

ADDRESSING THE VILIFICATION OF WOMEN: A FUNCTIONAL THEORY OF HARM AND IMPLICATIONS FOR LAW

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Notwithstanding its prevalence, vilifying speech directed at and about women on the basis of their female sex remains unregulated in most jurisdictions. It also has not received much scholarly or policy attention. In this article, I address some of those gaps in the literature. I rely on extant critical and speech act theory scholarship to arrive at a functional theory of sex-based vilification with reference to its harms, as relevant to law, as discriminatory treatment of women that constitutes and causes the systemic subordination and silencing of women on the basis of their sex. I then consider some implications of my functional theory for law, including that the enactment of sex-based vilification laws may be seen to constitute a counter-speech act by the state that may mitigate the harms to women of sex-based vilification.

In order to speak meaningfully to its subject matter, this article describes examples of vilifying speech. Readers are advised that those descriptions necessarily include explicit and derogatory language.

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I INTRODUCTION

Social and news media, as well as an emerging body of scholarly work, contain numerous accounts of speech directed at and about women and girls that prima facie expresses contempt for women and girls on the basis of their sex. I refer for now to such speech as ‘sex-based vilification.’¹ Sex-based vilification occurs across jurisdictions. It typically accompanies violence committed against women,² is often directed at and about women in positions

¹ Accordingly, I use ‘vilification’ or ‘vilifying speech’ for now to refer to speech directed at and about individuals that prima facie expresses contempt for those individuals on the basis of their relevant ascriptive characteristics. I use ‘woman’ and ‘women’ to mean woman or girl and women and girls. Though I have previously referred to ‘gender’ and ‘gender(ed) vilification’ (Anjalee de Silva, “Words Can Harm Us”: The Need for Gender Vilification Provisions in Victorian Law’ (2014) 88(8) *Law Institute Journal* 40), I use ‘sex’ and ‘sex-based vilification’ in favour of those terms throughout this article. It is unclear that gender, as *distinct* from sex, is an axis of women’s systemic oppression in patriarchal societies relevantly to my analysis. For example, the vilification of women on the basis of their gender expression, including gender non-conformity, is an aspect of their vilification in patriarchal societies on the basis of their female sex. This is distinct from vilification on the basis of ‘gender identity’: see below n 13. I conceptualise sex-based vilification as speech that is *about* women, even when it is directed *at* men and boys. As I hope to make clear in this article, contemptuous speech directed at and about men and boys on the basis of their male sex does not and cannot systemically harm them in the ways that sex-based vilification harms women in patriarchal societies. Whether gender non-conformity, as distinct from sexuality and gender identity, is an axis of men’s and boys’ systemic oppression in patriarchal societies is outside the scope of my discussion. See also below n 70, as to the characterisation of particular groups as systemically oppressed.

² See, eg, Llezlie L Green, ‘Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law’ (2002) 33(3) *Columbia Human Rights Law Review* 733.

of political leadership,³ and occurs prolifically in pornography,⁴ advertising,⁵ popular culture (including film, music, literature, and other visual and performance arts)⁶ and mainstream news and tabloid media reporting.⁷ It is directed at and about powerful women, ‘ordinary’ women, and women generally.⁸ It occurs in person, online (including characteristically as part of the cyber harassment of women),⁹ in physical spaces such as workplaces and educational institutions, and via speakers who may themselves colloquially be

³ Marian Sawer, for example, has written about the ‘sexual vilification’ that pervaded former Australian Prime Minister Julia Gillard’s time in office: Marian Sawer, ‘Misogyny and Misrepresentation: Women in Australian Parliaments’ (2013) 65(1) *Political Science* 105. See also Kate Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press, 2017) ch 8; Sue Joseph, ‘Australia’s First Female Prime Minister and Gender Politics: Long-Form Counterpoints’ (2015) 9(2) *Journalism Practice* 250. Mainstream media reporting in Australia, the United Kingdom, the United States, and other jurisdictions also contains numerous accounts of sex-based vilification directed at and about other women politicians: see, eg, Teri Finne-man, *Press Portrayals of Women Politicians, 1870s–2000s: From ‘Lunatic’ Woodhull to ‘Polarizing’ Palin* (Lexington Books, 2015); Clare Walsh, ‘Media Capital or Media Deficit? Representations of Women in Leadership Roles in Old and New Media’ (2015) 15(6) *Feminist Media Studies* 1025.

⁴ See, eg, Catharine A MacKinnon and Andrea Dworkin (eds), *In Harm’s Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997); Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993); Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) (*‘Feminism Unmodified’*); Andrea Dworkin, *Pornography: Men Possessing Women* (Women’s Press, 1981). See also Amanda Wong, ‘Broken, Brutal, Bloody: The Harms of Violent Racial Pornography and the Need for Legal Accountability’ (2016) 8(1) *Georgetown Journal of Law and Modern Critical Race Perspectives* 225 for an intersectional perspective.

⁵ See, eg, Nancy Artz, Jeanne Munger and Warren Purdy, ‘Gender Issues in Advertising Language’ (1999) 22(2) *Women and Language* 20; Mandy McKenzie et al, ‘Advertising (In)Equality: The Impacts of Sexist Advertising on Women’s Health and Wellbeing’ (Issues Paper No 14, Women’s Health Victoria, December 2018) 10–19.

