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Speech act theory, maledictive force and vilification in Australia

Nicole Asquith

Traditional Millian theory posits that free speech is the most important mechanism to achieve a greater tolerance of difference and thus create a dynamic marketplace for truth to flourish. In responding to maledictive hate, theorists such as Gelber and Butler recommend that marginalised speech actors engage with a process of speaking back; of returning the gaze in order to make perpetrators’ contributions to the marketplace of ideas marginal and aberrant. However, as will be demonstrated by an analysis of maledictive force and effects, the ideal speech situations of communicative action theory and the recasting of terms of abuse by ‘speaking back’ require either rational speech actors—something clearly absent in many acts of maledictive hate—or a validation of the authenticity and probity of performative speech acts of marginalised subjects. Constructing new truths is both socially and politically contingent. As such, the capacity for marginalised subjects to contribute rests upon their ability to be able to speak with authority and to be authorised to speak. Yet this validation as authorised speech actors can be withheld from marginalised groups such that, even when individuals feel empowered to speak back to their victimisers, their locutions may be forestalled, gagged, frustrated and disabled by the historicity of their abjectification. Furthermore, speaking back is presented by those who oppose the regulation of speech as inherently non-institutional. This failure to read institutional responses as a process of speaking back—which re-contextualise social relationships, as they exist at the time of enactment—fundamentally devalues the contributions that the state can make to managing maledictive hate.

Malediction is critical to the efficacy of most hate violence. In previous research, maledictive hate was found to occur in eighty per cent of all reported cases of antisemitic and heterosexist violence. Explicit, personalised verbal abuse constitutes one of the identifying characteristics of hate violence and establishes it as a practice unique to this form of interpersonal violence. Maledictive hate acts as a warning and as a justification: a prelude of things to come, and—if addressees respond—a justification for the transformation of malediction into physical violence. Too often in accounts of hate violence, escalation from malediction to physical or sexual assault occurs when those named in hate violence heed and take on the abjectifying label. Embracing the abject is proof enough that disorder is contained in the marginal body, and order must be reinstated by physical containment of the body.

Rather than employing a simplistic Millian or equally unresponsive post-structuralist theoretical framework to account for this transformation from speech to action, Bourdieu’s critical engagement with Austrian speech act theory and Langton’s twist on speech act theory have been foregrounded in this paper. This is not to say that state intervention is privileged over a radical reworking of social
institution—for that would fall prey to the misrecognition of state power as arbitrary. As such, it will be shown that ‘speaking back’ from unauthorised or de-authorised social positions is as inefficacious as state intervention that is purely symbolic; both are incapable of bringing about real change to the lived experiences of survivors of heterosexist and antisemitic hate violence.

**Performative speech acts**

In 1955, Austin presented a series of lectures on *How to Do Things with Words*. This work reconstructed the field of linguistic philosophy at that time, and, later, reconstructed the debate over the regulation of pornography and ‘hate speech’ in the United States. In an attempt to short-circuit the limitations imposed by the First Amendment of the US Constitution upon the regulation of ‘content’, MacKinnon and Critical Race Theorists re-contextualised the speech acts of pornography and ‘hate speech’ as conduct, rather than mere words. Central to this conversion from speech to conduct was the redeployment of Austin’s analysis of perlocutionary and illocutionary performative speech acts. In *How to Do Things with Words*, he argues that:

> We first distinguished a group of things we do in saying something, which together we summed up by saying we perform a *locutionary act*, which is roughly equivalent to uttering a certain sentence with a certain sense and reference ... Second, we said that we also perform *illocutionary acts* such as informing, ordering, warning, undertaking, &c., i.e., utterances which have a certain (conventional) force. Thirdly, we may also perform *perlocutionary acts*: what we bring about or achieve by saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading.8

From this seemingly simple classification of speech and the ways in which speech can be action, theorists such as Bourdieu, Butler and Langton have developed a sophisticated system for assessing the force and effects of subordinating and silencing speech. However, particularly for Bourdieu and Langton, it is Austin’s deeper analysis of the forms of illocutionary speech that provides the basis for their claims about the authority to speak, and the power of authorised speech. Austin, in his analysis of performative acts, details five classes of illocutionary utterances: verdictives (exercise of judgment), exercitives (exercising of power), commissives (assuming of an obligation or declaring of an intention), behabitives (adopting an attitude) and expositives (clarifying of reasons and arguments).9 The two most significant classes of illocutionary performatives for the study of maledictive hate are verdictives and exercitives.

