE CENTURY OF NEGATIVE IDENTITY (Stanford Univ. Press 2018); Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCHOL. Q. 224 (Sept. 2000); Zenobia Bell, *African-American Nomenclature: The*

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Erickson aptly observed that “the development of psychosocial intimacy is not possible without a firm sense of identity.”⁴⁸ Erickson describes the process of embracing the negative identity as the transvaluation of the negative identity.⁴⁹ Interestingly, Erickson first expressed the psychoanalytic construct of a transvaluation a negative identity in the context of an adolescent coming to terms with his or her sexual-identity.⁵⁰ Erickson viewed this process of accepting a non-majoritarian identity as a *cul-de-sac* in personal development because it precluded the complete integration of the individual with the dominant group. He apparently (and erroneously in my opinion) assumed the prevailing group norms, such as heterosexuality, were superior to the individual’s norms. Perhaps, societal integration trumps ego integration.⁵¹

Consequently, the terms that define the negative identity will inherently be disparaging, at least as viewed from the perspective of the dominant culture or sometimes by more traditional members of the disparaged group. The terms (signifiers or descriptors) of identity adopted by a non-majoritarian group will rarely be the polite euphemisms that are used by the majority to describe the disaffected group. These polite euphemisms can be used to define the disaffected group without an apparent *intended connotation* of an insult.⁵² These are

Label Identity Shift from “Negro” to “Black” in the 1960s,
ESCHOLARSHIP: UC OPEN ACCESS PUBLICATIONS (2013),
<https://escholarship.org/uc/item/1j12q56x>.

⁴⁸ ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 186 (1994).

⁴⁹ *Id.* at 186–88.

⁵⁰ *Id.* at 313.

⁵¹ *Cf. id.* at 186–87.

⁵² This distinction may be seen in a discussion of gender. Gender pronouns terms, such as *she* or *he*, *her* or *his*, are arguably neutral (presumptively without an intended insult). However, when these binary gender pronouns are used to identify an individual who identifies as genderqueer (or non-binary), these binary gender terms may be an insult

the terms with the most emotive power that the disaffected group wants to recapture the power of naming and defining by repurposing the term. So, if the disenfranchised group commandeers the naming right, they then are empowered to reject the shaming-meaning ascribed to the designation by the dominant group. If one wishes to think of the transvaluation or appropriation of a negative identity in trademark terms, it is an opportunity for the rebranding of a mark under a new owner.⁵³

If the question of a negative identity now becomes a brand issue, trademark law provides a useful paradigm for creating a legal regime to govern the new brand or brand rehabilitation. Trademarks are essential to all communities, but uniquely to communities composed of sexual minorities. Physical characteristics are often used to identify gender, racial, or ethnic minorities. In contrast, sexual and political minorities often must create their badges and incidents that visibly define the group. These symbols of identity are often designations (signifiers) that could be commodified as marks. One commonality is that

to the individual's identity because these terms do not respect the individual's gender identity. *See also* John McWhorter, *Is 'Colored People' a Slur?*, CNN (Aug. 23, 2016, 8:47 AM), <https://www.cnn.com/2016/08/22/opinions/colored-people-and-abc-anchors-apology-mcwhorter/index.html>.

⁵³ The process works too in reverse. Designations that are accepted as polite euphemisms may become disparaging over time. For my mother's generation, the term "colored" for an Afro-Caribbean woman was acceptable. We have the National Association of Colored People (NAACP), one of the leading civil rights groups for people of color. Nonetheless, the dictionary (as well as social norms) informs the reader that the term "colored" is dated and offensive. *See Colored*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/colored>. Section 2(a) would never cleanse marks from the register that initially registered but later acquired a meaning that was disparaging or scandalous. *See* McWhorter, *supra* note 52.

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all these groups have a presumed “negative identity.”⁵⁴ The individual or group should not have to choose between legal trademark protection with an innocuous mark and forfeiting federal registration by selecting a statement making “in-your-face mark.”