⁶ See, eg, Annika Rudman, ‘“Whores, Sluts, Bitches and Retards”: What Do We Tolerate in the Name of Freedom of Expression?’ (2012) 26(3) *Agenda* 72; Edward G Armstrong, ‘Gangsta Misogyny: A Content Analysis of the Portrayals of Violence against Women in Rap Music, 1987–1993’ (2001) 8(2) *Journal of Criminal Justice and Popular Culture* 96.

⁷ See, eg, Martha C Nussbaum, ‘Objectification and Internet Misogyny’ in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press, 2010) 68, in relation to gossip websites. One might even make an argument, as Jocelynn Scutt does, that sex-based vilification is ‘so generalised’ that it encompasses ‘the vast majority of advertisements, reel after reel of film and video, rack upon rack of newspapers and magazines’: Jocelynn Scutt, ‘Group Defamation and the Vilification of Women’ (1992) 12(2) *Communications Law Bulletin* 9, 9.

⁸ In the online context, see, eg, Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014) 13–14.

⁹ *Ibid.*

described as powerful or ‘ordinary’.¹⁰ Despite its recent media attention, it is not a new problem.

Notwithstanding the prevalence of sex-based vilification, there is a ‘sex-based gap’ in anti-vilification laws.¹¹ Apart from some notable exceptions at the domestic level in some jurisdictions,¹² anti-vilification laws on the basis of sex (‘sex-based vilification laws’) do not exist.¹³ Nor has the issue of sex-based vilification received much scholarly or policy attention.¹⁴ In contrast, vilifica-

¹⁰ See, eg, *ibid.*

¹¹ By ‘anti-vilification laws’, I mean legislation that self-consciously addresses an essentially legalistic understanding of vilification. Such laws tend to sanction speech expressing hatred towards, or seen to give rise to a risk of hatred, discrimination, or violence towards, individuals possessing particular ascriptive characteristics (defined below as ‘target group members’: see below 994).

¹² See, eg, *Criminal Code*, RSC 1985, c C-46, ss 318(4), 319(1)–(2), (7); *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 10. See also *Strafgesetzbuch* [Criminal Code] (Germany) § 130. In June 2020, the Cologne Upper Regional Court held that ‘sections of the population’ for the purposes of that provision includes women: ‘German Hate Speech Laws Also Cover Misogynist Abuse, Court Rules’, *DW* (Web Page, 15 June 2020) <<https://www.dw.com/en/german-hate-speech-laws-also-cover-misogynist-abuse-court-rules/a-53819941>>, archived at <<https://perma.cc/23J4-RE4Z>>.

¹³ Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) (‘*Tasmanian Act*’) prohibits ‘conduct which offends, humiliates, intimidates, insults or ridicules’ a person on the basis of various defined attributes, including ‘gender’: at s 16. It covers only speech directed at and about a person, rather than a group of people, so it applies to speech directed at and about individual, identifiable women, rather than women generally. It also only applies to speech occurring in limited spheres of public life, for example, in connection with employment or the provision of accommodation, rather than to public speech generally: at s 22(1). Consequently, sex-based vilification is not regulated in Tasmania to the same extent as other categories of vilification pursuant to s 19 of the Act. Section 17(1) is not so much a sex-based vilification law as it is an extension of existing anti-discrimination laws to encompass harmful speech engaged in in specified contexts that would not be captured by, for example, provisions prohibiting sexual harassment. (Sexual harassment offences tend to be articulated similarly to s 17(1), but additionally require that the offending conduct be *of a sexual nature*: see, eg, at ss 17(2)–(3). Section 17 of the *Tasmanian Act* is also headed ‘Prohibition of certain conduct and sexual harassment’.) Sex-based vilification is also distinct from vilification on the basis of gender identity, as is prohibited in some Australian jurisdictions: see, eg, *Anti-Discrimination Act 1991* (ACT) s 67A (‘*ACT Act*’); *Anti-Discrimination Act 1991* (Qld) s 124A (‘*Queensland Act*’). Gender identity as a category of vilification is typically addressed to vilifying speech directed at and about transgender and intersex persons: see, eg, *Anti-Discrimination Act 1977* (NSW) s 38S (‘*NSW Act*’), and excludes vilification directed at and about women on the basis of their female sex: see, eg, *ACT Act* (n 13) Dictionary (definition of ‘gender identity’); *Queensland Act* (n 13) sch (definition of ‘gender identity’); *Tasmanian Act* (n 13) s 3 (definition of ‘gender identity’).

¹⁴ In the Australian context, the recently introduced Racial and Religious Tolerance Amendment Bill 2019 (Vic) (‘Racial and Religious Tolerance Amendment Bill’) and its second reading speech are notable exceptions: Victoria, *Parliamentary Debates*, Legislative Council, 28

tion on the basis of other ascriptive characteristics, including, for example, race, religion, sexuality, gender identity, intersex status, disability, or HIV/AIDS status, is unlawful under international law and in many domestic jurisdictions.¹⁵ The socio-legal implications of the harms and regulation of

