CONSIDERING *MATAL v. TAM*: DOES TRADEMARKING DEROGATORY TERMS FURTHER RECLAMATION PRACTICES FOR MINORITY COMMUNITIES?

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"The act of claiming an identity can be transformational. It can provide healing and empowerment. It can weld solidarity within a community. And, perhaps most important, it can diminish the power of an oppressor, a dominant group."[1]

- Simon Tam, lead singer of The Slants

I. INTRODUCTION

On June 19, 2017, the U.S. Supreme Court ruled in *Matal v. Tam* ("*Tam*") that Simon Tam had the right to trademark his band's name "The Slants," and that the Disparagement Clause of the Lanham Act ("Disparagement Clause"), which had barred disparaging terms like "slant" from being trademarked, was facially unconstitutional under the First Amendment's free speech clause.[2] Although this was not the first case concerning the First Amendment and the Disparagement Clause, the decision in *Tam* set a new precedent evaluating derogatory terms.[3]

Specifically, the *Tam* decision meant that derogatory terms could now be trademarked, and—at least in Tam's case—such trademarking could be done for the purpose of "reclaiming" minority identity.[4] However, it also opened the door for cases such as *Pro-Football, Inc. v. Blackhorse*,[5] which addressed the same issue, although from the exact opposite viewpoint. In Pro-Football, an American football team used a

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[1] Simon Tam, *The Slants on the Power of Repurposing a Slur*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/opinion/the-power-of-repurposing-a-slur.html.

[2] *See* Matal v. Tam, 137 S. Ct. 1744, 1751–52 (2017).

[3] *See* Kaitlin Corey, *"We Are Slant, Who Cares? We're Proud of That": Intersection of the Lanham Act and Free Speech*, 35 COMPUTER & INTERNET L., 24, 24–25 (2018), http://www.agtlawyers.com/wp-content/uploads/2018/02/We-Are-Slant.pdf.

[4] *See* Matal, 137 S. Ct. at 1751-52.

[5] Pro-Football, Inc. v. Blackhorse, 62 F. Supp. 3d 498, 502 (E.D. Va. 2014) (deciding an action brought by five Native Americans against the Washington Redskins football team, arguing under the Lanham Act that the team's trademark of "Redskins" should be cancelled on the grounds that it is offensive to Native Americans).

term—"Redskins"—not for reclamatory purposes, but in a manner allegedly disparaging to the people the term referenced.[6] Thus, without the protection the Disparagement Clause provided in such instances, the *Tam* decision raises significant questions about the future of minority reclamation practices as they relate to trademarking and free speech.[7]

This Note will use *Tam* to examine whether trademarking derogatory terms furthers identity reclamation, and how, in its wake, minority communities might adapt to the reality that terms may be trademarked both for reclamatory and derogatory purposes. Throughout this Note, "derogatory" terms will be defined as any term which has historically been used to refer to a specific racial, ethnic, cultural, gender, or otherwise marginalized minority group in a negative, offensive, or degrading manner. Additionally, in analyzing *Tam*, this Note will focus on an Asian-American perspective of discrimination. Furthermore, "reclamation" will be used interchangeably with terms such as "self-labeling" and "reappropriation" to refer to the practice of minority groups taking derogatory terms historically used against them and repurposing their negative perceptions into meanings of positivity, defiance, and empowerment.

Part II will discuss the factual background of *Matal v. Tam* and how its decision impacts trademarks, free speech, and the use of derogatory terms in such contexts. Part III will discuss the formation of Asian-American identity and examine the significance and process of how minority groups reclaim demeaning labels under two frameworks: Kenneth Burke's concept of rescreening and Adam D. Galinsky's theoretical model of reappropriation and self-labeling. Part IV will look at whether trademarking furthers, or in any way benefits, minority reclamation practices, and whether the *Tam* decision specifically helps or hinders such practices. Finally, Part V will examine potential frameworks and ideas under which to continue advancing reclamation practices in light of the *Tam* decision.

Because the government cannot censor some offensive speech without risking the possibility of censoring any and all speech,[8] it may fall

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[6] *See* Gabriela M. Kirkland, Note, *An Offensive Mark on Offensive Lines: The Question of Violating the First Amendment Through the Cancellation of the Washington Redskins' Trademark*, 44 HASTINGS CONST. L.Q. 479, 489 (2017). *See generally* Pro-Football, Inc. v. Blackhorse, 62 F. Supp. 3d 498 (E.D. Va. 2014) (reviewing the Trademark Trial and Appeal Board's cancellation of the "Redskins" trademark for disparaging Native Americans).

[7] Jed Ferdinand & Kathleen Seavey, *Free Speech Trumps the Lanham Act: The Supreme Court Declares the "Disparagement Clause" to Be Unconstitutional*, IP LITIGATOR, 1, 4 (2017).

[8] *See* Lee Rowland, *Victory! The Slants are Officially Rock Stars of the First Amendment*, ACLU (June 19, 2017), https://www.aclu.org/blog/free-speech/victory-slants-are-officially-rock-

on communities to become more vigilant in differentiating between valid and invalid forms of linguistic reclamation.[9] If the benefits of trademarking derogatory terms outweigh its detriments, trademarking may contribute positively as one of many elements in a wide array of reclamation practices.[10] But, if trademarking serves no tangible benefit or would actually produce more harm than good, it may be in the best interests of minority groups to eschew trademarking all together as a means of reclamation. Either scenario is possible depending on how derogatory terms are used going forward. However, barring the introduction of new jurisprudence that would reinstate the Disparagement Clause, minority groups will need to carefully evaluate how they implement and approach derogatory reclamation practices moving forward.

II. *MATAL V. TAM* AND ITS LEGAL IMPLICATIONS

A. THE SIGNIFICANCE OF THE *TAM* DECISION

Tam concerned the Asian-American rock band "The Slants," led by Simon Tam, whose federal trademark application of their band's name was rejected by the Trademark Trial and Appeal Board ("TTAB").[11] The TTAB based its rejection on the grounds that "The Slants" violated the Disparagement Clause of the Lanham Act[12] because "slant" was deemed an ethnic slur that would be found disparaging to a substantial composite of people of Asian descent.[13] However, Tam stated that he sought to trademark his band's name not to disparage other Asians, but to "reclaim" and "take ownership" of the slur, and thus make a statement about race and society in America.[14]

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stars-first-amendment (claiming that worries about overbroad censorship are further diminished by decisions like *Matal v. Tam*).

[9] *See id.* (suggesting that, in the wake of less censorships, it is on communities to fight against using derogatory terms that offend the public by calling out and boycotting companies that use these terms).

[10] *See id.* (stating that the *Matal v. Tam* decision will decrease the government's ability to silence unfavorable viewpoints, like those that align with reclamation practices).

[11] *See In re* Tam 808 F.3d 1321, 1331–32 (Fed. Cir. 2015), *aff'd sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017).

[12] 15 U.S.C. § 1052(a) (2018).

[13] *See In re* Tam, 808 F.3d. at 1332 (stating that the trademark board cited to dictionary definitions of the word "slant," as well as news articles, blog posts, and a brochure published by the Japanese American Citizens League to come to the conclusion that "slant" was disparaging to a "substantial composite" of Asian Americans).

[14] *Id.* at 1331.