Justice Harlan in *Cohen v. California* wrote for the majority:

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.⁵⁵

All words are not created equal. “Fornicate the Draft” is not the same as “Fuck the Draft,” and in our context, LESBIANS ON BIKES is not the same as DYKES ON BIKES. LESBIANS ON BIKES would sacrifice the emotive or cognitive force of DYKES ON BIKES or QUEERS ON BIKES.⁵⁶

Taking control over a negative identity descriptor and giving it new meaning worked well to influence meaning ascribed to a socially constructed identity in the context of disparaging marks. But what about scandalous

⁵⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015) (reciting a summary of the legal status of homosexuality under U.S. law).

⁵⁵ *Cohen*, 403 U.S. at 26.

⁵⁶ See ELIZA SCRUTON, GENDERED INSULTS IN SEMANTICS-PRAGMATICS INTERFACE 4–5 (2017).

marks? I thought of one: “CUNT.” However, upon a bit of research I found the following quote:

For me, the taking back of negative words has been a survival strategy. I came out in the early 80s when all the words available to me to articulate my desire were constructed negatively: lesbian, lessie, dyke, . . . cunt, pussy, fuck. . . . It has been a long haul back to reclaiming the right to call my cunt, my cunt[.] For many queer women, “cunt” is no longer defined as: “(knt) n. Vulgar Slang 1. The female genital organs. 2. Sexual intercourse with a woman. Offensive. a. Used as a disparaging term for a woman. b. Used as a disparaging term for a person one dislikes or finds extremely disagreeable.” The vulgar slang and offensive meaning have been neutered. *Rather now, cunt is a term of acceptance, endearment, and empowerment.*⁵⁷

I began to realize viscerally that many disparaging marks are also potentially scandalous and immoral marks under section 2(a).

When a negative identity descriptor is reconceptualized as a development brand issue, then the right word (mark) may be profane, vulgar, and offensive—at least to some in the context of marginalized groups. The range of acceptance (pride) to rejection (offense) can be measured on the spectrum on how the individual views his or her relationship with the dominant social or legal norm. The right word in this context is the word that best conveys the speaker’s meaning, including the speaker’s intended emotive impact. This semiotic issue is whether the communicator has a right to have access to lightning and not lightning bugs when conveying a message through a mark.⁵⁸

⁵⁷ Gibbons, *supra* note 3, at 221–22 (emphasis added and citation omitted).

⁵⁸ *See id.* at 197–202.

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As scholars, the precision of language is the hallmark of our profession. The emotive or the semiotic effect of speech on the audience plays a profound role in the rhetorical toolbox of every gifted speaker. The fact that the words and concepts that appeal to the individual's basic emotions and desires are most likely to cause the individual to react to the message is ingrained in our rhetoric and our polity.⁵⁹ Immoral, scandalous, or disparaging trademarks, are potential marks that appeal the baser parts of the human psyche. These words are often not only the best regarding communicative impact but also the best because they are the most commercially successful. Commercial success in this context means political success in changing either the internal or external meaning of the repurposed negative identity descriptor (signifier).

III. NAMES WILL NEVER HURT ME: RECAPTURING THE NEGATIVE IDENTITY

Having established arguably that a scandalous or immoral term is potentially an essential constituent element of an individual human or group identity, the question of registration and protection becomes a serious one as is the choice of the term that a group selects to define its identity. The *Semiotics* article first analyzed the Free Speech clause argument and then considered the Due Process/Liberty Interest argument. This section will address the First and Fourteenth Amendment contentions in turn solely as they are relevant to the redux of my *Semiotic* article.

While at its core, the *Semiotics* article contends that the scandalous, immoral, and disparaging clauses of section 2(a) violate the First Amendment. I had secretly hoped that perhaps section 2(a) could be narrowed by the courts and

⁵⁹ See generally VICKIE RUTLEDGE SHIELDS & DAWN HEINECKEN, MEASURING UP: HOW ADVERTISING AFFECTS SELF-IMAGE (2001).

limited to marks that are objectively harmful.⁶⁰ Probably, this new interpretation would require a new presumption that the USPTO would publish disparaging and scandalous marks and then any aggrieved individuals or associations could file an opposition to create a record that the examiner is unlikely to be able to develop on his or her own on as to the injuries caused by the mark. Alternatively, marks being prosecuted by a member of the disparaged group would presumptively be published for opposition with the examiner permitted to give some weight the status of the applicant as a member of the disparaged group. The applicant is in a better position than an examiner to determine disparagement in the context of the disparaged group.⁶¹