August 2019, 2725–7 (Fiona Patten). The Amendment Bill proposes to amend the *Racial and Religious Tolerance Act 2001* (Vic) (*'Racial and Religious Tolerance Act'*) to include, among other 'protected attributes', 'sex characteristics' and 'gender' as categories of vilification. If the Bill is passed, it will become unlawful in Victoria to 'engage in [public] conduct that is likely to incite hatred against, serious contempt for, or severe ridicule of' a person or class of persons on the basis of her/his/their sex characteristics and/or gender: *Racial and Religious Tolerance Amendment Bill* (n 14) cl 1. A discussion of the merits of the Bill is outside the scope of this article. However, given its treatment of sex-based vilification as speech that harms women and men equally, and given its focus on causal rather than constitutive harms, the proposed sex-based vilification law is prima facie inappropriate and inadequate to address the systemic harms of such speech to women, as I conceptualise those harms in this article. Some further notable exceptions in the Australian context are Tanya D'Souza et al, 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' (2018) 41(3) *University of New South Wales Law Journal* 939; de Silva (n 1); Kylie Weston-Scheuber, 'Gender and the Prohibition of Hate Speech' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 132. See also New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Report No 92, November 1999) [7.86]–[7.87]. Scholarship on discrete categories of harmful, sex-based speech, for example, sexual harassment, some pornography, and obscenity is relatively well established. Some of the most influential literature on pornography is referenced in this article. There is also a growing body of scholarship on harmful, sex-based online speech: see, eg, Citron (n 8). What the extant scholarship does not do, and what I begin to do in this article, is provide a functional account of the unifying ways in which those categories of speech harm women as *sex-based vilification*.

¹⁵ For example, each of those categories of vilification is prohibited in varying forms in one or more Australian jurisdictions: *Racial Discrimination Act 1975* (Cth) s 18C (*'Racial Discrimination Act'*); *Criminal Code Act 1995* (Cth) ss 80.2A–80.2B, 80.2D; *ACT Act* (n 13) s 67A; *Criminal Code 2002* (ACT) s 750; *NSW Act* (n 13) ss 20C, 38S, 49ZT, 49ZXB; *Crimes Act 1900* (NSW) s 93Z; *Queensland Act* (n 13) ss 124A, 131A; *Civil Liability Act 1936* (SA) s 73; *Racial Vilification Act 1996* (SA) s 4; *Tasmanian Act* (n 13) s 19; *Racial and Religious Tolerance Act* (n 14) ss 7–8, 24–5; *Criminal Code Act Compilation Act 1913* (WA) ss 77–80. In September 2017, the Northern Territory Department of the Attorney-General and Justice published a discussion paper in relation to, among other things, amending the *Anti-Discrimination Act 1992* (NT) to include anti-vilification laws prohibiting offensive conduct on the basis of race, religion, disability, sexual orientation, gender identity, and intersex status: Department of the Attorney-General and Justice (NT), 'Modernisation of the Anti-Discrimination Act' (Discussion Paper, September 2017). For examples of categories of vilification prohibited in foreign domestic jurisdictions, see Alexander Brown, *Hate Speech Law: A Philosophical Examination* (Routledge, 2015) ch 2. Racial and religious vilification are also prohibited under international law: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), arts 1, 4; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 20.

those categories of vilifying speech, including, in particular, racial and religious vilification, have also been more extensively considered at the scholarly and policy levels in many jurisdictions.¹⁶

The sex-based gap in anti-vilification laws, when viewed alongside the pervasiveness of sex-based vilification, raises various questions from a legal perspective. For example, is the 'problem' of sex-based vilification, including the frequency and manner of its occurrence, a problem that is relevant to law? Are there coherent justifications for the sex-based gap in existing anti-vilification laws, including free speech considerations, if any, that apply differently or particularly to sex-based speech? What would be the utility, if any, of extending existing anti-vilification laws to include sex as a category of vilification? Central to those questions is the issue of harm. Any meaningful consideration of the cogency of regulating sex-based vilification, whether by extending existing anti-vilification laws or otherwise, requires understanding the harms of such speech. Specifically, it requires understanding whether sex-based vilification *does* harmful things, *how* it does those things, and *what* those things are.

Nevertheless, the functions of sex-based vilification, as well as those of potential sex-based vilification laws, remain unaddressed in any detail in the limited literature in this area. For example, in a recent article published in the *University of New South Wales Law Journal*, Tanya D'Souza, Laura Griffin, Nicole Shackleton, and Danielle Walt argue that 'by failing to address gendered hate speech, Australian law permits the marginalisation of women and girls, and actively exacerbates their vulnerability to exclusion and gender-based harm.'¹⁷ 'Gendered hate speech' is not defined in their article, linguistically or otherwise, but I will assume that it corresponds roughly to my provisional definition of sex-based vilification.¹⁸ 'Gendered hate speech', they argue, 'is best understood as a mechanism for reinforcing power imbalances and social hierarchies, and specifically as an instrument of misogynist hostility serving to uphold patriarchal structures.'¹⁹ Those 'broader structures

¹⁶ See, eg, Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).

¹⁷ D'Souza et al (n 14) 939.

¹⁸ As I hope to make clear in this article, functional theories of vilification and sex-based vilification are preferable to linguistic or expressive conceptualisations of such speech. That is the main reason I refer to such speech as 'vilification' and 'sex-based vilification', rather than 'hate speech' or 'sex-based hate speech'. See above n 1 as to my use of 'sex' and 'sex-based vilification' in favour of 'gender' and 'gender(ed) vilification'.

¹⁹ D'Souza et al (n 14) 967 (citations omitted).

both give rise to [gendered hate speech] and are reinforced by it'.²⁰ Accordingly, 'state inaction, in the form of failing to legislate, works to produce women's vulnerability to [gendered hate speech] in public spaces', and 'legislation against [gendered hate speech] could be seen as an important tool for interrupting the social and discursive production of women's vulnerability'.²¹ Their article is a welcome addition to the literature as it partly addresses the relative invisibility in socio-legal scholarship of sex as a category of vilification. It is also correct and important to situate sex-based vilification, as they seek to do, within existing structures of male dominance and female subordination in patriarchal societies as speech that is both symptomatic of and that (re)enacts those structures. Notwithstanding those contributions, what remains absent from their article and the literature is an account of *how* sex-based vilification harms in relevant ways and *how* legislation regulating such speech may mitigate those harms.