The first of these classes of illocutions relates to the ‘delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact’.10 It is important to note that Austin clearly states that exercising judgment can be either official or unofficial: judgments by Jo Citizen as easily as judgments by Jo Magistrate. Verdictive perlocutions aim to rank and value the addressee and thus establish a verdict on the ‘truth and falsity, soundness and unsoundness and fairness and unfairness’ of their subjectivity or contributions to the marketplace of ideas.11 In maledictive hate, verdictive perlocutions include interpellations that
institution—for that would fall prey to the misrecognition of state power as arbitrary. As such, it will be shown that ‘speaking back’ from unauthorised or de-authored social positions is as inefficacious as state intervention that is purely symbolic; both are incapable of bringing about real change to the lived experiences of survivors of heterosexist and antisemitic hate violence.

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name addressees within a hierarchy of subject positions according to their proximity to dominant representations of the body and identity.

The second class of illocutions relevant to the analysis of maledictive hate is exercitive performatives. Unlike verdictive illocutions, exercitives are a judgment that '[something] is to be so, as distinct from a judgment that it is so: it is advocacy that it should be so, as opposed to an estimate that it is so; ... it is an award as opposed to an assessment; it is a sentence as opposed to a verdict'12. Exercitives include statements that warn, order, advise and command. More than verdictives, exercitives require an authorised force in order to affect the objective of the performative act. Furthermore, where verdictives are temporally present or an assessment of the past, exercitives are statements about how the future should look: an advocacy of things to come. As such, if exercitives secure uptake by being spoken with authority or by an authorised delegate, they are capable of influencing addressees in more ways than verdictives.

**Subordination and silence**

Subordination is the objective of both verdictive and exercitive illocutions. Langton reclassifies these two classes of performative speech acts as authoritative illocutions because at the core of their felicitous performance is a recognition of the authority conferred upon or taken up by the speaker.13 As discussed previously, this authority need not be institutionally bound, yet is always socially constituted. Ranking particular subject positions and conferring rights and privileges on these individuals is conventionally an act of governments and courts. In maledictive hate, however, it can also be performed by a range of actors centrally situated in social relations: heterosexuals naming homosexuals, Anglo-Australians naming the migrant other.

Langton argues that authoritative speech acts are capable of achieving two types of action: subordination and silencing. There is an important relationship between subordination and silencing. Many free speech theorists argue that the best way to dismantle explicitly subordinating speech that ranks individuals and groups, legitimises inequitable treatment towards them and withdraws right and privileges from them, is with more speech.14 However, as Langton highlights, fighting speech with more speech is an impossible task when marginalised individuals or groups are also silenced.15 She argues that '[f]ree speech is a good thing because it enables people to act ... Speech that silences is bad, not just because it restricts the ideas available on the shelves, but because it constrains people’s action.16 When marginal groups are unable to make recognisable contributions to the construction of their identities—as authorised participants in the discussion and as experts on the subject—they are not only silenced, they are also subordinated.

Addressees are subordinated when these performative speech acts 'rank certain people as inferior ... legitimate discriminatory behavior towards them ... [and] deprive them of powers and rights'.17 Being ranked as inferior, and having that assessment legitimised (for example, through the devaluation of violence against gay men or lesbians, or the construction of homosexuality as paedophilia) also creates the conditions for withholding rights and privileges such as the proscription of same-sex marriage, and adoption or guardianship.
The second set of actions achieved in performative speech is silencing. Langton suggests that if speech (or text) is action, 'then silence is the failure to act' or the failure of speech to count as an action. This failure to act can be seen in the locutionary gag, perlocutionary frustration and illocutionarydisablement. While Langton privileges the latter form of silencing (illocutionary disablement)—perhaps due to her need to operate within the confines of First Amendment jurisprudence—all three forms of silencing are judged as having sufficient force to constrain the actions of marginalised subjects.