⁶⁰ The courts have been able to do this in other contexts. *See, e.g.*, *N.Y. v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (false statements of fact); *Miller v. Cal.*, 413 U.S. 15, 23 (1973) (obscenity); or *Chaplinsky v N.H.*, 315 U.S. 568, 571-72 (1942) (regarding fighting words, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”). *Contra R.A.V. v. City of St. Paul*, 505 U.S. 377, 381–82 (1992) (“Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the ‘fighting words’ doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”). It would have been an interesting result if marks that constituted or closely analogous to fighting words, for example the N-word, could have been circumscribed as disparaging while permitting the merely offensive, profane, or vulgar. *See In re Tam*, 808 F.3d at 1365–74 (Dyke, J., concurring in part and dissenting in part).

⁶¹ *See TMEP* (5th ed. Sept. 2007) (“Therefore, to support a refusal on the ground that a proposed mark is immoral or scandalous, the examining attorney must provide evidence that a substantial portion of the general public would consider the mark to be scandalous in the context of contemporary attitudes and the relevant marketplace . . . This evidence could include dictionary definitions, newspaper articles, and magazine articles.” (internal citation omitted) (Pre-*Tam* citation to TMEP)).

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Of course, I am more sympathetic to federally registering a vulgar mark, as the use of the mark moves from mere commerce towards core political speech (especially speech as creating a social identity). I was worried but the *Semiotics* article proposed no solution to the parade of scandalous marks that serve only the economic interests of the registrant by offering products with what is in essence a novelty mark that conflates the mark with the product.⁶² Albeit, I was and am agnostic on the ability of the courts to reform section 2(a) consistent with jurisprudential restraint and the First Amendment.

A. First Amendment (Free Speech Clause)

The U.S. Supreme Court was correct in holding unconstitutional the disparaging clause of section 2(a). Accordingly, I will not repeat the Court's well-reasoned First Amendment analysis of the disparaging clause of section 2(a).⁶³ Before *Tam*, section 2(a) had not been analyzed by the courts since *In re McGinley*,⁶⁴ and subsequent decisions merely cited *McGinley* with a putative talismanic force ignoring a generation of intervening First Amendment commercial speech jurisprudence.⁶⁵ The

⁶² See, e.g., *In re Fox*, No. 76315793, 2011 WL 6012204 (T.T.A.B. Nov. 15, 2011) (COCKSUCKER mark for a rooster-shaped lollipop). I assume that this is a high-quality confectionary product. Cynically, I presume the mark qua mark is what would sell the product and not the mark as a symbol of a high-quality confectionary product. The mark is the product.

⁶³ See also *Matal*, 137 S. Ct. at 1757–63; McCarthy, *supra* note 34, at § 19:77.25.

⁶⁴ *In re McGinley*, 660 F.2d at 484.

⁶⁵ See *In re Tam*, 808 F.3d at 1333-34; Gibbons, *supra* note 3, at 224–25. At best one could describe the McGinley Court's cursory opinion of the intersection First Amendment and section 2(a) as perfunctory if not dismissive of the constitutional claim. The entire analysis is reproduced below.

McGinley Court’s First Amendment analysis is roughly fifty words long.⁶⁶ *McGinley* and its progeny were based on a fallacious assumption that the failure to prohibit speech is sufficient to take government action or inaction out of the realm of First Amendment’s limitations on government action.⁶⁷ *McGinley* and its progeny failed to go beyond the prohibition of speech and consider whether the regulation of expression was content neutral.⁶⁸ The Court in *Tam* wisely focused on the lack of content neutrality in that benign complimentary pro-messages could be conveyed with a registered mark, but a disparaging anti-message was denied registration.⁶⁹

In *Tam*, the Court begins with an unclear (and caveated) statement of law in the text of the opinion: “[w]ithout federal registration, a valid trademark may still be used in commerce. And an unregistered trademark can be enforced against would be infringers.”⁷⁰ The text refers to “valid” marks.⁷¹ But, in the first footnote, the Court notes the Federal Circuit’s perturbation that it was not clear whether marks that disparaging marks could serve as a basis for an infringement action under section 43(a), the provision

With respect to appellant’s First Amendment rights, it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant’s First Amendment rights would not be abridged by the refusal to register his mark.