In this article, I seek to address some of those gaps in the literature on sex-based vilification and its potential legal regulation by conceptualising sex-based vilification with reference to its harms. As mentioned above, a proper and detailed understanding of those harms is overlooked in the literature and is fundamental to legal considerations of such speech. I rely on extant critical and speech act theory scholarship to arrive at a functional theory of sex-based vilification, as relevant to law, as discriminatory treatment of women that systemically subordinates and silences women on the basis of their sex.²² I conceptualise such speech as speech that *does* things, that does *harmful* things, and that both causes *and constitutes* systemic subordination and silencing harms to women. On the basis of my functional theory, I argue that the enactment of sex-based vilification laws may be seen to constitute a 'counter-speech act' by the state that may mitigate the harms to women of sex-based vilification.

I begin in Part II by briefly introducing speech/conduct dualism and resulting arguments that dominate liberal free speech theory and discussions around the regulation of prima facie harmful speech in liberal democracies. I then examine the tenability of the speech/conduct distinction with reference to the work of JL Austin, who was the earliest expositor of what is now well

²⁰ Ibid 968.

²¹ Ibid 972.

²² Whether sex-based vilification as speech that subordinates and silences women on the basis of their sex is a subset of speech that prima facie expresses contempt for women on the basis of their sex (as I have provisionally conceptualised sex-based vilification for now), or if those categories overlap entirely, is irrelevant for the purposes of my discussion.

known as speech act theory. Speech act theory remains influential and demonstrates how ‘to say something is to do something.’²³ In Part III, I consider whether speech can do harmful things. My discussion in that part centres on the work of Rae Langton, who effectively uses Austinian speech act theory to demonstrate that some speech, when spoken with authority, can harm.²⁴ I also refer to work by Mary Kate McGowan that demonstrates that speech may harm ‘covertly’, even if it is only trivially authoritative. In Part IV, I argue for a functional theory of sex-based vilification with reference to its harms. I consider key extant critical race and feminist accounts of discriminatory, harmful speech — namely, racist speech and some pornography — to construct a more complete account of the nature of harms constituted and caused by such speech. Those accounts weigh heavily against orthodox liberal understandings of speech harms as empirically indefensible, causally attributable to hearers rather than speakers, or otherwise immaterial to law. On the basis of those accounts, I argue that vilifying speech is discriminatory treatment that constitutes and causes subordinating and silencing harms to individuals possessing relevant ascriptive characteristics (‘target group members’). Accordingly, I argue that sex-based vilification is discriminatory treatment of women that constitutes and causes subordination and silencing harms to women. It constitutes women as subordinate and silent and, by doing so, causes them to be subordinated and silenced. As sex-based vilification derives its authority at least partly from women’s structural or systemic oppression to men in patriarchal societies, and as it harms women on the basis of their sex, its constitutive and causal harms of subordination and silencing are systemic harms. That is *how* sex-based vilification functions to harm women, and it is *those* functions of sex-based vilification that lend context to the legal questions: should sex-based vilification be regulated, how should it be regulated, and what, plausibly, can regulation achieve? In Parts V and VI, I partly address those questions by considering some implications of my functional theory for law. In Part V, I argue that states would, in enacting

²³ JL Austin, *How to Do Things with Words*, eds JO Urmson and Marina Sbisa (Harvard University Press, 2nd ed, 1975) 12 (emphasis in original). Of course, to do something is also to say something. See, eg, Charles R Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’ in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 53, 59, in relation to the United States Supreme Court’s reasoning in the desegregation case of *Brown v Board of Education*, 347 US 483 (1954) (‘*Brown*’) as to the communicative functions or message of segregation.

²⁴ My discussion of Langton’s work continues in Parts IV(A)(1)(a) and IV(A)(2)(a) below with respect to the subordinating and silencing functions of some pornography.

sex-based vilification laws, engage in counter-speech acts that 'speak back' against sex-based vilification and may mitigate its harms. That is, the state has authority to enact permissibility facts in and of law and in and of patriarchal oppression that compete with women's systemic subordination and silencing through sex-based vilification. I also argue that the state's silence as to sex-based vilification is an act of accommodation that derives authority on such speech and may constitute the permissibility facts it (re)enacts as 'correct play' for some hearers. In Part VI, in order to further demonstrate the advantages for law of my functional theory and to broaden my contributions to the literature, I respond specifically to two key modes of analysis that D'Souza et al use in their article. First, I argue that they misconceive causal and constitutive speech harms and their interrelationship. Second, I argue that their primary argument, that is, their categorisation of existing Australian legal definitions of vilifying speech as 'progressive' or 'conservative', while novel, fails adequately to account for sex-based vilification, properly conceived as relevant to law, as discriminatory treatment constituting systemic subordination and silencing of women. It therein also fails adequately to account for relevant free speech considerations.

