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Judith Butler, the Bakhtin Circle and Free Speech: State Hegemony, Race and Grievability in R.A.V. v. St Paul

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Abstract
In June 21, 1990, the Joneses, an African-American family living in the mainly white and working-class neighbourhood of St. Paul in Minnesota, saw a small white cross burning in their yard. By placing the burning cross on the yard, the Minnesota Supreme Court argued that one of the accused, Robert A Viktora, had engaged in 'fighting words'. However, the US Supreme Court reversed this decision, arguing that the local authority in St Paul only legally banned certain 'fighting words', but not others. Judith Butler explores this legal case, *R.A.V. v. St. Paul*. Judith Butler argues in her earlier work that the Supreme Court in effect represented the burning cross as being non-performative and simply a vehicle of expression rather than a historical symbol of hate speech towards African-Americans. In this paper, I look again at the *R.A.V.* case. But I do so by both drawing on what Butler explicitly says about the case in her early work and integrating this with her later work on the ethics of grief, state hegemony and public assemblies. Furthermore, I also incorporate some of the insights of the Bakhtin Circle into Butler's work to strengthen her arguments. The paper then revisits *R.A.V. v. St. Paul* and shows how Reaganite state hegemony effectively transformed issues of racism surrounding this free speech case into 'monologic' and 'ungrievable' public matters of concern. The paper concludes by briefly discussing counter-hegemonic politics of free speech.

Introduction

In June 21, 1990, the Joneses, an African-American family living in the mainly white and working-class neighbourhood of St. Paul in Minnesota, saw a small white cross burning in their yard. Two further burning crosses were positioned in public spaces

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in the neighbourhood, with one placed outside apartment blocks that housed several black families. Police arrested a 17-year-old Robert A. Viktora and his friend. They were prosecuted under the St. Paul, Minnesota, 'Biased Motivated Crime Ordinance', which at the time stated:

> '[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanour'. (cited in Moore 1993, p. 1257)

During the pre-trial, a juvenile court judge claimed that the prosecution had based their case on 'content-based' reasons contrary to the First Amendment, namely, finding Viktora guilty for merely expressing his opinions. Viktora was therefore found not guilty. The Minnesota Supreme Court disagreed and stated Viktora had in fact engaged in 'fighting words' by burning the cross. In 1992, the case went to the Supreme Court, which eventually overturned the Minnesota Supreme Court judgement on the grounds that the original guilty verdict was indeed in this particular instance contrary to the First Amendment. In the judgement of the Supreme Court, the burning cross certainly constituted 'fighting words', but the Minnesota Ordinance only banned particular 'fighting words', namely, those based in race, colour, creed, religion and gender, but not others, such as disability or homosexuality. The Ordinance was therefore deemed not to be content-neutral, but was, instead, overbroad in the 'fighting words' it prohibited. Furthermore, reasoned the Supreme Court, the First Amendment should always protect ideas contained in free speech expression even if we dislike their modes of expression (*R.A.V. v. City of St. Paul, Minnesota* 1992).

In *Excitable Speech*, Judith Butler argues that the Supreme Court's decision ignored the performative dimension of injurious words and how such words construct racist and racialised subjectivities. Butler correctly notes that the Supreme Court symbolically stripped the socio-historical representation of the 'blackness' of the family. After all, '[i]mplying that a burning cross is simply an ordinary part of language that deserves protection', Butler notes, 'the judgement in fact ignores that a burning cross in America has a racist performative history and so is not merely an expressed "opinion"' (Butler 1997, p. 97). As a result, the judgement rendered the Jones family as being 'illegible' and 'unspeakable' (Butler 1998, p. 253) exactly because it brushed aside the performative nature of the burning cross. Indeed, for Justice Scalia who headed the majority opinion, the burning cross was not speech as such, but simply the 'vehicle of […] expression' (Butler 1996, p. 209). Supreme Court judges were therefore willing to protect the actual 'fire' embodied in the burning cross against what they argued was the 'incineration of free speech' embodied in the Minnesota Ordinance (Butler 1996, p. 209; 1997, p. 55).

This paper suggests that Butler's early theoretical observations are extremely useful in revisiting the legal case of *R.A.V v. St. Paul*. At the same time, the paper shows that her later work on ethics, state hegemony and racism can also be drawn upon to present a more complex and nuanced account of *R.A.V.* In this later work, Butler says

that state power and its 'partners' in civil society, such as the media, frame certain groups and populations at particular points in time as being 'unthinkable' and not worthy of being the subject of grief and grieving (Butler 2004a, p. xiv). Butler further contends that this framing of grief is then often associated by governments with types of racism so that 'non-white' and non-western populations – immigrants, for example – are framed as not being worthy of national grief (Butler 2009, 2020). These insights are employed, in part, to give a new reading of the *R.A.V.* case.

But the article also notes some theoretical limitations to Butler's ideas on state hegemony and everyday speech. In terms of hegemony, Butler tends to assume that states act through relatively unified hegemonic agendas to win support of some in civil society while coercing others. The paper however argues it is preferable to view the state as an ensemble of groups, departments, rules, regulations, ideologies and discourses, which are used strategically by state factions aiming for hegemony (see Jessop 2016). This point further implies that the state itself is a dialogic entity insofar that state factions also enter into discussions among themselves over policy agendas and hegemonic strategies. What is also understated in Butler's account is how norms attached to utterances are 'multiaccentual' and contradictory because they refract real contradictions and strategic dilemmas evident in everyday social contexts and dialogic events.