The primary form of silencing is the locutionary gag. This is where speech is unavailable because the conditions for articulating are made 'unspeakable'. The principal way in which silence is secured is through the loss of mechanical means (such as limited access to a public forum, or a physical incapacity) to create speech or text. Silence as the result of mechanical loss is a factor in any traumatic incident. Traumatic memory is unlike automatic memory or narrative memory in that it resides largely in corporeal sensation and dysfunction. Recollecting traumatic memory calls upon different parts of the brain than those required to speak and construct narratives of experiences. Brison suggests that this is one reason why many survivors of trauma lose the ability to articulate a coherent narrative of the encounter, and why memories of these events can appear as 'full of fleeting images, the percussion of blows, sounds, and movements of the body'.

The second way that Langton suggests silence can be secured is through perlocutionary frustration. While locutionary silence is the failure to make a sound, perlocutionary frustration is achieved by letting a person speak but not letting those speech acts have the intended effect. Austin argues that by saying something—in contrast to the illocutionary force created in saying something—'often, or even normally ... certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons are produced'. These perlocutionary effects may be that the audience is persuaded, intimidated, or convinced by the speaker's arguments. Perlocutionary silence or frustration is a regular part of everyday life, such that 'one invites, but nobody attends the party; one votes, hoping to oust the government, but one is outnumbered', one refuses consent in sex, and it is ignored. However, for marginalised subjects, perlocutionary frustration is more likely to be integral to their life experiences because their marginality results in the construction of their subjectivity as flawed, suspect and inadmissible in any context. The ability for a perlocutionary statement to secure a felicitous uptake relies on the perception that he or she is speaking with authority. If marginalised subjects are proscribed from positions of authority (even on the subject of marginality) then the effects of their speech acts are bound to be frustrated.

The final form of silence is presented by Langton as the most serious way that the objectives of marginalised subjects are disabled. An illocutionary speech act is one that does something in saying. Illocutionary disablement occurs 'when one speaks, one utters words, and fails not simply to achieve the effect one aims at, but fails to perform the very action one intends': one refuses consent in sex, and it is transformed into an eroticised 'yes'. In illocutionary performatives, not only are speakers required to speak with authority (or with a sense of expertise) but also
are required to be authorised to speak. Consequently, those with no recognised authority or expertise, or those who are not delegated to speak on a given topic, can have their actions disabled.

**Speaking with authority and the authority to speak**

When Judith Butler turned to Austin’s work four years after Langton’s analysis of sexual violence, it was to interrogate the use of perlocutionary effect and illocutionary force as a theoretical and legal tool in regulating subordinating and silencing speech.\(^{26}\) Butler rejects a straightforward reading of illocutionary force, and the notion of a state-sponsored response to maledictive hate advocating, instead, an appropriation of hateful speech which creates new contexts of meaning and thus de-authorises, then re-authorises the words spoken. In the space between meaning and intent—between speaking and acting—Butler argues there is a slippery re-iterative moment where there is an opportunity for a reversal, an appropriation or an expropriation that undermines the hatred and intentions of the speaker, and offers new meanings, new intentions and the chance of linguistic agency.\(^{27}\)

Butler argues that illocutionary speech acts or utterances are reserved for very few occasions in contemporary societies as they rely on prior convention in order to convey what is said (the meaning and intent) and the physical, corporeal power to bring about the uttered intent or meaning.\(^{28}\) Butler suggests that there are moments of illocutionary power but that any analysis of malediction that claims this rare moment as the primary process in maledictive hate closes or fixes the possibilities of changing or uncoupling the hurtful connections between meaning and intent and the ability to act on that meaning and intent.\(^{29}\) Butler contends that every utterance is unstable and open to reinterpretation.\(^{30}\) To fix meanings of maledictive hate within a state framework such as law, she argues that we undermine the possibility of inscribing new meanings and, therefore, negate the addressee’s linguistic agency.\(^{31}\)