Upon taking the case to federal court, The Slants prevailed, as the Federal Circuit court found that the Disparagement Clause engaged in content-based viewpoint discrimination in violation of the First Amendment's free speech clause.[15] The Supreme Court affirmed the Federal Circuit court's ruling, holding that trademarks are not government speech, and therefore cannot be prohibited simply because the ideas they express may be offensive to some.[16] Furthermore, the Court reasoned that even if trademarks were commercial speech, the government cannot regulate them since the Disparagement Clause fails to meet the *Central Hudson* test for (1) serving "a substantial interest" and (2) being "narrowly drawn."[17] Thus, the Court held that the government may not prohibit or regulate offensive speech and that the Disparagement Clause was unconstitutional.[18]

B. BACKGROUND AND PURPOSE OF TRADEMARKING

A trademark is "a name, word, slogan, symbol, picture, or combination of any of these elements" used to distinguish the products of one party from another.[19] The purpose of trademarking is to stimulate economic efficiency by promoting marketplace competition, facilitating higher quality goods and services, and helping consumers distinguish among the different goods they consume.[20] Therefore, a trademark is intended specifically for commercial use.[21]

It is neither necessary nor required that a trademark be registered to receive trademark law protection.[22] However, registering a mark through the U.S. Patent and Trademark Office ("USPTO") affords broader legal protection.[23] Additionally, because trademark rights are based on a mark's

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[15] *See id*. at 1339, 1358.

[16] *See* Matal v. Tam, 137 S. Ct. 1744, 1757–63 (2017).

[17] *See id*. at 1764 (citing Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564–65 (1980)). The *Central Hudson* test is the test used by the Supreme Court to evaluate restrictions on commercial speech, and consists of a four-part test: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the government interest is substantial; (3) whether the regulation directly advances a government interest; and (4) whether such restriction is no more extensive than necessary.

[18] *See id*. at 1764–65.

[19] ASHLEY PACKARD, DIGITAL MEDIA LAW 159 (2010).

[20] *See id*.

[21] *See id*.

[22] *Trademark, Patent, or Copyright?* U.S. PAT. AND TRADEMARK OFF. https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright (last visited Oct. 22, 2020).

[23] *See* PACKARD, *supra* note 19, at 161.

continuous and actual use in commerce, a trademark does not expire after a set amount of time.[24] As long as all proper documents are filed and fees paid, a trademark registration can last indefinitely.[25]

Trademark registration requires that the mark in question be distinctive. Marks that fall under the categories of "fanciful," "arbitrary," or "suggestive" are considered inherently distinctive.[26] Such marks easily qualify for trademark protection because they either are not likely to be associated or confused with another mark, share no obvious connections to the products they represent, or are abstract enough to require imagination rather than generic association.[27] For example, "Youtube" is considered a suggestive mark because although its name hints at the company's services, it is still abstract enough in nature that it does not merely describe its services.[28] On the other hand, marks considered "descriptive" in that they directly incorporate the name or a characteristic of their product, are required to develop a secondary meaning to be considered distinctive.[29] Once a mark has acquired distinctiveness, and assuming it is not already in use, too similar to an existing mark, or in violation of another provision of trademark law, it may qualify for registration and region-specific protection, or, if registering through the U.S. Patent and Trademark office ("USPTO"), national protection.[30]

C. THE INTERSECTION OF THE LANHAM ACT AND FIRST AMENDMENT IN *MATAL V. TAM*

The Court's decision in *Tam* concerned both the Disparagement Clause of the Lanham Act and the free speech clause of the First Amendment. The Lanham Act, enacted in 1946, is the primary federal statute governing comprehensive trademark protection in the marketplace.[31] The purpose of enacting the Lanham Act was to ensure that customers are getting the actual products they believe they are purchasing, and to protect trademark holders from infringement and

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[24] *Id*. at 161-62

[25] *Id*.

[26] *Id*. at 160.

[27] *See id*.

[28] *Id*.

[29] *See* PACKARD, *supra* note 19, at 160.

[30] *Id*. at 160–61.

[31] *Overview of Trademark Law*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y HARV. U., https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm (last visited Oct. 22, 2020).

misappropriation.[32] The Act also provides significant and exclusive benefits to federally registered trademarks in interstate and foreign commerce.[33] These rights include: (1) the right to exclusive nationwide use of the trademark; (2) the presumed validity of the mark, as well as incontestability after five consecutive years of post-registration use; (3) the ability to sue in federal court to enforce the trademark; (4) the assistance of U.S. Customs and Border Protection against the importation of infringing goods, as well as simplified procedures when obtaining protection and recognition of the trademark internationally; and (5) the security of knowing that the registration of a mark is a complete defense to state or common law claims of trademark dilution.[34]

Under the Lanham Act, the USPTO can refuse to register a trademark if it falls under one of the enumerated categories precluded from registration.[35] The Disparagement Clause,[36] which governed one such category, allowed a trademark to be refused registration if it "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[37] To evaluate whether a mark is disparaging, a trademark examiner generally applied a two-part test: (1) what is the likely meaning of the term in question, factoring in the term's definition and usage in the marketplace; and (2) if such term references a particular group, would that term's meaning be considered disparaging to a substantial composite of that group.[38] However, deciding what constitutes a "substantial composite" is a determination made by the reviewing trademark officer, and does not necessarily require or imply a majority of the affected group.[39] Furthermore, the USPTO may deem a term substantially disparaging even without a quantitative measure definitively proving so.[40]

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[32] *See In re* Tam, 808 F.3d 1321, 1328 (Fed. Cir. 2015).

[33] *See id*.

[34] *See id*. at 1328–29.

[35] *Id*. at 1329.

[36] 15 U.S.C. § 1052(a) (2018).

[37] *Id*.

[38] *See In re Tam*, 808 F.3d at 1331.

[39] *See id*.

[40] *See In re* Loew's Theatres, Inc., 769 F.2d 764, 767–68 (Fed. Cir. 1985) ("Rather, our precedent continues to hold that to establish a 'primarily geographically deceptively misdescriptive' bar, the PTO must show only a reasonable basis for concluding that the public is likely to believe the mark identifies the place from which the goods originate and that the goods do not come from there.").

The First Amendment prohibits "abridging the freedom of speech."[41] In relation to *Tam*, this means that "speech may not be banned on the ground that it expresses ideas that offend,"[42] nor may it be banned "because of its message, its ideas, its subject matter, or its content."[43] However, the First Amendment's application to commercial speech such as trademarks has not always been clear.[44] The TTAB that rejected Tam's trademark application relied on *In re McGinley*, which stated that because the refusal of a trademark application does not affect an applicant's right to still use the mark, no expression is suppressed, so there is no violation of free speech.[45] However, the court in *In re Tam* disavowed the *McGinley* reasoning,[46] and instead found that the Disparagement Clause violated the First Amendment because it constituted content-based regulation.[47]

Content-based regulation, which is the targeting of speech based on its communicative content, is presumptively unconstitutional under the First Amendment unless the government can (1) prove a compelling state interest, and (2) show that such regulation is narrowly tailored to meet that interest.[48] The *In re Tam* court also found that the Disparagement Clause engaged in unconstitutional viewpoint regulation— the discriminatory targeting of speech based on its viewpoint in order to exclude such viewpoints from the marketplace.[49] Taken together, these findings in *In re Tam* established that the Disparagement Clause violated the First Amendment. The Supreme Court in *Matal v. Tam*, in affirming the Federal Circuit's decision, held that trademarks do indeed contain expressive speech and content, and therefore are clearly protected under the First Amendment as private rather than government speech.[50]

With this decision, *Matal v. Tam* guaranteed that groups and individuals may express a viewpoint or position through a trademark, regardless of the mark's potentially offensive meanings. Though this was precisely what The Slants wanted, this expanded freedom raises new

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[41] U.S. CONST. amend. I.

[42] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

[43] *In re* Tam, 808 F.3d at 1334 (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

[44] *See id.* at 1333–34 (noting the analytical shift from the prior *McGinley* standard to the court's new position in *In re* Tam).