I suggest that Butler's own ideas on these areas can be developed, enhanced and strengthened through the theoretical insights of the Bakhtin Circle, which includes the work of Mikhail Bakhtin, Pavel Medvedev and V.N. Volosohinov.[1] The Bakhtin Circle explicitly highlight dialogic conflicts between monologic utterances that endeavour to articulate hegemony, and heteroglossic utterances that aim to construct counter-hegemonic discourses to monologic discourse. These and other conceptual terms developed by the Bakhtin Circle can be combined with Butler's insights to produce an innovative theoretical framework through which to explore legal events. For example, the paper argues that the legal profession will not only try to win a legal case through an appropriation of past and present dialogue about the meaning of different aspects of the law, but they will also seek to be 'internally persuasive' to the heteroglossic utterances that are often present in ordinary people's legal consciousness and in unwritten legal customs people hold about certain socio-legal rights, such popular free speech rights. Legal professionals will also often use the content and outcome of a legal case to make broader discursive points about which groups in society at a particular socio-historical point in time are worthy of our grief.

A legal event is therefore not only about the immediate free speech issues at hand, but is also mediated through an array of beliefs, politics, cultural forces and thematic issues pertinent to the social and historical conjuncture within which the case emerges. For example, the paper demonstrates that the *R.A.V v. St. Paul* opened up an opportunity for New Right figures in the US socio-legal field to 're-accent' past monologic meanings surrounding the First Amendment and the 'fighting words' doctrine into new free speech themes, which, at the same time, resonated with Reaganite attacks on liberal and progressive agendas of the time, especially a civil rights agenda. The article will further show how New Right hegemony mediated and framed *R.A.V.*

[1] See Brandist 2002 for an overview of the Circle.

in such a way that the Jones family's experience of racism was not thought worthy of being 'grieved' about. The paper thus follows Wendy Brown's recommendation that to understand neoliberalism's current offensive on relations in society, such as race relations, and how progressive politics might confront it, it is instructive to gain knowledge about the historical roots to the neoliberal assault (2019, p. 8). The Conclusion therefore makes some observations about how the discussion presented in the paper might help inform progressive socio-political activism on free expression. But we begin, first, by examining Butler's insights on free speech.

Judith Butler, the Bakhtin Circle, Free Speech, and Grief

In *Excitable Speech*, Butler notes that words and speech are always in some sense 'out of our control' (1997, p. 3). She argues that one can never obtain full knowledge about the social context and its conventions from within which an utterance is employed. Butler argues that while utterances are reproduced through ritual-like ways of being spoken about in social contexts, they can nevertheless be repeated in different ways that always exceed their original moment of being uttered. An 'interval' can thus be noted between the speech act itself and how it will be performed in another time and space. An injurious speech act, such as a racist word, might be performed differently and so 'assuming meanings and functions for which it was never intended' (Butler 1997, p. 147; see also Butler 1998, p. 95; 1999, p. 122). This, then, 'opens up the possibility for a counter-speech, a kind of talking back, that would be foreclosed by the tightening of that link' (Butler 1997, p. 15; see also Butler 2009, p. 147).

In her later work, Butler develops her insights by focusing on counter-hegemonic social movements and their activism around free expression in public spaces. According to Butler, when people enter public spaces to practise dissent, such as that witnessed by the Occupy movement in 2011, they do so to form what is often a spontaneous assembly. While an assembly can be brought to life through words and utterances of protestors, it can also be formed through people sharing a common condition of 'precarity' and a sense that they all lack access to basic social and economic needs (Butler 2015, p. 58). Precarity is a theme that therefore often brings people together in an assembly to engage in a number of expressive performative acts. 'Showing up, standing, breathing, moving, standing still, speech, and silence are all aspects of a sudden assembly, an unforeseen form of political performativity that puts livable life at the forefront of politics' (Butler 2015, p. 18). New publics of equality and inclusions are thus generated, which are not yet fully codified in law (Butler 2015, p. 183). For Butler, this is different to right-wing assemblies, a contemporary example being the January 2021 attack on Capitol Building by Donald Trump supporters, because these assemblies do not wish to institutionalise equality for all (cf. Butler 2015, p. 183).

Butler of course also stresses the need to understand how the state frames issues of debate and discussion at particular points. Capitalist states operate, in part, by enacting policies and subjectivities through, 'an ontological horizon saturated by power that precedes and exceeds state power' (Butler 2009, p. 149; see also Birla 2011). The

state therefore tries to co-op some groups and organisations into its hegemonic project, while condemning and marginalising others. One powerful state partner in this respect is the media, which can often 'frame' events in certain ways congruent with a state project. Mainstream media platforms will for example construct images about 'what will and will not be human, what will be a liveable life, what will be a grievable death' (Butler 2004b, p. 146). The state will thus create historical-schemes that morally justify why some in society are deemed more worthy to speak than others and, therefore, more worthy to be valued and grieved about should harms be inflicted on them (Butler 2020, pp. 63–64; see also Butler 2009, p. 149). Grief is, accordingly, not only about the loss of somebody. To claim a life is grievable is, instead, to claim that a life is worthy of grief should it be lost (Butler 2020, p. 75). Butler is likewise clear that grievability can be related to racism. Racialised Others caught up in wars, famines, imprisonment and torture are often framed by dominant western powers and the media as not being part of 'life' and thereby not worthy of our anguish, grief and recognition (Butler: 2009, p. 24; see also Butler 2006, p. 3).