Pinning down the context for Butler is a partial task of interrogating ‘words that wound’ because contexts and meaning change over time and place, and because some performatives actually gain their efficaciously from their break with prior contexts (for example, ‘queer’ in the mouths of gay men and lesbians, or ‘nigger’ in the mouths of African Americans).\(^{32}\) Bourdieu rejects Butler’s position, claiming instead that social power is invested in all speech acts prior to this utterance of ‘words that wound’. He highlights that the conventional means that bring about felicity are not embodied in language use nor is convention authorised internally to language. Rather, convention is efficacious because of social conditions external to language. Bourdieu argues that the illocutionary force of a performative utterance does not gain its efficacy from ‘the fact that they seem to possess in themselves the source of a power’, rather this efficacy ‘resides in the institutional conditions of their production and reception’.\(^{33}\) This position has the advantage of foregrounding the social construction of authority, and thus the social conventions required for individuals to wield hate as an act of power.

In this sense, language is a social structure determined prior to any utterance by the speaker and maledictive hate is a habit that requires generational re-inscription for it to do its social magic. This inter-generational re-inscription
requires structural processes in order for hate to pass to the next generation. Langton argues that speaking with authority requires social recognition of one’s position as a specialist on the subject under discussion, while being authorised to speak requires a social delegation of power to define the subject of discussion, and whether the subject is in fact a valid, legitimate matter to be discussed.34

**Speech act theory and anti-vilification legislation in Australia**

Given that institutional validation is the most potent form of recognition available in Western democratic states, and that the interests of marginalised subjects have been best met by the intervention of state agencies in Australia, it is counter-productive to suggest that a privatised response to maledictive hate is the primary way forward. Although a small number of individuals and communities may at times feel empowered to engage with perpetrators of hate violence without the intervention of the state35, prioritising this form of response not only constructs others unable to act in this manner as less than socially engaged citizens, it also constructs social change as a localised process. Unlike privatised individual or community responses to maledictive hate, state intervention can establish the ground rules for social engagement for all citizens. This is not to say that marginalised groups have no role in the elimination of maledictive hate. Rather it is to argue that these groups require state support and intervention in order for their voices to be perceived as being authorised and as having the requisite expertise or authority to be contributors to the issues raised by hatred.

Without a First Amendment to hamper their intervention, since 1995 Australian state and federal governments have adopted a variety of mechanisms to seek remedies for the damage caused by maledictive hate. Unfortunately, this intervention has been forestalled in part because of the conditions under which intervention is tolerable to the electorate, and because governments have abrogated their responsibility as active participants in this adjudication in favour of an individualised, privatised system of seeking justice. In particular, anti-vilification measures such as the New South Wales *Anti-Discrimination Act 1977* and the federal *Racial Hatred Act 1995*, seek only to regulate those maledictive acts that have incited—or could possibly incite—another person to hate. Further, maledictive hate in Australia is judged not on the basis of the intent of perpetrators; rather, harm is assessed through the eyes of the reasonable third person of law. While an objective assessment is preferable to the subjective assessment of intent, the reasonable third person is also problematic. Finally, Australian models for regulating maledictive hate, while requiring a public act of hatred, are adjudicated in-camera. This effectively forestalls the capacity for these institutional illocutionary speech acts to create a social commitment—perlocutionary effects—to the elimination of vilification.

The right to demand a life free from targeted violence requires state interventions that establish a set of standards for good citizenship. Law should never be solely an exercise in symbolism: it must also be able to change the circumstances of abjectification. Too often institutional measures such as the *Anti-Discrimination Act 1977* (NSW) and the *Racial Hatred Act 1995* (Cth) are presented as symbols of the intent of state and federal governments rather than as mechanisms for real social change. The containment of these legislative responses
to acts of symbolism stems from the adjudicating framework employed to seek redress for marginalised subjects. In particular, these institutional measures only partially capture the acts of hatred experienced by marginalised subjects because these civil procedures only relate to public acts that incite others to hate. These regulatory measures only trap those acts that create perlocutionary effects, rather than those that create illocutionary force. This is the reverse of the regulatory system in the US, which can only ever regulate illocutionary speech acts. In Australian regulatory systems, it is not enough that one person hates: that hatred must infect another mind too. Governments in Australia have deemed that the damage of vilification is not contained in the initial authoritative speech act; rather, the damage is contained in the maledictive infection of another. This preference for perlocutionary effects over illocutionary force significantly devalues the damage done in the one-on-one engagement between addressee and addressee.