Id. at 484. See also *In re Tam*, 808 F.3d at 1333.

⁶⁶ *In re McGinley*, 660 F.2d at 484.

⁶⁷ *Gibbons*, *supra* note 3, at 224–25.

⁶⁸ *Matal*, 137 S. Ct. at 1333–35.

⁶⁹ *Id.* at 1763–64, 1766–67.

⁷⁰ *Id.* at 1752.

⁷¹ *Id.* at 1752.

protecting unregistered marks.⁷² To elide valid and invalid marks is to conflate a core question before the court, and the dispositive presumption on which all the prior case law rejecting any challenge to section 2(a) was built.

The *Tam* Court left unanswered whether a common law mark that is unregistrable under the Lanham Act may serve as a basis for a section 43(a) infringement action of the common law mark.⁷³ It also presents a new post-*Tam* corollary about whether a registered scandalous, immoral, or disparaging mark might be unenforceable. I bring up this point because while the Court adjudicated the registration of disparaging marks, the Federal Circuit more recently held that scandalous or immoral marks are now federally registerable.⁷⁴ The Federal Circuit declined to narrowly interpret section 2(a) and limit its application to the most extreme edge of scandalous or immoral marks—the legally obscene mark or the legal pornographic mark.⁷⁵ The other provisions of section 2 will probably survive First Amendment scrutiny.⁷⁶

Scandalous, immoral, or disparaging marks still may present a potential trademark conundrum to the courts. Courts may have merely kicked the can down the road a bit regarding protecting the most extreme marks against

⁷² *Id.* at 1752 n.1.

⁷³ *Id.*

⁷⁴ *See In re Brunetti*, 877 F.3d 1330, 1341–42 (Fed. Cir. 2017).

⁷⁵ *Id.* at 1356–57.

⁷⁶ But see 15 U.S.C. § 1052(b) (2012) (stating the prohibition on registering “any simulation” of a flag or coat of arms) as a likely candidate for a free speech challenge. Registering the flag or something that is likely to cause consumer confusion with the flag, but “any simulation” appears to be beyond any legitimate government purpose. Congress could probably accomplish this goal with a linguistic tweak but has failed to do so here. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 531–33 (1987). What constitutional goal could Congress have achieved by this legislation? As of yet, this is an unanswered question.

infringement—the question of whether there is a remedy for infringement remains unanswered. Trademark law now poses a problem analogous to the problem facing the courts in copyright cases: whether pornographic copyrighted works are protected against copyright infringement under copyright law and the scope of the remedy, if any, is unsettled in many circuits.⁷⁷ In the case of trademarks, the courts may not want to, as a matter of equity, protect marks such as the *N*-word, pictorially salacious marks, or the most gutter-level of vile four-letter words and limit the remedy to a legal remedy: actual damages.⁷⁸ To be just a bit tongue-in-cheek, think of the salacious potential of 3D marks, olfactory marks, or tactile marks, and the challenges that they will present the courts.

B. Fourteenth Amendment (Liberty Interests of Due Process Clause)

In Part I of this Article, and in the *Semiotics* article, I demonstrate that in some contexts trademark expression is more than mere political speech.⁷⁹ Trademarks are speech in the act of creating and defining a community and transforming the social-political identity of the group into an autonomous socially commodified identity.⁸⁰ Understanding the role served by trademarks solely as an economic function of their statutory purpose in commerce is unhelpful in learning to appreciate the semiotic use of a mark in a broader psychosocial context. The constitutional values

⁷⁷ See *Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444, 447 & n.2 (D. Mass. 2011); see also Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 831–34 (2008).

⁷⁸ See *In re Tam*, 808 F.3d at 1344–45.

⁷⁹ Gibbons, *supra* note 3, at 189-90, 215, 219–21

⁸⁰ *Id.* 215, 219–21.