[45] *See id.* (citing *In re* McGinley, 660 F.2d 481, 484 (1981)) (noting that *McGinley* was decided over 30 years ago during a time when the First Amendment had only recently begun to be applied to commercial speech, and that the decision has since been widely criticized).

[46] *See id.*

[47] *See id.* at 1334 (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

[48] *See id.*

[49] *See In re* Tam, 808 F.3d at 1334.

[50] Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

questions concerning the use of disparaging terms. In attempting to protect free speech, is it possible that groups who were previously protected by the disparagement clause may now actually be harmed? More specifically, could *Tam's* purported benefits actually pose a danger to minority reclamation efforts, especially if these groups were to be intentionally targeted or disenfranchised as a result?

III. MEANING, IDENTITY, AND THE PROCESS OF RECLAMATION

In the early part of the twentieth century, the use of racially derogatory trademarks was accepted in America.[51] Though such practices are considered unacceptable today,[52] the contentious meanings they represent are still relevant. In making reclamation the central focus of his claim, Simon Tam highlighted the sociopolitical value that words can carry, as well as the significance of recognizing historically marginalized community experiences in America, both of which are crucial to understanding the implications of *Tam* in minority reclamation efforts.

A. THE MEANING AND CONTEXT OF "SLANT"

In *In re Tam*, the court recognized that "[w]ords—even a single word—can be powerful,"[53] and Tam's interest in reclaiming "slant" does in fact hinge on the power of this word's contested meaning.[54] Though "slant" has several innocuous and well-understood meanings,[55] it also has documented use as a derogatory term towards people of Asian descent.[56] In fact, The Slants' name was derived as a play-on-words reference to this

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[51] *See* Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?* 22 PEPP. L. REV. 7, 8 (1995).

[52] *Id*.

[53] *In re* Tam, 808 F.3d at 1327.

[54] *See id*.

[55] *See id*. at 1332; *see also Slant*, MERRIAM-WEBSTER ONLINE DICTIONARY (2019) https://www.merriam-webster.com/dictionary/slant (defining "slant" in several ways, including "a slanting direction, line, or plane;" "to maliciously or dishonestly distort or falsify;" and "a peculiar or personal point of view, attitude, or opinion," but none that refer to the term's use as a racial slur).

[56] *See In re* Tam, 808 F.3d at 1332-33 (citing multiple dictionary and slang sources describing the meaning of "slant" as disparaging towards people of Asian descent); *see also Slant*, AM. HERITAGE DICTIONARY ENGLISH LANGUAGE, https://www.ahdictionary.com/word/search.html?q=slant&submit.x=0&submit.y=0 (last visited Oct. 22, 2020) (listing a definition of "slant" as "a disparaging term for a person of East Asian birth or ancestry."); *Slant*, DICTIONARY.COM, https://www.dictionary.com/browse/slant (last visited Oct. 22, 2020) ("Slang: Extremely Disparaging and Offensive. [A] contemptuous term used to refer to a person from East Asia, especially a Chinese or Japanese person.").

racialized stereotype,[57] as the band's goal in choosing this name was to take control of the racial slur and reappropriate it as a positive element of Asian American identity.[58] However, using derogatory terms can be controversial, as many fear that it only reinforces negative stigmas, even if used in a positive manner.[59] Thus, the offensiveness of a term depends not only on its literal definitions, but also on its historical meaning, and by whom it is interpreted.

Additionally, the assertion that "slant" can reclaim identity not just for The Slants, but for Asian Americans as a whole, implies the existence of a single Asian-American identity. Accordingly, to understand the significance of "slant" as a term of reclamation requires understanding the historical background of the community it references. The concept of Asian Americans as an ethnic group grew out of movements in the late 1960s to secure government support for programs to benefit and recognize Asian American communities.[60] This need for governmental support was due partly to increased immigration from Asia, as well as the Asian community's growing political, social, and educational involvement in American society.[61] Though Asian Americans accounted for less than 0.5 percent of the U.S. population at the time,[62] this movement pulled the different racial subgroups into a single entity, forming the basis for the "panethnic" Asian-American identity.[63] This conceptualization centered on the idea that despite the different experiences of each group, members could collectively identify as a community based on shared interests, characteristics, and experiences.[64] In this way, panethnicity provided a way for Asian Americans to address inequality, exploitation, and subordination, while fighting in solidarity against the marginalization and disenfranchisement their communities faced.[65]

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[57] *See* Katy Steinmetz, *"The Slants" Suit: Asian-American Band Goes to Court Over Name*, TIME (Oct. 23, 2013), http://entertainment.time.com/2013/10/23/the-slants-suit-asian-american-band-goes-to-court-over-name/.

[58] *See* Simon Tam, *supra* note 1.

[59] *See* Galinsky et al., *The Reappropriation of Stigmatizing Labels: The Reciprocal Relationship Between Power and Self-Labeling*, ASS'N PSYCHOL. SCI. 2020, 2020 (2013).

[60] *See* Dana Y. Nakano, *An Interlocking Panethnicity: The Negotiation of Multiple Identities Among Asian American Social Movement Leaders*, 56 SOC. PERSP. 569, 575–77 (2013).

[61] *See id*.

[62] PEI-TE LIEN, THE MAKING OF ASIAN AMERICA THROUGH POLITICAL PARTICIPATION 42–43 (2001).

[63] *See* Nakano, *supra* note 60, at 575–77.

[64] *See* LIEN, *supra* note 62, at 48–49.

[65] *Id*. at 81.

Given this background, the significance of "slant" becomes clearer. Tam's assertion that trademarking "slant" is a valid form of reclamation hinges on the idea that reclamation would be beneficial for a historically marginalized group such as Asian Americans. This reasoning becomes even more salient when considering the Asian-American population today. According to the 2010 census, Asian Americans, including those who identified as multiracial, accounted for 5.6 percent of the population,[66] and from 2000 to 2010, the Asian-American population grew 43.3 percent, faster than any other major racial group.[67] However, despite the significant increase in the Asian-American population since the formation of the panethnic Asian-American identity in the 1960's, the Asian-American community still faces many of the same racial challenges. According to a 2017 survey, Asian Americans still report substantial discrimination both individually and institutionally.[68] On an individual level, 32 percent of Asian Americans reported experiencing racial or ethnic slurs, and 35 percent reported instances of negative or offensive comments made to them about their race.[69] On an institutional level, a quarter or more reported being personally discriminated against when applying for jobs, being considered for equal pay, or when trying to rent or buy property.[70] These figures, thus, illustrate the continued discrimination Asian Americans face today. In this context, "slant" signifies not just an derogatory term, but a reference to an extensive, enduring, and community-wide history of harm.

B. FRAMING THE PRACTICE OF RECLAMATION

"Reclamation" describes the act of reappropriating a demeaning slur in order to transform it into something positive or empowering.[71] Two ways of conceptualizing reclamation practices are through Kenneth Burke's notion of "terministic screening" and Adam D. Galinsky's theoretical model of reappropriation.

Burke conceptualizes terministic screens through a metaphoric analogy to photographic color filters: Just as a different colored filter

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[66] *See* U. S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 1, 7 (2010), https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[67] *Id*. at 4–5.

[68] *See* NAT'L PUBLIC RADIO, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF ASIAN AMERICANS 1, 5 (2017), https://www.npr.org/assets/news/2017/12/discriminationpoll-asian-americans.pdf.

[69] *Id*. at 1.

[70] *See id*.