My contributions in this article to the legal literature on sex-based vilification and the 'hate speech' literature are fourfold. First, I synthesise key extant critical and speech act theory scholarship regarding the harms of racist speech and some pornography to demonstrate that such speech functions in analogous ways to harm minorities and women. As far as I am aware, speech act theory has not previously explicitly been applied to critical scholarship on racist speech in order to analyse its operative similarities to pornography, some of which is sex-based vilification. Second, I conceptualise vilification and sex-based vilification, as relevant to law, functionally, with reference to their harms. That is contra much of the literature on 'hate speech' regulation, which tends to conceptualise vilifying speech linguistically, with reference to its expressive qualities, such that it is distinguished and distinguishable from (other) conduct constituting harm.²⁵ Third, I conceptualise the enactment of sex-based vilification laws as a counter-speech act by the state that may quash or mitigate the harms to women of sex-based vilification. I conceptualise the state's silence in response to sex-based vilification as accommodation of and derivation of authority on such speech. Fourth, I respond explicitly to some aspects of D'Souza et al's arguments that might benefit from the application of

²⁵ Cf Katharine Gelber, 'Differentiating Hate Speech: A Systemic Discrimination Approach' (2019) *Critical Review of International Social and Political Philosophy* 1–22 ('Differentiating Hate Speech').

my theory. Accordingly, my functional theory of sex-based vilification with reference to its harms has several advantages for legal considerations of such speech and its potential regulation. It assists to: understand the harms of sex-based vilification as constitutive, rather than merely causal; illuminate how law might mitigate those harms; and enact sex-based vilification laws that are adequately and appropriately responsive to those harms, while being sufficiently narrow to account for free speech concerns.

A final point before I move on. There are a number of authors who are not feminist or critical race theorists who have also written meaningfully about the subordination and silencing harms of vilifying speech. Some of those authors may even be described as traditionally 'liberal'. Though I have referred to those authors where appropriate, my focus, particularly in Part IV, is to amalgamate and amplify the scholarship of critical authors. Orthodox liberal views, including ones that engage intelligently with the harmful functions of vilifying speech, have tended to dominate debates around speech regulation. They have formed the basis of the 'neutral' starting point from which critical theorists have had to argue their 'radical' positions regarding speech harms and in favour of regulation.²⁶ My inversion of that ordering is deliberate. I do it because target group members are best placed to speak to the harms of vilifying speech, and feminist and minority socio-legal scholarship is most representative of *their* voices.²⁷

²⁶ See, eg, Catharine A MacKinnon, 'The Sexual Politics of the First Amendment' in Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 206, 207–8.

²⁷ Critical race theory, for example, 'recognizes that the experience of racism, of persecution for membership in a group, makes the group's consciousness the victim's consciousness, all of which is relevant in assessing the harm of racist speech': Mari J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 17, 46. See also below Part IV. Target group members' voices and experiences, even as imagined, are generally absent from orthodox liberal scholarship on vilifying speech, with a few notable exceptions: see, eg, Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). As critical theorists have also noted, that is a telling and material absence that enables 'members of the empowered group [to] simply announce to the disaffected one that they do not see their problem, that they have looked for evidence of harm but cannot find it': Richard Delgado and Jean Stefanic, *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* (NYU Press, 1997) 37. The liberal literature on vilifying speech, including that on pornography, is also replete with examples of members of the 'empowered group' dismissing target group members' available testimonies of harm out of hand: see, eg, Ronald Dworkin, 'Women and Pornography' (1993) 40(17) *New York Review of Books* 36.

II SPEECH AS CONDUCT

Historically, liberal philosophy has maintained a marked distinction between speech and conduct.²⁸ That divide is fundamental to a free speech principle, or the idea that speech, unlike conduct, ought to be free from state intervention.²⁹ Katharine Gelber describes three influential arguments based on the distinction. First, ‘speech is not a form of action, and it cannot coerce.’³⁰ Second, ‘the maintenance of free speech is “only coherent to the extent that speech can be distinguished from other areas of human conduct and activity”.’³¹ Third, ‘to equate the uttering of offensive words with committing an act of violence would be “falsely and mischievously conflating ideological dissidence with overt acts”.’³² Liberal theories of free speech thus support a view that, even if speech can harm, causal responsibility for such harm ought not to be attributed to speakers in the way that causal responsibility for harmful actions may be attributed to actors.³³ That distinction between actions that may harm in and of themselves and speech that may ‘only’ harm through its normative or persuasive force has been central to liberal thought regarding the legitimacy or otherwise of state restrictions on particular categories of speech, including vilifying speech.³⁴

²⁸ See, eg, Susan J Brison, ‘Speech, Harm, and the Mind–Body Problem in First Amendment Jurisprudence’ (1998) 4(1) *Legal Theory* 39, 39–40, 53, 60 (‘The Mind–Body Problem’); Susan J Brison, ‘Speech and Other Acts: A Reply to Charles W Collier, “Hate Speech and the Mind–Body Problem: A Critique of Postmodern Censorship Theory”’ (2004) 10(4) *Legal Theory* 261, 270 (‘Speech and Other Acts’). That distinction is grounded in Cartesian philosophy, which is in turn grounded in mind/body dualism: see, eg, Katharine Gelber, *Speaking Back: The Free Speech versus Hate Speech Debate* (John Benjamins, 2002) 50 (‘Speaking Back’); Brison, ‘Speech and Other Acts’ (n 28) 270.

²⁹ Gelber, *Speaking Back* (n 28) 50; Brison, ‘The Mind–Body Problem’ (n 28) 40–1; Eric Heinze, ‘Towards a Legal Concept of Hatred: Democracy, Ontology, and the Limits of Deconstruction’ in Thomas Brudholm and Birgitte Schepelern Johansen (eds), *Hate, Politics, Law: Critical Perspectives on Combating Hate* (Oxford University Press, 2018) 94, 98–9.