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expressed in *Lawrence*⁸¹ and later in *Obergefell v. Hodges*⁸² go to the core value of human worth and dignity. The *Tam* Court did not need to address these issues, and for jurisprudentially constitutionally sound reasons, the Court declined to do so, despite there being some mention of this argument in an amicus brief.⁸³ However, for counterfactual reasons, I would like to rehash these arguments. Because, if the Court had extended its civil rights jurisprudence, it would have been a revolution in trademark and copyright law. Courts could begin to look at the non-economic social functions that they serve in modern society, trademarks as elements of identity, and copyrights, if they were elements of the author's identity, courts then might be more solicitous of the author's moral rights.

1. Liberty Interest

Lawrence and *Obergefell* carve out spheres of an individual's life where the Constitution minimizes government intrusion if it is to encourage human flourishing. The crux of the individual's liberty interest is autonomy of self. This has several critical elements: freedom of thought, belief, expression, intimacy, and association.⁸⁴ However, the Court has held that freedom of political association (as opposed to an intimate association) is not a liberty interest; instead, it is protected by the First Amendment.⁸⁵ One's identity is one of the protected core constitutional values. The closest analogy is a claim of constitutional protection to one's right to a physical appearance, clothing, hairstyle,

⁸¹ *Lawrence*, 539 U.S. at 576–78.

⁸² *Obergefell*, 135 S. Ct. at 2597.

⁸³ See Brief for First Amendment Lawyers Ass'n as Amicus Curiae in Support of Respondent, *Matal v. Tam*, 137 S. Ct. 1744, (No. 15-1293), 2016 WL 7664489 at *18.

⁸⁴ *Lawrence*, 539 U.S. at 562; Gibbons, *supra* note 3, at 242.

⁸⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984).

etc.⁸⁶ If there is a liberty interest in one's physical appearance, then there should be one of the intangible psychological attributes that create either the individual or the group identity.⁸⁷

The Court has bifurcated its Fourteenth Amendment analysis in a manner that makes the protection of intersectional identities problematic.⁸⁸ An individual's identity is not established in social isolation. It is instead formed by the constant interaction of the individual, the family, other social relations (race, religion, ethnic identity, national origin, gender, sexual orientation, etc.), and of course, the relationship between the individual and his government.⁸⁹ The social identity and an association grouping that goes to identity should be protected both as a First Amendment associational right to the degree that it is public or political, but a liberty interest to the degree it exists in the private or personal sphere of one's life. The distinction between the personal and the political may be a false one, but it serves a useful bridge between clearly protected First Amendment associational rights, and a liberty interest in associational rights that are not naturally political.⁹⁰ First Amendment rights to associate to petition the government for redress of grievances may not protect the need to use certain terms to create an identity, but the liberty interest in individual and group development may.

⁸⁶ Gibbons, *supra* note 3, at 243, 243 n.278.

⁸⁷ See *Lawrence*, 539 U.S. at 526 (stating that liberty is an expanding concept).

⁸⁸ See generally Judy Scales-Trent, *Black Women and the Constitution: Finding our Place; Asserting our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 21–35 (1989).

⁸⁹ See generally Gerry Veenstra, *Race, Gender, Class, And Sexual Orientation: Intersecting Axes of Inequality and Self-Rated Health in Canada*, 10 INT. J. EQUITY HEALTH 3 (2011).

⁹⁰ See Christopher J. Kelly, *The Personal Is Political*, ENCYCLOPAEDIA BRITANNICA (2017), <https://www.britannica.com/topic/the-personal-is-political>.

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At the very least, the liberty interest should prevent a group from the stigma of being informed that they are labeled as unreasonable people lacking in ordinary sensibilities or that the government places its imprimatur of immoral, scandalous, or disparaging the signifier that creates their identity.⁹¹ If the designation that I self-select to define my identity is legally characterized, then that governmental characterization also labels me as an individual. Labeling may also be implicit. The presence or lack of a ® indicating a federal trademark registration also may convey a message of government disapproval, since there is a legal strong presumption that the trademark application will be approved, and the burden is on the examiner to show that the mark is not eligible for protection.⁹² To paraphrase *Lawrence*, the act labeling and of positive discrimination by the government is “demeaning the lives” of the affected individuals.⁹³ Accordingly, “[w]hen a new insight reveals a discord between the Constitution’s central protections and a received legal structure, a claim to liberty must be addressed.”⁹⁴

2. Due Process

The Court in *Lawrence* decided the case on the grounds of a substantive due process liberty interest in a consensual private sexual activity.⁹⁵ Justice O’Connor in a persuasive concurrence offered the Equal Protection clause of the Fourteenth Amendment as an independent basis on

⁹¹ Cf. Office Action for U.S. Trademark Application Serial No. 78/281,746 (mailed Oct. 28, 2004) (emphasis mine).