[71] Galinsky et al., *supra* note 59, at 2020.

change the meaning of a photograph, so too can language, like a filter, change the way in which we understand something, even as the subject itself remains the same.[72] Burke notes that "even if any given terminology is a *reflection* of reality, by its very nature as a terminology it must be a *selection* of reality; and to this extent it must function also as a *deflection* of reality."[73] In this sense, the ways in which we use terminology necessarily shape the context, meaning, and understanding of what we say, and in turn, shape the realities we live in. Burke also asserts that we are, to a certain degree, living in a world of endless terministic screens, as each person has their own unique world-view.[74] However, the common use of symbolism to conceptualize reality results in a given symbol either "'dividing' us from the 'immediate,'" or "uniting' us with things on a 'higher level of awareness.'"[75] This means that in addition to shaping the context of what we say, terms can also become symbolic representations that further shape and organize our individual viewpoints.

Though Burke never explicitly references the impact of terministic screens on derogatory terms, Gregory Coles asserts that terministic screens can be used to understand the reclamation of such terms.[76] Typically, a society's dominant group has the power to dictate the terms used in any given discourse.[77] In this way, derogatory terms can become linked to particular patterns of discourse because affected minority groups usually lack the power to overcome the dominant group's discourse and remove the derogatory word from use.[78] However, a minority group may still be able to change such discourse by changing the terministic screen, thereby "consciously reassign[ing] the realities a given terminology selects and deflects in order to change what a discourse is capable of saying."[79] Thus, by changing the "filter" over a derogatory word, rather than changing or removing the word itself, a minority group can change the meaning of a term. In this way, it is possible for a formerly negative term to be reclaimed, even within the existing framework of discourse in which it is developed.

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[72] *See* Kenneth Burke, *Terministic Screens*, 39 AM. CATH. PHIL. ASS'N, 87, 88–89 (1965).

[73] *See id*. at 88.

[74] *See id*. at 96.

[75] *See id*. at 97.

[76] *See* Gregory Coles, *The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 C. ENG., 424, 429 (2016).

[77] *See id*. at 430.

[78] *See id*.

[79] *See id*.

Galinsky et al. provided support for a theoretical model of reappropriation through a series of experiments establishing a reciprocal relationship between power and "self-labeling" with derogatory terms.[80] "Self-labeling" refers to the intentional use of a derogatory term in a self-referential manner in order to subvert the term's stigmatizing meanings.[81] By doing so, self-labeling becomes an act of power and agency by giving control of the term to the marginalized group while simultaneously stripping control from the dominant group, thus reversing the binary of who can use the term and what its meaning should imply.[82] Galinsky et al. found that self-labeling with a derogatory term creates an inference that the individual, and by extension, the stigmatized group they represent, has power.[83] Self-labeling also facilitated the establishment of group solidarity, and gave marginalized communities the power to actively self-define rather than be defined by dominant groups.[84] Furthermore, such results were specific to self-labeling with derogatory terms, as opposed to self-labeling with benign terms.[85] Thus, self-labeling provides a way to challenge a derogatory term's negative implications and weaken the stigma surrounding the group to which the term refers.[86]

C. RECLAIMING "SLANT"

The court in *In re Tam* defined a disparaging mark as one that "dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison."[87] This comparison is particularly important for a term like "slant" because racially charged constructions in America are fundamentally about unequal relationships between dominant and subordinate groups, informed by patterns of power

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[80] Galinsky et al., *supra* note 59, at 2020. This model suggests that self-labeling with derogatory terms leads to inferences of power for the self-labeler. *Id*. Such inferences, then, are extended to the stigmatized group as a whole. *Id*. This sense of power, then, mediates the derogatory power of the label, and ultimately results in the self-labeler seeing the label as less negative and their own group as more powerful. *Id*.

[81] *See id*. at 2021.

[82] *See id*. at 2020–21.

[83] *See id*. at 2021.

[84] *See* Coles, *supra* note 76, at 425–26.

[85] *See* Galinsky et al., *supra* note 59, at 2028.

[86] *See id*. at 2021.

[87] *See In re* Tam, 808 F.3d 1321, 1330 (Fed. Cir. 2015) (quoting *In re* Geller, 751 F.3d 1355, 1358 (Fed. Cir. 2014)).

and privilege in society.[88] Considering the past and present discrimination of the Asian-American community, the desire to reclaim "slant" is clear.

In *Tam*, "slant" was undisputedly considered derogatory. However, as both Burke's and Galinsky et al.'s models suggest, the term's offensiveness was derived not just from the historical struggle it referenced, but also from the context of how it was used. In other words, though "slant" on its own is not necessarily offensive, its contextual usage dictates its derogatory meaning and intent. Robin Jeshion provides a useful distinction of this dichotomy in her discussion of "weapon" and "non-weapon" derogatory terms.[89] Terms used as weapons are understood as such in contexts where negative intent is directed against a particular group; whereas in non-weapon contexts, terms typically understood to be offensive are not seen as such because of the lack of negative intent, as well as the clear, positive intent to not convey anything negative.[90] In this sense, the historic, racialized use of "slant" against Asian Americans demonstrates its negative, weaponized intent, while Simon Tam's self-referencing use of "slant" demonstrates a non-weaponized use that fits the conception of positive, appropriate reclamation.

However, this does not mean that derogatory terms are offensive only when used by a non-minority, or that they are automatically "reclaimed" or inoffensive when a minority uses them. As Galinsky et al. noted, distinguishing reclamation from disparagement also hinges on who cannot (or should not) use a term, because when self-labelers "capture" a derogatory term for themselves, they deny others the use of it.[91] This is because the process of reclaiming derogatory terms also serves as specific recognition of the shared struggle and oppression of the "in-group"—the group referenced by the derogatory term—in the sense that "each member of the group has earned the right to use the term by being a victim of its use by the majority."[92]

Prior to the *Tam* decision, some, such as the South Asian Bar Association of Washington, D.C., argued that whether a trademark applicant is in support or opposition of a derogatory term should not matter because a term that embodies a slur should be prohibited,

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[88] *See* Manning Marable, *Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy*, 33 RACE & CLASS, 113, 114 (1993).

[89] *See* Robin Jeshion, *Expressivism and the Offensiveness of Slurs*, 27 PHIL. PERSP., 231, 238 (2013).

[90] *Id*.

[91] *See* Galinsky et al., *supra* note 59, at 2021.

[92] *See* Coles, *supra* note 76, at 437 (quoting Jeff Greenberg, S. L. Kirkland, & Tom Pyszczynski, *Some Theoretical Notions and Preliminary Research Concerning Derogatory Ethnic Labels*, DISCOURSE & DISCRIMINATION 74, 82 (Dijk, Teun A. Van ed., 1988)).

regardless of an applicant's identity or intent.[93] However, in a post-*Tam* world, for the purposes of reclamation at least, it does still matter who is doing the defining and what their intent is. A term like "slant," trademarked by someone like Simon Tam can be contextualized and understood as a valid act of reclamation; but, there would arguably be a difference if it were a non-Asian plaintiff trying to argue the same.[94]

The question here is the issue of false reclamation—if it matters who can or cannot use a term, how can we tell the difference between false and legitimate reclamation claims, given that even an individual's race or assumed group cannot automatically indicate the validity or invalidity of such claims? One solution is to delineate when derogatory terms are used in proper and improper reclamation contexts. Considerations might include: (1) who is empowered by using the contested term; (2) what is the intent behind that term's use in the given situation; (3) is there reason to suspect ulterior motives; and (4) if there could be an ulterior motive, would such motive be a reasonable inference to make in relation to the person or group attempting to use the term?