³⁰ Gelber, *Speaking Back* (n 28) 50, citing Harry M Bracken, *Freedom of Speech: Words Are Not Deeds* (Praeger, 1994) 8.

³¹ Gelber, *Speaking Back* (n 28) 50, quoting Eric Barendt, *Freedom of Speech* (Clarendon Press, 1st ed, 1985) 6.

³² Gelber, *Speaking Back* (n 28) 51, quoting Bracken (n 30) 51.

³³ Brison, ‘The Mind–Body Problem’ (n 28); Brison, ‘Speech and Other Acts’ (n 28) 270–1.

³⁴ Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016) 32–5. See, eg, Kent Greenawalt, ‘Insults and Epithets: Are They Protected Speech?’ (1990) 42(2) *Rutgers Law Review* 289–90; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 102–3. That view is not restricted to legal philosophers: see, eg, *American Booksellers Association, Inc v Hudnut*, 771 F 2d 323, 329 (7th Cir, 1985) (‘Hudnut’), where Easterbrook J found that ‘[the negative effects of pornography] simply [demonstrate]

In the important *How to Do Things with Words*, JL Austin challenges the tenability of that speech/conduct dualism.³⁵ He is critical of philosophers' tendency to focus on speech as descriptions or statements of fact, and instead argues that some speech, what he terms 'performatives',³⁶ can additionally *do things*.³⁷ Austin delineates three categories of 'speech acts' or ways in which speech can do things. First, the act of 'saying something', in the sense of uttering certain noises or words in a certain construction and with a particular meaning, is a locutionary act.³⁸ Second, *in* performing a locutionary act, a speaker may also perform an illocutionary act. For example, in saying 'I do', they may marry. Third, *by* performing a locutionary act, a speaker may perform a perlocutionary act. Perlocutionary acts are the 'consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons' that a locutionary act produces.³⁹ Speech act theory thus provides a framework through which to conceive of speech as capable of constituting action, rather than merely saying things.⁴⁰ If a performative utterance is successful, or 'happy', it is the case that what the speaker should be described as doing, or what the speaker is stating they are doing, is actually being done.⁴¹

Why is it important to refer to *happy* performative utterances rather than performative utterances *per se*? Austin argues that in order for performative speech to do things, certain 'felicity conditions' need to be met, in addition to the performative utterance itself occurring. If those conditions are not met, performative speech will be 'unhappy'.⁴² So, some of the felicity conditions for marriage, in addition to the utterance of 'I do', may be that the persons

the power of pornography as speech. All of these unhappy effects depend on *mental intermediation*' (emphasis added). Cf Frederick Schauer, 'The Phenomenology of Speech and Harm' (1993) 103(4) *Ethics* 635, as well as the critical scholarship referred to in Part IV below.

³⁵ Austin (n 23).

³⁶ *Ibid* 12.

³⁷ *Ibid* 4–6.

³⁸ *Ibid* 94–5. Austin's interest in locutionary acts is mainly to distinguish them from other acts with which he is primarily concerned.

³⁹ *Ibid* 101.

⁴⁰ Of course, speech act theory is by no means the only framework through which to understand how speech acts or the specific claims that some critical race theorists and feminists make as to the harms of racist speech and some pornography respectively: Catharine A MacKinnon, 'Foreword' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) vi, xvi ('Foreword to *Speech and Harm*').

⁴¹ Austin (n 23) 14–15.

⁴² *Ibid*.

marrying are consenting adults and, in many jurisdictions, of opposite sexes, and that the celebrant is duly registered. If those conditions are not met, the act of marrying ‘misfires’; it ‘is not successfully performed at all, does not come off, is not achieved.’⁴³ Different infelicities can be combined or can overlap, and it may be a choice as to how the unhappiness in any given example is classified.⁴⁴ Each of the three types of speech acts is susceptible to failure. Unless a particular act is constituted, the illocutionary function of an utterance will not have been successfully, or happily, performed. Generally, what is required for a successful illocution is the bringing about, in the audience, of the understanding of the meaning and force of the locution. In other words, ‘the performance of an illocutionary act involves the securing of uptake.’⁴⁵ In a perlocutionary sense, a speech act may misfire if it produces effects or consequences that are unintended.⁴⁶

Although Austin is at pains to draw a bright line between illocutions and perlocutions,⁴⁷ that distinction is not so clear in practice. Austin himself acknowledges that each type of speech act ‘embraces doing many things at once to be complete.’⁴⁸ What is required in assessing the illocutionary or perlocutionary functions of an utterance is not merely to study the utterance itself, but to understand the ‘speech situation’ in which it occurs.⁴⁹ As John Searle argues, the meaning and force of utterances are often linked. What is said, what is done, and any consequences of what is done by an utterance are all dependant on the utterance’s broader context.⁵⁰ In order to understand what speech acts *really* do, both Austin and Searle advocate for the examina-

⁴³ Ibid 15–16.

⁴⁴ Ibid 25–6. See generally at 12–24.

⁴⁵ Ibid 116–17 (emphasis omitted). John Searle writes that recognition on a hearer’s part is necessary for a speaker to fully succeed in particular speech acts: see, eg, John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969) 43–5. Jennifer Hornsby refers to ‘reciprocity’: Jennifer Hornsby, ‘Speech Acts and Pornography’ in Susan Dwyer (ed), *The Problem of Pornography* (Wadsworth, 1995) 220, 224. See also Jennifer Hornsby and Rae Langton, ‘Free Speech and Illocution’ (1998) 4(1) *Legal Theory* 21, 25.