Nevertheless, there have been criticisms made about Butler's theory of free speech. Notably, she is often accused of working with abstract understandings of 'agency', structure' and 'power' and so fails to pay enough attention to the nuances and subtleties in the relationship between them in empirical contexts (Rothenberg 2006, p. 73; Schwartzman 2002, p. 433; Walker 2017, p. 153). However, I wish to highlight two slightly different evaluative areas on Butler's work around free speech, but do so to strengthen some of her core insights on this subject-matter. These two areas relate to state hegemony and the 'inner dialectical quality' of utterances. To flesh out some of these critical points, I will draw on the ideas of the Bakhtin Circle along with other critical theorists. Like Butler, the Bakhtin Circle examine power relations in everyday utterances and they analyse how these power relations establish ethical boundaries of worth and value between people. Such similarities not only therefore highlight affinities between Butler and the Bakhtin Circle, they also underline productive exchanges of theoretical ideas on similar topics of concern.

The first evaluative area therefore revolves around state hegemony. While Butler explores specific state ideological policies, she sometimes underplays the conjunctural and strategic nature of state policies. Take how Butler characterises the contemporary post-9/11 US state. One noticeable change to the American state after 9/11 was the US government's tendency to extend sovereignty into the field of governmentality and to suspend laws indefinitely to detain terrorist suspects (Butler 2004b, p. 57; see also Loizidou 2007). Yet, much of Butler's description of the American state here minimises the extent to which dialogue, disagreements and tensions existed among factions within the state itself over which of these strategies might elicit hegemony in civil society (cf. Gramsci 1986, p. 326; Jessop 2002, p. 40; Poulantzas 2000, p. 32). For example, while the Bush administration after 9/11 did adopt sovereign powers for itself, the administration also engaged in substantial global dialogue with other American politicians, external states, NGOs, and global governance organisations to win support for its neoconservative policies across key strategic areas in the world. The Bush government also co-opted a selective number of global strategic partners by promising to increase 'humanitarian' aid to those suffering in places in the southern hemisphere, which were also key strategic US places of interest (Roberts 2010).

This illustration points towards a broader theoretical observation. State hegemony operates in distinctive socio-historical conjunctural moments, which will constrain but also present opportunities to the state on how it mobilises some forces in civil society to its agenda while coercing others, how it endeavours to get some voices to speak more than others, how it seeks to enter social fields, like the legal field, to alter their institutions to suit its hegemonic agenda, how it draws upon oppositional forces in order to merge some of their discourse within its own hegemonic agenda and thereby alter it, and so on (Bakhtin and Medvedev 1991, p. 14; see also Hall 1990; Grossberg 2019). Conjunctural analysis thus alerts us to how a specific legal case like *R.A.V* is 'overdetermined' by a number of social mediations and fields. While Butler does discuss *R.A.V.* in light of other free speech legal cases in America, she mainly does so through a textual analysis of them. Conjunctural analysis subsequently complements and strengthens Butler's insights because it encourages us to pay closer attention to the dialogic work required of the state to gain hegemony among strategically selective 'partners' in civil society and within selective state factions.

This brings us to the second evaluative area. As we know, Butler says that every time a word is uttered in a context, there is a temporal gap between the intention embedded in the original word and its operation in a new context. But notice here that Butler implies a 'word' has a singular normative meaning, which might then get repeated in a new way in a future context. This viewpoint, though, underestimates how utterances always in fact contain an 'inner dialectical quality' (Voloshinov 1973, pp. 19–23; see also Bakhtin 1981, pp. 262–263; 1984, p. 27) because everyday dialogue reflects and refracts social factors like, 'the title, class, rank, wealth, social importance, and age of the addressee […] the relative position of the speaker' (Bakhtin 1986, p. 96; 1990, p. 118). This inner dialectical quality will sometimes become reproduced into struggles between 'heteroglossic' and 'monologic' utterances. Heteroglossic utterances seek to use the inner dialectical quality of utterances to destabilise how dominant monologic utterances try to translate 'norms' into 'uniaccentual' meanings that reflect a hegemonic agenda (Bakhtin 1981, p. 326; see also Bakhtin 1984, p. 82; Volosohinov 1973, p. 71).

The Bakhtin Circle can subsequently be employed to bring to the fore Butler's insights on the unstable nature of utterances. This is especially useful in respect to legal discourse. The inner dialectical quality of utterances is particularly noticeable in terms of 'legal consciousness' – those 'meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by the law' (Ewick and Silbey 1998, p. 22). Legal consciousness thus draws attention to how ordinary people do not merely accept and internalise formal legal rules, but actively negotiate these legal rules within their own lived experience, especially when they use the law to seek redress to their own problems. People can accordingly hold monologic and heteroglossic views of legal rights at one and the same time (see Hoffmann 2003; Sarat 1990).

'Free speech' in America also has multiaccentual meanings and themes attached to it both in formal law and in legal consciousness. The free speech clause in the First Amendment, 'Congress shall make no law […] abridging the freedom of speech', sits side-by-side with the free media clause, the free assembly clause, the free petition

clause and the freedom of religion clause. Over the years, these clauses have been used by the likes of judges, the media, civil society organisations, private businesses, and by ordinary people through their everyday legal consciousness, to campaign on different monologic and heteroglossic meanings and themes about free speech and to use these meanings and themes to activate other rights in American society (see Kairys 1982). Free speech rights in America are therefore 'a terrain of struggle in a world of continuous change' (Zick 2018, p. 4). Dominant monologic narratives, for instance, will often portray this struggle as one of protecting *individual* rights of speech over and above protecting heteroglossic civil rights and social rights (Shiffrin 2016, pp. 1–2).