In regards to "slant," anyone who uses the term to refer to person of Asian descent can be given power. Used positively, it confers power by subverting the term's negative meaning into one of empowerment. Used negatively, it gives power to the individual who seeks to stigmatize or oppress by referencing the term's historically negative meaning. Accordingly, the intent behind the usage clarifies whether the reclamation claim is valid or invalid. For example, Simon Tam's explanation that his intent was to empower Asian Americans[95] supports his use of "slant" in a positive manner. However, it could be possible for an individual to obscure both a term's use and intent by claiming a false or insincere meaning or using their membership in the affected group to assume innocence. For example, Simon Tam could falsely claim reclamation as his intent if he actually wanted to trademark "slant" to reinforce its derogatory meanings toward Asian Americans. However, if we then consider whether this ulterior motive is reasonable, the fact that the

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[93] *See* Brief for S. Asian Bar Ass'n D.C. et al. as Amici Curiae Supporting Appellee and Affirmance at 33, *In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015) (No. 2014-1203).

[94] *See* Todd Anten, *Self-Disparaging Marks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV., 388, 390 (2006) Anten suggests that an applicant's identity should be considered in the trademark process, and illustrates an example of the difference between a lesbian organization applying to trademark the phrase, "DYKES ON BIKES," versus a generic basketball team trying to register the same name. *Id*.

[95] *See* Simon Tam, *supra* note 1.

premise of The Slants centered on being proud of their Asian heritage,[96] and that it is not clear what benefit, if any, Tam could have gained if he intended to use "slant" to disparage, suggests that any ulterior meaning would be unlikely. Thus, the motive behind reclamation, and the line between legitimate and illegitimate reclamation, can reasonably be inferred in *Tam*—and arguably in other reclamation contexts—by assessing the validity of the asserted claim through the frameworks in which reclamation operates.

D. IS RECLAIMING DEROGATORY TERMS A VALUABLE GOAL?

Though the purpose of reclamation is clear, one question that remains is why there is a need for it at all. One answer to this can be found by considering the intersection of culture and commodification in relation to derogatory terms. If derogatory terms had no long-standing effects on disparaged groups, they would be little more than mean words, akin to innocuous name calling. However, derogatory terms do not exist in a vacuum, nor are they merely independent incidents with localized meaning. Rather, in addition to the historic oppression they reference, such terms also symbolize the ways in which majority groups have taken and continue to take advantage of minority groups for tangible or financial gain.

1. Commodification and Dignity Taking

Cultural appropriation is one way in which majority groups take advantage of minority groups. This occurs when a minority group is deprived of their culture, and hence, their identity, by a majority group who disadvantages or racially stigmatizes them.[97] According to Madhavi Sunder, cultural appropriation raises two significant concerns: (1) "that non-owners of a culture may misrepresent another culture, and thereby damage the culture being distorted," and (2) "that outsiders will exploit the cultural resources of the people, with the people losing the economic benefit of their cultural production (this claim is akin to one of unjust enrichment, or of 'cultural theft')."[98] Thus, if culturally charged words

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[96] *Id*.

[97] *See* Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1072 (2018).

[98] *See* Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, J. GENDER RACE & JUST. 69, 73 (2000); *see also* Phillips, *supra* note 97, at 1072 (quoting Sunder's cultural appropriation concerns).

such as "slant" are considered to be cultural symbols that can be "borrowed by majority societies for their enjoyment, profit, and even to expressly harm minorities,"[99] then their trademarking can be contextualized as a form of cultural appropriation because it imposes a sense of legal ownership on those cultural symbols. Furthermore, when a group's identity or culture does become owned by another—in the case of the Washington Redskins, for example—it invites stereotyping, misrepresentation, and exploitation.[100] Thus, a minority group may have a legitimate and valuable interest in preventing tangible loss by using an avenue such as trademarking to prevent the adverse commodification of a derogatory term.

This sense of exploitation is further developed in Bernadette Atuahene's notion of "dignity takings." Atuahene conceptualizes dignity takings as instances when an individual or community suffers involuntary property loss at the hands of the state without just compensation or cause.[101] Within this framework, Atuahene defines "dignity" as the concept that people have equal worth and therefore the right to live autonomously.[102] Additionally, she states that such "property" loss can involve displacement, dispossession, and ultimately result in the subordination of the deprived individual or group because it "prevents them from being full and equal members of the polity."[103] Atuahene suggests that when dignity is taken, it harms the deprived individual or group by subjecting them to dehumanization, infantilization, or community destruction."[104] Atuahene concludes by suggesting that the adequate response to such deprivation is dignity restoration, which is "a compensation that addresses both the economic harms and the dignity deprivations involved."[105]

Victoria F. Phillips, through her analysis of *Blackhorse v. Pro-Football, Inc.,* takes this framework one step further by suggesting that the

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[99] *See* Phillips, supra note 97, at 1072.

[100] *See id.* at 1073.

[101] Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 800 (2016).

[102] *See id.* at 800–01.

[103] *See id.* at 798.

[104] *See id.* at 801. ("*Dehumanization* is the failure to recognize an individual's or group's humanity. . . . *Infantilization* is the restriction of an individual's or group's autonomy based on the failure to recognize and respect their full capacity to reason. . . . *Community destruction* is when a community of people is dehumanized or infantilized, involuntarily uprooted, and deprived of the social and emotional ties that define and sustain them.") (emphasis in original).

[105] *See id.* at 818 (quoting BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 4 (2014)).

definition of "property" under Atuahene's dignity takings could be extended to include not just physical property, but cultural imagery and identity as well.[106] The issue in *Pro-Football* was whether or not the term "Redskin," by nature of its historical references to Native Americans, is derogatory, and if so, whether the Washington Redskins team's attempt to trademark the name constituted a dignity taking.[107] Phillips argues that it does, because if the government were to register the trademark, it would allow the team to continue using "Redskins" for commercial gain.[108] Therefore, given a trademark's exclusionary effects, Native Americans would suffer a "taking" of their right to their identity and cultural imagery.[109]

Furthermore, Phillips argues that the team's stated justification—that their use of the term has been "consistently respectful" and "reserved and tasteful," and that Native Americans use the term as well—constitutes evidence of infantilization under Atuahene's framework.[110] This is because the team makes these claims not in consultation with Native Americans, but on behalf of them, despite significant arguments contradicting the team's claims.[111] Therefore, despite the fact that not all Native Americans find "Redskins" offensive,[112] Phillips asserts that the team's use of it does constitute a taking because it precludes the ability of Native Americans to define and use the term without interference, and deprives their community as a whole of the economic and legal benefits that the Redskins team gains from using the name.[113]

Thus, reclamation (in regards to culturally implicated terms) is valuable because it allows disadvantaged minority groups to contest their disenfranchisement by the dominant majority group, thereby preventing their community and culture from suffering the adverse effects of commodification and infantilization.

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[106] *See* Phillips, *supra* note 97, at 1076.

[107] Pro-Football, Inc. v. Blackhorse, 62 F. Supp. 3d 498, 502 (2014).

[108] *See* Phillips, *supra* note 97, at 1076.

[109] *See id*.

[110] *See id*. at 1078.

[111] *See id*. at 1078–79.

[112] *See id*. at 1079.

[113] *See* Phillips, supra note 97, at 1079, 1085.

2. Successful Reclamation

Instances of groups successfully reclaiming derogatory terms similar to "slant" and benefitting from the process has been demonstrated across various marginalized communities in America.