⁹² See 15 U.S.C. § 1052 (2012) (“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it. . .”).

⁹³ *Lawrence*, 539 U.S. at 575; *U.S. v. Windsor*, 570 U.S. 744 (2013).

⁹⁴ *Obergefell*, 135 S. Ct. at 2598.

⁹⁵ *Lawrence*, 539 U.S. at 576-78.

which to protect consensual private sexual activity. The Fourteenth Amendment prevents the government from classifying individuals for impermissible or arbitrary purposes.⁹⁶ Justice O'Connor stated that moral disapproval could not be a rational basis to harm a group.⁹⁷ The question that *Semiotics* posed is whether although 2(a) is facially neutral does it have a disproportionately harmful impact on some groups. The article posited that sexual minorities are more likely to wish to adopt designations that are scandalous or disparaging, and that the government in refusing these marks is more likely to be relying on stereotypes held by a substantial composite of the American people.⁹⁸ This point is illustrated by the DYKES ON BYKES litigation. In *McDermott v. San Francisco Women's Motorcycle Contingent*, McDermott objected to the DYKES ON BIKES trademark registration because "it is comprised of scandalous and immoral material because the mark in full is associated with a pattern of illegal activity by the group applying" for the mark.⁹⁹

CONCLUSION

Post-*Tam*, the sky did not fall; the trademark register was not corrupted. In 1946, section 2(a) of the Lanham Act codified a commercial morality into the definition of a valid federally registered mark. In 2017, the U.S. Supreme Court struck commercial (a codified form of personal) morality from section 2(a) Lanham Act. With liberty perhaps comes license; since *Tam*, the USPTO has registered, or has pending at least, 21 applications for marks that use the N-word or simulations thereof, 5 applications for marks using the C-word or simulations thereof, over 325 versions of the

⁹⁶ Gibbons, *supra* note 3, at 245.

⁹⁷ *Lawrence*, 539 U.S. at 582-83 (O'Connor, J., concurring).

⁹⁸ Gibbons, *supra* note 3, at 217-18.

⁹⁹ *McDermott*, 240 Fed. App'x at 866.

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F-word or simulations thereof, and 1170 applications for the B-word or simulations thereof.¹⁰⁰ Whether most of these NSFW designations or marks are being used for identity or expressive purposes or for a merely prosaic commercial purpose the sale of goods or the offering of services without any intended social message is unclear to the author.¹⁰¹

For many of these vulgar marks, I am agnostic that registering them makes the world better off; however, I am certain that the trademark register is no worse off. Individuals and institutions that desire to use an edgy or profane mark to communicate may now do so with fewer worries of another co-opting the message or the money associated with the mark. If economic theory is right, the implicit legal subsidy of trademark registration will make these marks more common which for some represents the coarsening of society, but still for others it represents legal recognition of their semiotic liberation. Vulgar marks are now registered or registerable. However, the battle over disparaging and scandalous marks may not have been lost. Tam may be a Pyrrhic victory for vulgar mark owners. The next major trademark battle may be whether these marks will be protected by courts under a public policy analysis or under equitable remedy limiting doctrines, such as clean hands. On a purely personal note, I look forward to future cases in which the Court tries to disentangle morality per se as an element of constitutionally valid legislation in the context of intellectual property and commercial law.

¹⁰⁰ Based on a search of *Trademark Electronic Search System*, United States Patent & Trademark Office, <http://tmsearch.uspto.gov> (last visited on 30 September 2018) (searching for the terms nigger, cunt, fuck, and bitch).

¹⁰¹ See *NSFW*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/NSFW> (defining NSFW as “not safe for work; not suitable for work —used to warn someone that a website, e-mail attachment, etc., is not suitable for viewing at most places of employment”).