We will now draw on and develop these theoretical observations to examine *R.A.V v. St. Paul*. Among other things, we will see that some conservatives used this case to articulate new Reaganite themes in US society, but in ways that appeared as noble heteroglossic free speech causes (cf. Umphrey 1999, p. 412; West, Jr. 1997, p. 303).

The Dialogic Event of *R.A.V. v. St. Paul*

Butler notes that to be considered a person who might be worth grieving for if subjected to violence in the here and now, is to be considered a life which is seen as valuable. Your life is thus to be seen as one that matters when you are alive and when you die. Your life should flourish and your experience of precarity minimised (Butler 2020, p. 59). Hegemonic powers, however, aim to differentiate those lives which are deemed as being 'real' from those deemed as 'unreal' and not worthy of grief. Those constructed as 'unreal' can then be banished from public speech (Butler 2004a, p. 34). Butler also explores how norms around grievability are tied to the reproduction of racism, although she tends not to elaborate on the complex refracted mediations of state hegemonic agendas into grievability and race. We therefore need to analyse how Reaganite hegemonic and monologic discourse sought to distribute grievability about race through a number of social mediations and how these mediations were then refracted into the *R.A.V*. case.

Reaganite State Hegemony and Race

The *R.A.V.* legal event occurred within the broader Reaganite socio-economic and socio-political terrain. In 1970s America, a number of economic interests had already come together to campaign for free market policies, such as the deregulation of key sectors of the economy, new constraints on using taxes or spending to increase aggregate demand, reducing welfare state spending, and a crackdown on the bargaining power of organised labour and unions (Moody 1987). The election of Ronald Reagan in 1981 and the subsequent imposition of early neoliberal policies in America through the project of 'Reaganism' put these ideals into practice. But these neoliberal successes were contradictory. While certain socio-economic areas like inflation were effectively tackled within the confines of Reaganite policy, other areas were much less successful. For instance, average GNP dropped from 3.1% from 1977 to 80 to 2.4% during 1981-86, while productivity growth was by 1987 at just about 1% annu-

ally. Median family income, moreover, increased by only 1% between 1980 and 85, while inequality among social classes grew (Cohen and Rogers 1988, pp. 400–401).

But how did Reaganism as a hegemonic state project start to attack the gains made by the Civil Rights Movement in America? For Butler, radical assemblies challenge liberal abstract and individualised rights. They do so by bringing together coalitions of people who wish challenge precarity and dispossession from certain needs (welfare, housing, health, employment, and so on) and campaign for greater socio-economic, socio-political and socio-cultural equality (Butler 2015, pp. 137–138). Assemblies do not therefore only make assertions, but also make political enactments that go beyond language. Simply showing up in an assembly is to enact a demand against inequality (Butler 2015, pp. 186–187). And by appearing in such an assembly, one is publicly stating they have a value and worth to their lives that should be protected by the state and government.

The rise of the New Right can be thought of in one respect as a reaction against progressive and militant left-wing public assemblies in America, which had grown in stature from the 1960s to the mid-1970s (Elbaum 2002). In terms of civil rights, African-American social and political movements had gained notable free speech successes during the late 1950 and 1960s. During this period, the Supreme Court had thus recognised the right of African-Americans to assemble in public places to communicate equality claims (Zick 2016, p. 29). Reagan's administration, however, began to enact both a discursive and policy assault on these gains. A note of caution, though, needs to be flagged up on this point. Dialogic disagreements were certainly evident on the subject of civil rights policy inside the Reagan administration, let alone with organisations outside of it. The Civil Rights Division within the Department of Justice was in 1981 vocally against preferential treatment for African-Americans, while other civil rights enforcement agencies felt it best not to touch existing civil rights legislation as such, but to simply limit their effectiveness. Some policy-makers appointed by Reagan, who worked in other agencies, also favoured elements of affirmative action won by the Civil Rights movement (Devins 1993, p. 961). Even so, many of these different government groups shared broad Reaganite interests towards certain policy issues, which included civil rights policies.

Reagan, like Margaret Thatcher in the UK, stressed the need to impose abstract virtues like limited government and tax cuts into American society to 'rescue' the country from the excesses of economic interventionism and welfarism. These abstract virtues could then be attached to 'a subtextual narrative casting Blacks as the "other" – welfare frauds whose government-induced depravity and dependency convincingly illustrated why big government did not work' (Cook 2015, p. 95). The Reagan administration thereby sought to undo the gains made through progressive Civil Rights activism by attacking affirmative action programmes. Among other things, these programmes had in the past been part of an assortment of policy measures which communicated to African-American communities that the state held some social obligations towards them, especially in terms of equal opportunities, by prohibiting discrimination on the basis of race, colour or national descent (see Kennedy 1995). Reaganite policy-makers, however, introduced changes that now sought to individualise acts of discrimination. Now, 'only a concrete specific act against a specific victim' would constitute discrimination, 'not the absence of affirmative action

or numerical quotas' (Eisenstein 1987, p. 246). Furthermore, the Reagan administration made strategic appointments in a variety of government and legal bodies that curtailed the enforcement role of bodies such as the Equal and the National Labor Relations Board. Reagan also cut the budgets for civil rights programmes (Moody 1987, pp. 159–160). Individualising these rights was thus one mechanism the state employed to disavow its social obligation to maintain and enhance relations of equality in the lives of African-Americans (cf. Butler 2020, p. 45).