One example is the reclamation of the term "black" by the African American community. "Black" has a long history of use in America as a derogatory label that connoted "filth" and "evil," among other things, and was used to reduce and denigrate people of African ancestry because of their skin color.[114] "Black" thus signified oppression, and the belief that the white majority was superior. However, in the 1960s, African Americans sought to reclaim "black" in order to reverse the negative meanings associated with the label.[115] This reclamation effort, centered around the slogan "Black is Beautiful," used both the physical performance of black beauty, such as all-black fashion shows, as well as linguistic applications of "black" in a positive manner in order to change the meaning of the word.[116] In this way, African Americans, in the words of Burke's terministic screens, were able to re-screen "black" to claim a positive rather than negative meaning.[117] The benefits of this reclamation were clear, as without the negative stigma "black" used to carry, large numbers of African American women stopped chemically straightening their hair (implying a sense of racial pride), and the community as a whole experienced a linguistic shift in self-labeling from "colored" to "black."[118]

Another example is the reclamation of "queer" by the LGBTQ[119] community. "Queer" is another term rooted in historic disparagement, signaling otherization and inferiority of those who did not conform to the heterosexual norms of society.[120] However, from the 1990s through the early 2000s, the meaning of "queer" began to shift due to reclamation practices such as self-labeling that "emphasized the positive aspects of self-identifying [as] queer [to highlight] difference from the heterosexual majority."[121] Like African Americans and "black," such practices redefined "queer" by emphasizing and highlighting its difference as

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[114] *See* Coles, *supra* note 76, at 431.

[115] *See id*. at 432.

[116] *See id*. at 432–33.

[117] *See id*. at 432.

[118] *See id*. at 432–33.

[119] *What is LGBTQ?,* THE CENTER, https://gaycenter.org/about/lgbtq/ (last visited Oct. 22, 2020) (defining LGBTQ as the acronym for lesbian, gay, bisexual, transgender, and queer or questioning individuals).

[120] *See id*. at 433.

[121] *See id*.

something to be celebrated. In doing so, the LGBTQ community was able to "rob homophobes of the capacity to derogate by means of 'queerness.'"[122]

As Paul V. Kroskrity notes, "[l]anguage and communication often provide important and sometimes crucial criteria by which members both define their group and are defined by others."[123] Thus, linguistic reclamations can have valuable effects on the communities who seek to employ such practices. By reclaiming a once derogatory term, a community can drain it of its negativity, thereby disabling the majority's ability to further oppress through that term. Furthermore, reclamation can also bring individuals closer together as a community and create a sense of self-empowerment by turning what was once derogatory into a positive symbol of cultural and individual identity.[124] Thus, these reclamation practices can ultimately become a form of redemption for minority groups.[125]

IV. DOES TRADEMARKING FURTHER RECLAMATION?

The question that *Tam* leaves unanswered is whether or not trademarking actually furthers reclamation practices. This Note argues that it does not, and that overall, it is actually more detrimental than helpful.

A. THE BENEFITS OF TRADEMARKING ARE IRRELEVANT TO RECLAMATION

As the Court recognized in *Tam*, trademarking has the ability to convey powerful messages.[126] Additionally, in *In re Tam*, the Federal Circuit court defined a list of substantial legal benefits gained through trademarking.[127] However, these benefits are useless for reclamation purposes because they are irrelevant to the way in which reclamation functions. "Historically, reclamation has been based on collective social action—not trademarking of slurs by individual parties or businesses."[128] Therefore, the benefits of trademarking are necessarily geared for the

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[122] *See id*.

[123] *See* Paul V. Kroskrity, *Identity*, 9 J. LINGUISTIC ANTHROPOLOGY 111, 111 (1999).

[124] *See* Coles, *supra* note 76, at 438.

[125] *See id*.

[126] *See* Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

[127] *See In re Tam,* 808 F.3d 1321, 1328–29 (Fed. Cir. 2015).

[128] *See* Brief for Asian Ams. Advancing Just. et al. as Amici Curiae in Support of Neither Party at 11, Matal v. Tam, 137 S. Ct. 1744 (2017) (No. 15-1293) [hereinafter Brief for Asian Ams. Advancing Just.].

singular benefit of the trademark holder, and as such, restrict a term's meaning to the trademark holder's definition. While this may not be such a bad thing in Simon Tam's case, it nevertheless prevents the rest of the community from participating in the shared discourse of the term as they are simply forced to accept the definition dictated by the trademark holder.

The idea that trademarking benefits reclamation assumes that a term has a fixed meaning in the first place. However, language and meaning are not static, so restricting reclamation to one definition at one particular point in time may only stifle reclamation efforts in the long run. Additionally, terms are not always reclaimed all at once or through one singular event, and in some cases, a term's usage and meaning shift gradually over time.[129] This lends further support against trademarking as a useful form of reclamation. Lastly, many of the other federal benefits that a trademark receives, such as protection against infringement and obtaining recognition overseas, are irrelevant to reclamation. For example, if "slant" were being reclaimed for the purpose of empowerment, its meaning would come from the understanding and use of the term, not because it can be protected like an importable item or because it has international registration.

Despite this, perhaps some of the other benefits of trademarking such as exclusivity and incontestability would help further reclamation. Reclaiming a derogatory term through trademarking could preclude any other negative uses or attempts to confuse, reverse, or obscure its meaning.[130] Additionally, since trademarking generally renders a mark incontestable,[131] it could provide further protection by ensuring that a reclaimed term's positive meaning is not the subject of malicious or disingenuous attacks by the majority. Such legal protections, thus, could create a shield of sorts for minority groups to use as a defense against attempts to reverse their reclamation efforts.

However, this only works in situations where the affected minority group is able to trademark a derogatory term first. In fact, even if no one tried to trademark a term for negative purposes, it is still very much possible for a term to be trademarked by an outside group. As the Federal Circuit court noted in *In re Brunetti*, individuals or organizations could still attempt to trademark scandalous or derogatory terms for other reasons, including merely for shock value or to voice support for social or

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[129] *See* Coles, *supra* note 76, at 432 (explaining how the African American community reclaimed terms like "black" through various consecutive processes over several years).

[130] *See* Brief for Asian Americans Advancing Justice, *supra* note 128, at 11.

[131] *See In re Tam*, 808 F.3d at 1329.

political causes.[132] Thus, if a derogatory term is trademarked by anyone other than the minority group it references, the protections that trademarking grants could become detriments to that group's reclamation efforts. For example, a store could trademark a derogatory term like "fag" or "chink" for its own purposes, and even if there is no intended ill will, that store's trademark would still preclude LGBTQ or Asian groups from trademarking and using the term themselves. Furthermore, it simply is not reasonable to suggest that all derogatory terms would be trademarked solely by minority groups for reclamatory purposes in the first place. In this sense, trademarking could potentially be detrimental rather than beneficial for reclamation. Asian Americans Advancing Justice ("AAAJ") also argued that the purpose of the Lanham Act is to facilitate trade and commerce, not free expression or reclamation.[133] Thus, trademark law is ultimately concerned with identification, not personal expression, and so to give it the ability to "reclaim" terms as Simon Tam intends is an incorrect use because it actually limits rather than frees speech.[134]

B. TRADEMARKING RISKS FALSE OR INSINCERE RECLAMATION

Another potential risk is the possibility of insincere or even harmful reclamation. A mere month after the *Tam* decision was released, at least nine trademark applications for derogatory terms had been filed with the USPTO.[135] Some filed to trademark in order to turn the derogatory term into a brand, under the belief that saturating the market with such terms could reduce their negative connotations.[136] Others claimed they wanted to trademark terms in order to "take back" and reclaim them, but gave indication that their real motives lay closer to personal financial gain.[137]

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[132] *See In re* Brunetti, 877 F.3d 1330, 1349 (Fed. Cir. 2017), *aff'd sub nom*. Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

[133] *See* Brief for Asian Americans Advancing Justice, *supra* note 128, at 5.

[134] *See id*. at 5, 11.

[135] *See* Andrew Chung, *Supreme Court Ruling Leads to Offensive Trademark Requests*, REUTERS (July 23, 2017), https://www.reuters.com/article/us-usa-court-slur/supreme-court-ruling-leads-to-offensive-trademark-requests-idUSKBN1A80L6.

[136] *Id*. (referencing consultant Steven Maynard's application to trademark the word "nigger").