The second major concern in relation to the regulatory frameworks adopted by Australian governments is their use of the objective, reasonable, third person to assess the harm caused by maledictive hate. To adjudicate the perlocutionary effect of malediction, the government has established the ordinary reasonable person as the third person in every encounter of vilification. In Harou-Sourdun v. TCN Channel Nine, the Tribunal set the reasonable person as one who is neither ‘immune from susceptibility to incitement’ nor compelled to act with ‘racially prejudiced views’. Given that the objective approach requires an analysis of the contextual factors that play a part in each incident of vilification, it appears counter-intuitive to start from a position of the ordinary reasonable person not being inclined to racist or heterosexist views. Australia was founded on the racist proclamation of terra nullius: it did not give Indigenous Australians full citizenship until 1967; it maintained the White Australia immigration policy until 1967; and it criminalised sodomy (in Tasmania) until 1998. How then can we expect that the ordinary reasonable person is somehow immune to this socialisation? Takach argues that vilification legislation was introduced to remedy a perceived social problem. However, in the conversion from social policy to a legal framework, the objective approach ‘may not take into account the viewpoint of the very group[s] that the … legislation is designed to support’.

Finally, as both Gelber and McNamara argue, civil complaint systems that require public acts of discrimination, harassment and vilification to be adjudicated through a private, in-camera conciliation process, fail to achieve either the objective of establishing a symbol of the intent of governments or the production of real social change. While vilification must be a public act, anti-vilification processes are confined to private conciliation, where neither parties (nor the tribunals hearing the matter) are allowed to speak publicly about the proceedings. Gelber argues that confining these acts of vilification to the public arena, and the conciliation of these acts to the private arena, fundamentally undermines the stated goals and objectives of the legislation, as decisions reached are not made public and do not serve as symbols of unacceptable behaviour.

Each of these imperfections in the regulatory frameworks in Australia limit the ability for marginalised subjects to seek justice. Adopting Austin’s performative speech act theory may assist in ameliorating some of the more debilitating
impediments. This is not to make a case for textual analysis as the only tool in adjudicating malediction. Rather, speech act theory would serve as an additional framework to clarify the purpose, intent and consequences of malediction, and as a result would lead to a more efficacious system that is based on the force and effect of malediction instead of the assessment of the reasonable third person.

Concluding remarks

Since 2001, Western nations have progressively developed stringent regulatory controls to manage the risk of terrorism, such as the criminalisation of speech acts that include threats to the security of people and property. Speakers may not intend to blow up a building or plane, they may not even intend to frighten others—sometimes these speech acts are made in jest to parody what is perceived to be excessive over-regulation. Yet the state has defined these illocutionary speech acts as unspeakable because _in terrorem_ may cause harm. Maledictive hate—especially threats of death—are speech acts that do things in the saying and create a set of consequences for the addressees. While these illocutionary and perlocutionary speech acts are perpetrated against minority groups on an everyday basis, they are constructed as ethereal and somehow less harmful than threats of terrorism. This construction of maledictive hate as anomalous is perhaps due to the reduction of malediction to its most prevalent form—that of ‘naming’ the marginalised subject as an outsider. However, if analyses of maledictive hate acknowledge that there is more to these practices than interpellation, then it is easier to recognise that silencing individuals and groups also leads to subordination.

It has been suggested throughout this paper that the simple remedy proposed by traditional Millian theory—that maledictive hate can be countered by additional speech acts in the marketplace of ideas—fails to account for the legitimised power of illocutionary force. Bourdieu argues in _Language and Symbolic Violence_ that the official institution of meaning is a ‘symbolic act of imposition which has on its side all the strength of the collective, of the consensus, of common sense, because it is performed by a delegated agent of the state’. As such, rather than constructing the truth about hate violence from the perceived integrity of the speaker of these statements—as epitomised in Millian free speech theory—truth is a contingent object constructed out of social positions of power. In order to achieve a status or position of power that facilitates legitimation, and allows marginalised groups to speak with authority, they must be formally recognised by the state as valid players in the democratic process and as experts on the force and effects of maledictive hate.