Spatially, Reaganism adopted a number of policies that not only impacted on the potential for groups to form coalitional politics against racial discrimination in cities, but also that would directly impact the Joneses. By the 1960s, civil rights activists and groups organised a series of campaigns to prevent race-based discrimination in housing. This led to the Fair Housing Act 1968, which outlawed 'discrimination on the basis of race, national origin, colour, and religion in the sale, rental, and occupancy of housing' (Bell 2007, p. 52). Action against these affirmative housing policies emerged, however, from the mid-1970s onwards with the rise of the New Right. Fair-house legislation, originally constructed to help the African-American community, was abolished while race-affirmative actions and programmes were curbed (Devins 1989, pp. 354–355). During this period, there were also notable instances of organised violent activism by white groups in and against black families moving into certain neighbourhoods. These attacks occurred not only in the Southern states of America, but also in cities like New York (Bell 2007, p. 54).

Some civil rights organisations tried to organise counter-hegemonic strategies against anti-integrationist policies (see Bell 2007, p. 53), but nevertheless this assault on civil and social rights had dramatic effects for African-Americans. While some middle-class African-Americans undoubtedly prospered during this period, many others saw a considerable worsening of their social conditions. In 1990, roughly 12% of all black families were earning less than $5000 per annum, while a third of African-American families lived below the federal government's poverty level (Marable and Mullings 1994, p. 62).

Reaganite Themes in the Socio-legal Field of R.A.V.

While Butler gives an astute reading of the *R.A.V.* case, we still need to understand the broader changes enacted by the Reagan administration to the US socio-legal field. The first point to note here is that Reaganism had embarked on coercive mission within the American state itself in order to stamp its hegemonic authority around free speech issues into other state apparatuses and factions and within civil society at large. To give just a few illustrations: in 1982 President Reagan reversed 30 years of automatic declassification of documents considered no longer secret; in October 1983 journalists were for the first time in history barred from a US invasion, namely the invasion of Grenada; in June 1984 thousands of public sector employees had to sign lifelong pre-publication agreements and undergo lie detector assessments; and in February 1987 a Senate Armed Services Committee report was subject to censorship by the Pentagon (Bennett 1988, pp. 30–31).

Reaganite themes on free speech and censorship came to be refracted into the *R.A.V.* case. Justice Scalia, a well-known conservative judge who was appointed to

the Supreme Court under President Reagan, set out the majority opinion that struck down the St. Paul ordinate in *R.A.V.* Interestingly, Scalia was a member of the Federalist Society (established in 1982), which was a New Right organic intellectual network in America that came to prominence and gained considerable influence under Reagan's terms in office. Members of the Society campaigned for government and the legal establishment to interpret the Constitution based on the original intent and meaning of the Founding Fathers. For those in the Federalist Society, the purpose of 'originalism' was (and is) to narrate constitutional and legal issues away from liberal, progressive and civil rights interpretations and instead open up a space for conservative and libertarian interpretations of constitutional matters (Shiffrin 2016, pp. 178–180).

That Scalia flirted with originalism is noticeable in certain themes he employed in his summing up of the majority opinion in *R.A.V.* He started by noting: 'From 1791 to the present […] our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas', but even restrictions on 'fighting words' have only been made to those types of speech that carry no 'essential part of any exposition of ideas' (*R.A.V. v. City of St. Paul*1992, pp. 382–385). Here, Scalia constructed a monologic narrative about America's 'civilized' past, which went back to the Founders, concerning the justice of a liberal marketplace of ideas approach to free speech, and one that refused to consider forms of power, social divisions, inequalities, and so forth, in decisions about free speech cases.

Other forces in this hegemonic agenda sought to articulate an internally persuasive discourse in the socio-legal public sphere in and around the meaning of free speech. A few years after *R.A.V.*, for example, Viktora's legal representative, Edward J Cleary, argued that the City of St. Paul had sought to establish 'a political climate' in which, 'expression that is felt to be offensive by a *group* can be prosecuted' (1992, p. 930). Indeed, Cleary later criticised liberal and multicultural ideals surrounding the case, which resulted 'in a type of enforced silence in which each group claims the status of victim' (1995, p. 1669), and was associated with 'fascism from the Left' and 'political correctness' (Cleary 1994, p. 63) that stifled free speech. In effect, Cleary wanted to portray his own attack on multicultural ideals as being heteroglossic, while liberal and multicultural free speech ideals were depicted by him as being monologic.

Changing Legal Dialogue on 'Fighting Words'

Scalia and the majority opinion also reproduced the legal meaning of the relationship between 'fighting words' and free speech into *new* socio-legal themes during the unique event of *R.A.V*. They achieved this, as Moore (1993) notes, by using the *R.A.V.* event to build on a history of changes to the monologic meaning of 'fighting words' in the US legal system, which narrowed the social context of the 'fighting words' doctrine in relation to 'free speech'.

The 'fighting words' doctrine was first introduced in America through the *Chaplinsky v. New Hampshire* (1942) case. In 1942, Walter Chaplinsky was distributing leaflets in a public sidewalk in Rochester. The leaflets attacked organised religion in favour of Jehovah Witness beliefs. A disturbance ensued with some others and Chaplinsky was taken to a police station where he allegedly called the City Marshall,

'a God damn racketeer' and a 'damned Fascist'. Chaplinsky was then charged with violating a New Hampshire law that prohibited a breach of the peace in a public place through offensive words. In a review of the case, the Supreme Court upheld the conviction and claimed that 'damned racketeer' and 'damned Fascist' were 'fighting words' that would provoke an average person to retaliate and thereby breach the peace.