[137] Compare *id*. (noting entrepreneur Mike Lin's application to trademark a slur against Chinese in order to 'take back" the term), *with* Andrew Alleman, *Company wants to Trademark Pets.com, X.com, and Famous Slogans*, DOMAIN NAME WIRE (Sept. 6, 2016) https://domainnamewire.com/2016/09/06/l-company-wants-trademark-pets-com-x-com-famous-slogans/ (noting that Mike Lin's company 47/72 Inc. has tried to trademark a number of famous terms and phrases for commercial gain, simply because the companies and individuals associated with those terms had not trademarked them specifically for online retail).

This lack of clarity in separating honest and dishonest reclamation could prove detrimental in several ways.

First, a group who is falsely claiming reclamation—or claiming a benign use that others contest, in the case of the Washington Redskins, for example—could use their trademark to stop all others from changing or subverting its use. This goes against the very nature of reclamation, as it inverts the entire point of using a derogatory term. Reclamation only works when a minority group takes back its own derogatory term. Thus, the Washington Redskins, with no ties to Native Americans or the historical harms, by definition cannot "reclaim" it. Yet, the removal of the Disparagement Clause allows them to bypass this key difference and claim the name for themselves. Second, although Simon Tam's claim was recognized as an honest effort,[138] where exactly does society draw the line on reclamation? Is anything done for the sake of "reclamation" good, even if the ultimate goal of the reclaimer is merely personal gain? What about reclamations done with honest intent that end up being of negligible impact, or even inadvertently harmful? Without a clear definition of what constitutes honest and allowable reclamation, it is difficult to consistently evaluate and protect against harmful or adverse claims. Thus, without the Disparagement Clause, trademarking could actually end up facilitating false reclamation (or a blatant disregard for its purposes), and in the process, disempower the minority groups who should have gained from the *Tam* decision.

The removal of the Disparagement Clause could also potentially initiate a race by different groups to trademark contentious terms. Since any term the Disparagement Clause previously kept from being trademarked is now technically fair game, is it possible that an organization like the Ku Klux Klan could form a commercial entity for the purpose of trademarking a term like "nigger" in order to disempower African Americans? Assuming they do not run afoul of any other trademark laws, technically they could, although this scenario is not particularly realistic. However, it illustrates the risk involved in making trademark a free-for-all in terms of what can enter the marketplace. If anyone is free to claim reclamation as a motive, society risks losing sight of the original purpose of a trademark and turning it into a weapon, rather than a means of protection.

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[138] *See* Chung, *supra* note 135.

C. TRADEMARKING LACKS ENOUGH UNDERSTANDING AND VISIBILITY TO BE EFFECTIVE

The national protection afforded to registered trademarks suggests that perhaps the strongest point in support of trademarking a term is that it would help increase the visibility of reclaimed terms, thereby increasing the term's power because more people would notice them, and any adverse use that might be confusing could be removed. However, the Court in *Tam* recognized that "it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means."[139] Therefore, it seems likely that trademarking would still be an fruitless avenue for reclamation simply because it has such a small audience who could understand its significance in the first place.

Using a derogatory term for empowerment is not just an individual act, since reclamation, being closely tied to social identity,[140] relies by definition on others (both within the reclaiming group and in the dominant society) noticing and understanding that the term has been reclaimed. If no one recognizes that a term has been reclaimed, then the reclamation has no effect. In that sense, just because a term has legal protection does not mean that it is more prominent either. If no one ever contests or attempts to misuse the term, it would never have reason to invoke any of its federal protections. In fact, Simon Tam and his band only sought to trademark their name at the suggestion of their attorney, who told them that trademarking is "something that's commonly done for national [musical] acts."[141] If The Slants been anything else—a restaurant, a pet store, etc.—it's possible they may not have ever thought of trademarking as a means of reclamation.

D. TERMS HAVE MEANING AND PROTECTION EVEN WITHOUT REGISTRATION

A reclaimed term can also operate effectively without trademark registration. For example, as Ned Snow explains, even if a group like the Washington Redskins were denied the ability to trademark its name on the grounds of disparagement, its name could still hold value if the fans (consumers) continued to support it.[142] In fact, the market demand for the team generated by its fans could even outweigh the name's lack of

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[139] *See* Matal v. Tam, 137 S. Ct. 1744, 1759 (2017).

[140] *See* Galinsky et al., *supra* note 59, at 2021.

[141] *See* Simon Tam, *supra* note 1.

[142] *See* Ned Snow, *Moral Judgments in Trademark*, 66 AM. U. L. REV. 1093, 1100, 1108 (2017).

exclusive trademark rights.[143] Similarly, if The Slants had strong support from their fans or from the Asian-American community, "slant" could still have a significant meaning stronger than any trademark protection could provide. This further supports the idea that trademarking may not be necessary or useful to reclamation, as any recognition gained through such processes could be matched or overcome by the social and community support for a non-trademarked term.

Additionally, even without federal trademark benefits, derogatory terms such as "slant" are not entirely without legal protection either. There is nothing stopping Simon Tam from calling his band "The Slants" even without a trademark. In that sense, he is free to give "slant" whatever meaning he wishes and use it for any purpose he likes. Also, an unregistered trademark may still be used in commerce and can be enforced against infringement section 43(a) of the Lanham Act, which, though typically applied towards registered trademarks, is also understood to create a federal cause of action for infringement for qualifying unregistered trademarks.[144] Additionally, state common law provides protection for unregistered trademarks in the geographic area in which they are used.[145] Furthermore, there are federal statutes such as the Anticybersquatting Consumer Protection Act, which protects marks in online domains,[146] that do not contain any language requiring trademark registration, meaning these statutes may apply to both registered and unregistered marks.[147]

Thus, it is clear that even if "slant" had ultimately been denied registration, it was never entirely without protection to begin with. In fact, Tam and his band had been using the name "The Slants" years before they sought to trademark it, and made no claim of significant adverse issues due to their lack of trademark protection during that time.[148] Moreover, the fact that their name was intended as a positive representation of Asian Americans from its inception,[149] long before they thought to trademark it,

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[143] *Id*.

[144] *See Matal*, 137 S. Ct. at 1752 (quoting Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992)).

[145] *See* Richard Stim, *What Good are Unregistered Trademarks?,* NOLO, https://www.nolo.com/legal-encyclopedia/what-good-unregistered-trademark.html (last visited Oct. 22, 2020).

[146] 15 U.S.C.S. § 1125 (2018).

[147] *See Matal*, 137 S. Ct. at 1753.

[148] Ken Shima, Joe X. Jiang, & Simon Tam, *Our Story*, THE SLANTS (2018), http://www.theslants.com/biography/.

[149] *See id*.

suggests that any protection it gained through trademarking was incidental and of little necessity to its reclamatory intent.

In essence, though trademarking does confer some benefits, those benefits are largely irrelevant for reclamation. Furthermore, the potential detriment to minority groups seems substantially more damaging in comparison to the few benefits given in return. Thus, trademarking does not seem like a necessary or useful method of reclamation.

V. FUTURE IMPLICATIONS

If nothing else, *Tam* was a clear win for Simon Tam and The Slants. However, within the larger Asian American community, the question remains—was the *Tam* decision actually beneficial? In terms of reclaiming "slant," it was beneficial that the case put that particular term—and by extension, Asian Americans—in America's public eye, because when Tam won, it was seen as a vindication for minorities.[150] However, if both positive and negative interpretations of derogatory terms are now equally trademarkable in the absence of the Disparagement Clause, how do reclamation practices move forward?