⁴⁶ Austin (n 23) 106.

⁴⁷ See especially ibid 109–20.

⁴⁸ Ibid 108. See also MacKinnon, ‘Foreword to *Speech and Harm*’ (n 40) xvi. MacKinnon argues that ‘both illocution and perlocution are causal theories, the former more immediately and with fewer intervening contingencies than the latter.’

⁴⁹ Austin (n 23) 139.

⁵⁰ John R Searle, ‘Austin on Locutionary and Illocutionary Acts’ in Isaiah Berlin et al (eds), *Essays on JL Austin* (Clarendon Press, 1973) 141, 147–8 (‘Austin on Acts’).

tion of families of related, overlapping speech acts.⁵¹ Understanding that speech can do different things in different contexts is important. As critical theorists, in particular, have noted, speech that appears ineffectual when viewed in isolation may be seen to harm when viewed in light of, and precisely because of, the historical and cultural contexts in which it occurs.⁵²

III SPEECH AS HARMFUL CONDUCT

It was not until the early 1990s that explicit links were drawn between Austin's insights and the problem of potentially harmful speech. In her seminal article, 'Speech Acts and Unspeakable Acts', Rae Langton provides an Austinian account of how some speech can harm and argues that it may, for example, constitute and cause subordination.⁵³

To subordinate someone is 'to put them in a position of inferiority or loss of power, or to demean or denigrate them.'⁵⁴ Consider Langton's example: 'whites only', uttered in apartheid South Africa. In that context, that utterance has both perlocutionary and illocutionary functions. It has some significant perlocutionary functions.⁵⁵ Additionally, the speech acts of apartheid, Langton argues, are illocutionary acts of subordination by virtue of at least three features: 'They *rank* blacks as having inferior worth. They *legitimate* discriminatory behavior on the part of whites. And finally, they *deprive* blacks of some important powers: for example, the power to go to certain areas and the power to vote.'⁵⁶

Crucially, the illocutionary act of legitimating something, for example, the subordination of a group of people, is not the same as the perlocutionary act

⁵¹ Austin (n 23) 150; *ibid* 148–9.

⁵² See below Part IV.

⁵³ Rae Langton, 'Speech Acts and Unspeakable Acts' in Rae Langton (ed), *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 25.

⁵⁴ *Ibid* 35, citing Catharine A MacKinnon, 'Francis Biddle's Sister: Pornography, Civil Rights, and Speech' in Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 163, 176 ('Francis Biddle's Sister').

⁵⁵ Those perlocutionary effects include that

it keeps blacks away from white areas, ensures that only whites go there, and perpetuates racism. It is — one might say — a perlocutionary act of subordination. But it is also an illocutionary act: it orders blacks away, welcomes whites, permits whites to act in a discriminatory way towards blacks. It subordinates blacks.

Langton, 'Speech Acts and Unspeakable Acts' (n 53) 35.

⁵⁶ *Ibid* (emphasis in original).

of making people believe that something is legitimate.⁵⁷ While ‘one effect of legitimating something is that people believe it is legitimate ... they believe it is legitimate *because it has been legitimated*, not vice versa.’⁵⁸ Of course, not ‘all acts of ranking, legitimating, or depriving of powers are acts of subordination.’⁵⁹ The speech acts of apartheid are subordinating acts because ‘they *unfairly* rank blacks as having inferior worth; they legitimate *discriminatory* behavior on the part of whites; and they *unjustly* deprive [Blacks] of some important powers.’⁶⁰

Langton characterises the performative speech of apartheid as what Austin terms exercitives and verdictives. Exercitives are illocutions that ‘confer powers and rights on people, or deprive people of powers and rights.’⁶¹ They might include ‘[a]ctions of ordering, permitting, prohibiting, authorizing, enacting law’, or legitimating behaviours.⁶² Verdictives are illocutions involving ‘the authoritative delivery of a finding about some matters of fact or value’, which might include ranking or valuing.⁶³ Importantly, verdictives may have an exercitive element to them. For example, in passing a law ranking Blacks as inferior to whites, a legislator makes Blacks *count as* inferior, even though they are not inferior in fact.⁶⁴

As is clear from the referenced examples, it is a condition of successful exercitive and verdictive illocutions that their speakers have authority in a relevant domain.⁶⁵ So, in order for a certain class of speech act to be a subordinating speech act, its speaker must have the requisite authority.⁶⁶ That is important in distinguishing between speech that merely describes subordination (or speech that evinces an intention by the speaker to subordinate) and speech that actually is constitutive of subordination. Substantive authority may be officially recognised (for example, in the case of a legislator) or it may be less formal or customary (for example, in the case of a parent in relation to

⁵⁷ Ibid.

⁵⁸ Ibid (emphasis added).

⁵⁹ Ibid 36.

⁶⁰ Ibid (emphasis in original).

⁶¹ Ibid.

⁶² Ibid 36–7, citing Austin (n 23) 152–6.

⁶³ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 36.

⁶⁴ Rae Langton, ‘Pornography’s Authority? Response to Leslie Green’ in Rae Langton (ed), *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 89, 94 (‘Pornography’s Authority’).

⁶⁵ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 37.