However, and as Moore further documents, the 'fighting words' doctrine was narrowed in subsequent legal cases and brought under a more individualised marketplace of ideas approach. In *Terminiello v.Chicago* (1947), for instance, a suspended priest, Terminiello, condemned black and Jewish people at a speech in Chicago and labelled a crowd outside as 'slimy scum'. He was arrested and charged and convicted of giving a speech, which 'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance'. The Supreme Court then reversed this decision, arguing that 'fighting words' were only those words that would incite an *individual* to retaliate, not a crowd. In a later case, *Cohen v. California* (1971), the police arrested a man in Los Angeles for wearing an anti-Vietnam jacket that bore the words, 'F— the Draft'. His jacket was deemed by the authorities and court to constitute 'fighting words' that might 'provoke others into acts of violence'. Citing the *Terminiello* case, the Supreme Court then reversed the decision, stating that the words on the man's jacket were not directed at a specific person and so did not constitute 'fighting words'. In *Gooding v. Wilson* (1972), the case revolved around the words of Johnny C. Wilson spoken to police at an anti-Vietnam rally by a US Army headquarters in Georgia. The police arrested Wilson for blocking an entrance to the Headquarters. Wilson was prosecuted for allegedly saying to one of the police officers, 'White son of a bitch, I'll kill you', and then to another police officer, 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces'. But the Supreme Court reversed the decision on the grounds that merely uttering 'offensive words' had been illicitly transformed into 'fighting words' by the Georgia courts.

Crucially, the emptying out of the social and symbolic background to utterances that might constitute 'fighting words' – for example, by individualising 'fighting words' through successive cases – was developed in new ways through *R.A.V.* According to the majority opinion, the St. Paul Ordinance was an embodiment of 'viewpoint discrimination' insofar that it outlawed only *some* 'fighting words'. The majority opinion thus implied that the historical meaning and representation of certain racist symbols was not important when considering First Amendment 'non-political speech' cases (Gander 2006). Scalia and the majority opinion thus constructed a thematic utterance around the originalist core idea: 'The First Amendment generally prevents government from proscribing speech' (*R.A.V. v. City of St. Paul* 1992, p. 382).

Dialogue within the Supreme Court

It is also vital to recognise that the socio-legal event of *R.A.V.* created dialogue among the justices in the Supreme Court; dialogue which is underplayed in Butler's account. While the majority opinion, headed by Scalia, believed that the St. Paul ordinance should be struck down for the reasons already given, a minority opinion disagreed.

For example, Justice Stevens rebuked the majority opinion even if he agreed that the St. Paul ordinance was overbroad. Among other things, Stevens suggested that 'absolutist' definitions of free speech were limited and required 'a more subtle and complex analysis' that took account of the content of speech. For Stevens, trying to designate what is proscribed speech can only be realistically based on the content of the speech and the specific context and situation in which speech is being employed.

Butler also comments on the intervention Justice Stevens, but does so to dismiss his input into this debate. Butler claims that the minority opinion of Stevens appears to be more concerned about how the Supreme Court judgement might lead to public protests (Butler 1997, p. 57). However, while this is one interpretation of Stevens's claims, Butler too easily dismisses the relevance of the dialogue between the Supreme Court Justices on this case. After all, the intervention of Stevens against Scalia opens up a dialogic space of sorts that critiques hegemonic thinking around a marketplace of ideas approach (cf. Keynon 2021). For example, Stevens also argues that it is critical to explore multiple elements when assessing free speech regulations. These include reviewing the content and character of the speech involved (for example, should some speech gain free speech protection over and above other types of speech), the nature of restricting some types of speech (should we restrict some speech because of the subjects or views expressed), and the scope of regulating the certain types of speech (for example, should there be a total or just partial ban on some speech) (Demaske 2009, p. 106). Fissures and cracks in the Supreme Court's admittedly monologic verdict around this case therefore problematises Butler's view that all the judges simply separated 'speech' embodied in the burning cross from the 'conduct' bound up in the historical significance of placing this cross in an African-American private yard (Butler 1997, pp. 21–22). Qualitatively different utterances can in fact be noted in the monologic Supreme Court verdict.

Cross Burning in America

The dialogic event of *R.A.V.* is inescapably associated with the historical symbolic meaning of burning a cross in American public spaces, and, in particular, placing the burning cross near or next to the homes of African-American families. As Bell (2004) notes, and as we can see in the case of *R.A.V.*, burning a cross in the US has in many respects become dissociated by law from its situational and historical context. This socio-historical context includes using a burning cross to *terrorise* black families and instil fear into their lives (see also Matsuda and Lawrence III 1993, p. 134). Butler also rebukes Scalia's ruling because it fails to see the racist historical significance of burning a cross on a black family's lawn (Butler 1997, p. 55). Employing Butler's later ideas, we can add that the burning cross in this instance contributed to the 'non-valued' and 'non-grievable' lived experience of the Jones family *and* served to reproduce in a new form a historically specific state hegemonic agenda on race relations in America at this conjuncture.

The Unequal Value of the Jones Family

The Supreme Court judgement ensured that the experience of racism suffered by the Jones family was in effect not thought to be of the same value as the protection of a specific 'originalist' interpretation of the First Amendment. Subsequently, each family member was not considered as 'a recognizable and valued human' (Butler 2020, p. 58). They were 'socially dead' and their plight was not therefore subject to 'grief'. There are number of points to be made here.

First, the Jones family were the only black family living in that particular neighbourhood of St. Paul. Before the cross-burning event, they had already experienced a number of racist incidents from locals, including their car tyres being slashed and their son being called the 'N' word. It was three months after Joneses moved into the neighbourhood that the burning-cross was placed in their yard and other burning crosses placed nearby. The mother, Laura Jones, connected the burning cross to the history of racism in America. As she said in an interview: 'When I saw that cross burning on our lawn, I thought of the stories my grandparents told about living in the South and being intimidated by white people. When a cross was burned down there, they either meant to harm you or put you in your place' (cited in Lederer 1995, p. 30). Russ Jones, the father, at first felt anger at what had occurred, but this soon turned to 'fear' for his family (cited in Lederer 1995, p. 28).