One of the most obvious effects of the *Tam* decision is on groups like the Washington Redskins, for whom the Disparagement Clause was the only major roadblock to securing trademark registration.[151] From a legal perspective, perhaps an exception or test should be made to evaluate derogatory terms when reclamation is given as the reason. The AAAJ called for a nuanced approach that would take into account factors such as "(1) whether a mark is part of a reclamation effort; (2) the potential harmful effects of the term, and (3) how expressive the mark is."[152]

This process would first require contextualizing and substantiating submitted claims of reclamation by any group seeking to trademark a term under such a purpose.[153] Second, the trademark reviewer would be required to research not just whether a term is disparaging, but whether its widespread use would have detrimental effects on the population it references.[154] Lastly, a court would then be asked to balance the expressive content of a mark with its purported use to determine which trademarks

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[150] Joe Coscarelli, *Why The Slants Took a Fight Over Their Band Name to the Supreme Court*, N.Y. TIMES (June 19, 2017), https://www.nytimes.com/2017/06/19/arts/music/slants-name-supreme-court-ruling.html.

[151] *See* Phillips, *supra* note 97, at 1063–65 (noting the Washington Redskins' long-standing legal battle over and repeated registration and cancellation of their Redskins trademarks).

[152] *See* Brief for Asian Americans Advancing Justice, *supra* note 128, at 17.

[153] *See id*. at 18–19.

[154] *See id*. at 20–25.

are stronger candidates for approval than others.[155] This model would be beneficial in that it acknowledges the difficulties in determining valid reclamation, and attempts to provide a process that still allows for review and mediation. However, in a post-*Tam* society without a legal alternative that accomplishes the same effects as the Disparagement Clause, it may be better to focus on how reclamation practices can adapt to *Tam's* repercussions within the existing legal framework.

One idea is to consider reclamation from the perspective of reparation. If striking of the Disparagement Clause will open the door to the registration and use of many contentious trademarks considered harmful to the groups they reference, instead of trying to stop such trademarks, perhaps there should be reparations mandated if a group could conclusively show that such a trademark is not only being used disparagingly, but that it is also causing demonstrable harm to the affected community. This concept, contextualized in Phillips' extension of Atuahene's dignity takings framework, suggests that if the appropriation and commodification of a derogatory term can be considered a dignity taking, then the way to resolve it is through a reparation that, in addition to material compensation, requires restoration and reaffirmation of the agency and dignity deprived.[156] However, such "dignity restorations" are context specific, and as such, can take many different forms.[157]

Atuahene cites to the Tulsa Race Riot Reconciliation Act as an example, demonstrating how it provided economic repatriation to survivors and their descendants.[158] However, there are some key differences between this example and the trademarking of a derogatory term, if such terms are to be considered a dignity taking. Whereas the Tulsa Race Riots were a single event, a trademark by nature is ongoing; thus, any "harm" caused by a derogatory trademark could be continuous, potentially even endless. Additionally, a derogatory term's harm may be far more subtle. The Tulsa Race Riots resulted in quantifiable deaths and visible property loss, which were clear and overt harms. In contrast, while a derogatory term may denigrate, its harms may not ever manifest in tangible forms such as death or property loss. If anything, the harm done may be mild and subversive, difficult to prove, and spread out over a number of years. Thus, this lack of concreteness raises the question of how such harms could be quantified for the purpose of reparation. Furthermore,

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[155] *See id*. at 26.

[156] *See* Phillips, *supra* note 97, at 1085; *see also* Atuahene, *supra* note 101, at 802.

[157] *See* Atuahene, *supra* note 101, at 819.

[158] *See id*. (citing Alfred L. Brophy, *When More than Property is Lost: The Dignitary Losses and Gains in the Tulsa Riot of 1921*, 41 L. & SOC. INQUIRY 824-32 (2016)).

such a model would have to assume that reclamation is valuable enough to merit such restorative justice and generalize that all members of an impacted group collectively view reclamation as beneficial—which may not be true.[159] Thus, although this suggestion raises the possibility of meaningful restoration, it is difficult to determine whether such a solution would actually be feasible to enact.

Ultimately, the most realistic perspective of using trademarking to reclaim derogatory terms would have to accept that such terms will always have the potential to be both pejorative and honorific; they are always in flux by default given their performative and contextual nature, and thus never exist as a single meaning.[160] Therefore, trademarking could never serve as a truly effective means of reclamation because it inevitably must fix its meaning to one definition, held by one entity. Perhaps then, *Tam*'s ultimate legacy is that it becomes not an example of reclamation in itself, but a small piece of a much larger reclamation trajectory. On its own, it is questionable how much reclamatory effect *Tam* even had. It was assumed that Asian Americans had an interest in reclaiming "slant," but Simon Tam's words alone do not necessarily mean this was so.[161] Additionally, it is hard to say whether trademarking gave The Slants any lasting benefit either, as Tam himself noted that "people will say they've heard about our band, but they say they've never bothered checking out our music."[162] Without an audience to understand it, any linguistic reclamation, even when the term in question has an established reclamatory interest, necessarily fails to achieve its purpose.

Nevertheless, *Tam* could still have some benefit. Over time, a body of similar cases supporting trademarked terms used for reclamatory purposes may outnumber those used negatively, and thus provide legitimacy to such reclamation efforts. The fact that an Asian-American group won before the Supreme Court might encourage and incentivize other marginalized individuals and groups to fight for their own representation and empowerment, thus bringing their issues to the forefront of American society. Furthermore, because many more derogatory terms can now be trademarked, Asian Americans and other minority groups may also be spurred to become more vigilant about calling out negative and improper uses of derogatory terms and actively

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[159] *See* Coles, *supra* note 76, at 438 (explaining that because demographic groups are composed of individuals who naturally disagree, collective identity as a topic is volatile and highly debatable).

[160] *See id*. at 441.

[161] *See* Brief for Asian Americans Advancing Justice, *supra* note 128, at 19.

[162] *See* Coscarelli, *supra* note 150.

boycotting or subverting adversely used terms to ensure that their reclamation efforts are not reversed. In this way, *Tam*, while not a definitive example of reclamation on its own, could become a spearhead for the development of a broader range of reclamation practices over time.

Finally, and perhaps most importantly, it is worth remembering that the law is not static, and neither are derogatory terms. What is immoral or offensive is constantly in flux and is only a reflection of current public opinion.[163] Accordingly, what one generation finds shocking may be entirely inoffensive to subsequent generations.[164] Thus, though the Disparagement Clause has been ruled unconstitutional, it could be that a framework similar to the AAAJ's will be written into law. Or, it may even be that in the future, "slant" will have no significant meaning, negative or positive, to any community.

VI. CONCLUSION

The legal benefits of trademarking, when compared to its potentially adverse effects, suggest that trademarking does not significantly further the goal of reclamation for minority groups; in fact, it could actually be more detrimental than helpful in the long term. Despite this, trademarking may potentially be able to play a positive role in constructing a broader narrative of reclamation practices over time. Rather than being seen as a form of reclamation in itself, it could instead be seen as a form of awareness for communities to think carefully about the repercussions of their reclamation efforts and be more vigilant about adverse linguistic uses by outside groups.

Ultimately, whether the absence of the Disparagement Clause will actually lead to a sustained increase in trademarked derogatory terms, and whether any significant and lasting harm to minority groups will come as a result, is hard to say. However, perhaps the strongest support for Asian Americans and other minority groups in this new legal landscape is the idea that resistance is rooted not necessarily in legal protection, but in the knowledge that citizens are able to engage, support,—or if necessary, boycott—those words and ideas that carry the meanings and further the goals that they and their communities believe—or do not believe—in.

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[163] *See* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 856-57 (1979) (discussing the example of *Martinelli v. Maguire*, in which a play featuring a woman in tights—though not offensive today—was considered scandalous and indecent in its time).
[164] *Id.*