When viewed through Austinian speech act theory, Australian anti-vilification laws appear to either ignore or devalue the force of authoritative illocutions, preferring instead to privilege the perlocutionary effects of malediction. This not only reduces anti-vilification legislation to ineffectual, symbolic law, it also indicates to those citizens most at risk of social death that their government is largely unconcerned by the violence of their everyday lives except when it incites others to action. It has been suggested that the limited success achieved to date through civil anti-vilification complaint procedures can be remedied by the employment of a more nuanced interpretation of the textual properties of
maledictive hate and the illocutionary force of authorised speech. The reformation of institutional measures will ensure that the symbolism of tolerance and a ‘fair go’ is converted into an authorised redistribution of justice.

Louise Curtis

A serious battle was won against disloyalty and sedition. One aspect of this battle was the monitoring of organisations by the military. By examining the groups targeted by this process, we can gain some insight into the actual nature of surveillance in Australian society. One organisation considered to be a case for suppression by the First Military District was the Russian Workers' Association (RWA).

Many scholars have explored the Queensland home front and the repressive officialdom in the threat of sedition represented by the RWA. The threat was examined by Raymond Evans in several publications that illuminate the social and political turmoil in Queensland. Works by Boris Christensen, Thomas Fritze, and Brian Friel bring to life the forgotten events of Russian activism in Queensland. More recently, Elena Govert analysis of Brisbane radicals in Australia during the Russian Revolution. "The Russian Mirror and Russian Anarcho: Kevin Windle links Australian radicals with the Soviet Union through his work on Aleksandr Zinoviev, a leading figure in the RWA at the time of the Red Flag Riots. Frank Cram has worked extensively on Australian radicals and censorship in Australia during the British War. Finally, "The Origins of Political Surveillance in Australia: Intelligence organisation and military censorship are also examined by Kevin Peake and "C "A. Clark and John Hilvert.

This article explores key trends in World War I era intelligence policies by the Russian Workers' Association through postal censorship. The passion of the censors' reports alone is a testament to their dedication. The manner demonstrates the radical left-wing politics of the RWA and how Russians are aggressive, militant, dangerous, violent, and of a criminal nature. The perception of the RWA was directly linked to the application of more severe legislation, which implicitly represented suppression of and hostility towards Russian and British subjects. This paper suggests that the censors tended to interpret the threat posed by the RWA.
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The findings reported in this article were developed from data provided by the NSW Anti-Discrimination Board, the Executive Council of Australian Jewry and the Lesbian and Gay Anti-Violence Project. Without the support and assistance from staff members and elected representatives of these organisations, this research would never have been possible. Further, I am grateful to Ms Sonya Stanford for her insights and comments on earlier drafts of this paper.


2 In this paper, as with my dissertation, I have made a break with traditional analyses of violence against gay men, lesbians and Jews, particularly in relation to the terms used to define ‘mere words’. In the construction of ‘hate speech’ (and, of course, in the deployment of speech act
theory), most analyses gloss over the fact that these practices include spoken and written forms of hatred. To remedy the shortcomings of the term 'hate speech', I have resurrected the term 'malecution', for its verbal and textual properties and for its stronger meaning: 'the utterance of a curse, the condition of being reviled, and an evil intention or deed'. Shorter Oxford English Dictionary, Oxford University Press, Oxford, 2002.
9 ibid., p 163.
10 ibid., p 153.
11 ibid.
12 ibid., p 155.
15 Langton, op. cit., p 325.
16 ibid., p 328.
17 ibid., p 307.
18 ibid., p 314.
19 ibid.
22 Langton, op. cit., p 315.
23 Austin, op. cit., p 101.
24 Langton, op. cit., p 315.
25 ibid.
26 Butler, op. cit.
27 ibid., p 161.
28 ibid., p 50.
29 ibid.
30 ibid., p 157.
31 ibid., p 161.
32 ibid.
35 In the analysis of complaints lodged by gay men and lesbians to the Lesbian & Gay Anti-
Violence Project, only 17 per cent of complainants indicated that they felt capable of responding to their perpetrator or of fighting back.


39 McNamara, op. cit., p 175.