Second, during the trial, the Joneses also felt that the (monologic) marketplace of ideas narrative employed by Viktora's legal team was soon having success in framing the event in the public sphere. For example, once it was announced that the far-right perpetrators would be prosecuted under the St. Paul Hate and Bias Crime Ordinance, the public discourse started to noticeably change. Russ Jones observed: 'After that everything turned into a circus. It seemed like the violation to our family was pushed to the back burner, and the entire case was focused on this skinhead's "free speech" right to burn a cross in our yard. We were hounded by the media, who twisted our words to fit their purpose […] A *Life* magazine article made it seem like the kid who burned the cross was the victim, instead of presenting as he was – a criminal who had terrorized our family' (cited in Lederer 1995, pp. 29–30).

Third, the legal consciousnesses of the Jones family, however, still held faith in the First Amendment. They were 'tremendous believers in the First Amendment' and, despite everything, still held out hope that the 'violation of our rights as citizens of the United States' would be corrected through the 'Constitution', which 'should protect us from violence, terrorism, and prejudice'. Unfortunately, the initial legal and media trial, had 'characterized' the Jones family 'as against free speech – as if burning a cross on our front lawn was free speech!' (cited in Lederer 1995, p. 30).

Finally, after the St. Paul Ordinance was struck down, the defendants rejoiced by holding a celebration across the road from the Jones' home. The mother, Laura Jones, remembered:

> They had a rally on one sunny Sunday afternoon, wearing their masks, wielding their baseball bats and clubs, waving their Confederate Flags […] It was awful. I felt trapped in my own home. We didn't go anywhere because I would have

had to face them and could never tell what they would do. (cited in Lederer 1995, p. 31)

The *R.A.V.* legal event had therefore emptied out even further the idea that the Jones family should be grieved. If anything, the legal event initially closed down their surrounding immediate public spaces because cross burning was now mixed with other potent expressive symbols, such as the Confederate Flag. Originally representing Confederate States of America (CSA or Confederacy), the Confederate Flag was created in 1861 when 11 states seceded from the 85-year-old nation. Some southern salve owners living in these states believed that President Lincoln wished to abolish the 'right to own slaves within their states' (Corbould 2020). Flying the Confederate Flag was therefore expressive symbol to the Jones family that they should not participate fully in the daily life of the mainly white neighbourhood in St. Paul.

Conclusion

This paper has been concerned to provide a rereading of a notorious free speech case in America. It has done so by integrating Butler's early and later work on free speech, alongside the ideas of other critical theorists, most notably the Bakhtin Circle, to place the legal event of *R.A.V vs. St. Paul* within the mediations of Reaganite state hegemony. Still, a question remains as to what this legal case might tell us about the socio-political nature of free speech. For example, does the case demonstrate there will always be a binary, an opposition, between monologic state agendas that seek to constrain and regulate free speech rights within hegemonic projects and heteroglossic social and political movements seeking to challenge state hegemony?

From a liberal perspective, Owen Fiss believes *R.A.V.* reveals that the state can play an active role in ensuring relations of equality are maintained during free speech events. The role of the state should be to act as a 'parliamentarian' and enrich, foster and 'protect the integrity of public debate' (Fiss 1996, p. 117). Seen in this way, Fiss argues that the partiality of the St. Paul Ordinance was acceptable in this instance. Local officials in the city were aiming to protect speech rights of the African-American population by trying 'to end a pattern of behaviour that tends to silence one group and thus distorts or skews public debate' (Fiss 1996, p. 117). Such a view, believes Fiss, is compatible with the First Amendment principle of self-governance because it creates a situation for ordinary citizens to engage in reflection without fear about issues under public debate. But while Fiss makes many astute observations on this issue, there is also a sense in which he fails to register how the state is not the sort of neutral mechanism he thinks it can be under capitalism, but is as we have seen, a strategically selective entity mediated through the dominance of hegemonic agendas and projects.

For Butler, the way to challenge state hegemony is in fact through counter-hegemonic coalitions. Butler defines these coalitions as groups representing a multitude of identities who are brought together to campaign in and against specific state policies. To illustrate her point, Butler draws on the example of 'marriage'. There has been for some time now a debate in some liberal democracies about whether gay and

lesbian couples should be granted the legal status of marriage. Problematically for Butler, this particular term – 'marriage' – reduces individuals to a singular legally accepted state definition, while recognising multiple pre-determined identities that fall under 'marriage' – gay and lesbian identities, for example. Accordingly, a coalitional politics should reject the liberal nature of this debate in favour of constructing counter-hegemonic politics in and around the alternative political themes of 'sexuality' and 'sexual identities'. This alternative politics will then be alive to the multitude of 'state and other regulatory policies that effect exclusions, abjections, partially or fully suspended citizenship, subordination, debasement, and the like' (Butler 2009, p. 147), which all help to frame 'sexuality' and 'sexual identities' in societies. Dialogue within a counter-hegemonic coalition also recognises contradictions, divisions and splinters exist between its members, but these also form part of its ongoing dialogue about a specific campaign (Butler 2006, pp. 20–21). Distinct to a left-liberal thinker like Fiss who talks in terms of singular identities like 'black' identity (Fiss 1996, p. 117), Butler thus argues that coalitions of counter-hegemonic speech come together through overlapping political aims, goals and identities. For Butler, then, a politics of free speech is one formed through *non-state* coalitional politics.

There is a sense in which coalitional politics is very similar to the Bakhtin Circle term as heteroglossia. After all, Bakhtin argues that heteroglossia views dialogic interlocuters as enjoying 'equally valid consciousnesses, just as infinite and open-ended as itself' (Bakhtin 1984, p. 68) and celebrating 'contradictory opinions, points of view and value judgements' about an object under discussion (Bakhtin 1981, p. 276). Important differences, however, are also evident between Butler's coalitional politics and Bakhtin Circle's heteroglossic politics. The Bakhtin Circle are clear that dialogism seeps into both monologic and heteroglossic utterances. Monologic hegemonic discourse is complexly stratified into its own distinctive 'professional' layers – the language of politicians, business people, lawyers, public officials, and so on – that must also try to resonate with discursive genres in civil society including those found in heteroglossic popular culture (Bakhtin 1981, pp. 288–290). Bakhtin therefore unambiguously notes that monologic dialogue has 'to make its presence felt as a force for overcoming this heteroglossia, imposing specific limits on it, guaranteeing a certain mutual understanding and crystalizing into a real although still relative unity – the unity of the reining conversational (everyday) […] language, "correct language"' (Bakhtin 1981, p. 270). A dominant monological discourse should then at a minimum 'develop a vital connection' with strategically selective elements of other ideological forces in civil society (Bakhtin 1981, p. 271).

But Bakhtin also claims that monologic discourse itself changes through different sociohistorical periods, or what was referred to above as 'conjunctures'. As such, certain forces within monologic discourse will endeavour to make its own 'specific verbal-ideological movements' the dominant and hegemonic one over and above other monologic forces (Bakhtin 1981, p. 270). Implicitly, then, the Bakhtin Circle acknowledge that monologic hegemonic forces are structured through their own dialogic struggles in and against *both* heteroglossic forces *and* rival monologic forces. This is important point can be illustrated in more detail through two examples.

In May 1981, British socialist councillor Ken Livingstone was elected Labour Party leader of the Greater London Council (GLC). His administration was comprised

by a coalition of mainstream Labour Party councillors, some of whom today would be characterised as 'centrists', as well as a number of left-wing councillors and a host of advisors, public sector officials and campaigners associated with social movements of the era. Soon after gaining power in London, the Livingstone-lead GLC enacted popular local policies for women's emancipation, gay and lesbian rights, antiracist programmes, new environmental proposals, and a number of local welfare and public sector areas (Curran et al. 2005, p. 42). During this time-period, the GLC was therefore seen by many as a local counter-hegemonic opposition to early 1980s Thatcherism (Hall 1994). Unsurprisingly, mainstream (monologic) media and right-wing politicians had slammed the GLC for seemingly engaging in 'moral subversion' of Londoners by funding the likes of gay and lesbian causes and by trying to change discourse and language in public services to favour these 'minority interests' (Curran et al. 2005, pp. 46–47). GLC public relations were, however, successful in countering these claims by demonstrating how the Council's funding of public services benefited all Londoners. GLC activists also used local mainstream outlets to articulate positive messages about the council's work to local communities and they co-opted support from other social and political groups. In the end, though, the Thatcher government closed down the GLC in March 1986.

The second example concerns the more recent emergence of so-called movement-parties. According to della Porta et al. (2017) movement-parties are comprised and formed when social movements – the groups that Butler tends to explore in her work – come together with more conventional electoral political groups to create new political parties (della Porta, et al. 2017, p. 7). Some movement-parties can be right-wing, such as the Pegida movement and the Alternative für Deutschland (AfD) party in Germany, or they can be left-wing like Podemos in Spain. Social movements can also attach themselves to mainstream political parties and help to reinvigorate them by introducing new activist and campaign strategies. Again, these can be right-wing as in the case of the Tea Party that attached itself to the Republican Party in America, or left-wing as is the case of Momentum that attached itself to the Labour Party in the UK (Mercea and Mosca 2021). Butler makes many astute observations about free speech in coalitional groups and in particular about free speech in coalitional assemblies like the Occupy Movement. Yet, she sometimes tends to separate these coalitional assemblies from mainstream political activism, especially parliamentary politics. Left-wing movement-parties, however, demonstrate how heteroglossic counter-hegemonic movements can merge with formal electoral politics. They are comprised of activists from diverse social backgrounds (della Porta 2015, pp. 64–66), but they also attempt to engage wider electoral publics within their progressive programmes of action and they endeavour to win political and state power.

In my view, Butler's ideas on coalitional politics gain their most potent force in terms of free speech campaigns if they are brought together with heteroglossic politics. Certainly, one convincing political message to take from Butler is to highlight how specific free speech events can generate a coalitional politics, and vice versa, which challenge even seemingly 'static' racist structures and injurious expressions (Butler 1997, p. 20). An illustration of this process in action concerns free speech events around whether it is justified for anti-racist protestors to topple statues of past public figures who were once complicit in the global slave trade. Such free speech

events can also of course raise questions about which groups in society are given worth and value. Still, from a heteroglossic perspective, these free speech events gain greater counter-hegemonic strength once their coalitional form makes connections with social and political movements who campaign more broadly in and against dominant hegemonic agendas (cf. Beech and Jordan 2021; Darder and Torres 2004). One tragic element of *R.A.V. v. St. Paul* is that Reaganite state hegemony at the time proved too strong for successful coalitional or heteroglossic forces and movements to mount a counter-hegemonic offensive. Left-wing and progressive socio-political movements, along with trade unions, had by the early 1990s lost considerable ground to Reaganism.

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