⁶⁶ Ibid.

their child).⁶⁷ Alternatively, as Mary Kate McGowan argues, authority may derive on a speaker trivially, by virtue of their participating in a 'rule-governed activity' in which they may, with their speech, enact 'permissibility facts'.⁶⁸ I refer to authority in that sense as 'covert authority'. Covert authority allows speakers to do covertly with their speech what they cannot do overtly.⁶⁹ Speakers have power to enact permissibility facts in and of rule-governed activities if their speech abides by the relevant rules. Structural or systemic oppression, for example, of Blacks by whites or women by men, is a rule-governed activity.⁷⁰ A speaker whose utterances are consistent with and reinforce rules of white supremacy has (at least) covert authority in relevantly racist societies to (re)enact permissibility facts that uphold white supremacy. A speaker whose utterances are consistent with and reinforce rules of patriarchal oppression has (at least) covert authority in patriarchal societies to (re)enact permissibility facts that uphold patriarchal oppression.⁷¹ Authority

⁶⁷ Ibid.

⁶⁸ Mary Kate McGowan, 'Oppressive Speech' (2009) 87(3) *Australasian Journal of Philosophy* 389.

⁶⁹ Ibid 395–7. McGowan writes that 'covert exercitives' are moves in rule-governed activities that 'enact changes in what is subsequently permissible in that activity ... [W]hen speech constitutes a move in a rule-governed activity, it has exercitive force in virtue of enacting new permissibility facts for the activity in which it is a move': at 396. Speakers are able to enact permissibility facts because 'the power to ... [do so] resides, not in the speaker ... but in the rule-governed activity in question. When one performs a covert exercitive, one enacts permissibility facts, not by exercising one's own authority or power, but by triggering the rules of the system': at 402. As vilifying utterances are not only covert exercitives but also 'conversational exercitives' that invoke rules of accommodation, they are able to 'enact permissibility facts without expressing the content of those facts, without the speaker intending to be doing so, and without the hearer recognizing that it is so': Mary Kate McGowan, 'Conversational Exercitives and the Force of Pornography' (2003) 31(2) *Philosophy and Public Affairs* 155, 169 ('Conversational Exercitives'). McGowan's work relies on David Lewis's work on rules of accommodation: see David Lewis, *Philosophical Papers* (Oxford University Press, 1983) vol 1, 233–49.

⁷⁰ McGowan, 'Oppressive Speech' (n 68) 395. It is relatively uncontroversial that women and racial minorities are subjected to systemic oppression at a societal level on the basis of their sex and/or race respectively. For guidance as to what other groups may be subjected to systemic oppression at a societal level, see Gelber, 'Differentiating Hate Speech' (n 25) 12–15.

⁷¹ That is,

being a move [in a rule-governed activity] requires only that the action in question be a contribution to, and thus a component of, the activity in question. Since speech is one way to differentially treat people, and since it is one way to differentially treat people in virtue of a person's membership in a socially marked group, speech is certainly sometimes a move (in the rule-governed activity) of oppression. Racist and sexist speech, for example, are such moves.

so understood brings us full circle in at least two related ways. First, it accords with what Austin and Searle say about the importance of the speech situation: what is requisite authority for a particular utterance to do a particular thing depends on the speech situation in which that utterance occurs. Second, it accords with what feminist and critical race theorists have been saying for decades about the ongoing constitution and reconstitution of systemically oppressed peoples *as oppressed* in oppressive societies. Authority as existing and functioning as cumulative, reinforcing, and systemically derived is explicitly identified in the critical scholarship discussed below in Part IV. What authority so understood means, its significance, is that 'ordinary' speakers have the requisite authority to subordinate others with their speech. Consider again Langton's example. Does a speaker who utters 'whites only' have the requisite authority to subordinate Blacks by ranking them as inferior to whites, by legitimating discriminatory behaviour against them, or by depriving them of their powers and rights? It depends on who the speaker is and where and when they are speaking. A legislator in Pretoria in the late 1980s certainly had that authority. A private citizen also has that authority if the 'speech situation' in which their utterance occurs allows. 'Whites only' subordinates when uttered by a private citizen who has covert authority if, for example, it is uttered within a historical or cultural context in which Blacks were, or are, seen to be inferior to whites.

Langton's work demonstrates that Austinian speech act theory can provide a plausible account of speech acts that subordinate. If she is correct, and if we take subordination, at least, to be harm, some speech, when spoken with the requisite authority, or when it produces particular effects, is capable of harming. That speech may be capable of harming in a causal sense. That is, it may harm as one of its perlocutionary functions. Additionally or alternatively, it may be capable of harming in a constitutive sense. It may harm as one of its illocutionary functions. It may *be* the harm in and of itself, regardless of its

McGowan, 'Oppressive Speech' (n 68) 397. The interrelatedness of constitutive and causal harms of systemic subordination is conceptualised as the core of systemic oppression in the critical scholarship discussed in Part IV below. As discussed in that part, whether and in what ways particular hearers act on enacted permissibility facts, with their words or otherwise, is, of course, an empirical matter. For McGowan, what is important is that the (re)enactment of permissibility facts of systemic oppression is, in and of itself, a constitutive speech harm of systemic subordination, and that constitutive subordination may plausibly result in the systemic subordination of women causally or 'in fact': at 399–400. See below n 86 in relation to the 'self-fulfilling' functions of pornography.

normative or persuasive force for some hearers. Langton's arguments⁷² have been incorrectly interpreted by those critical of them as attempting to provide some stipulative or essentialist understanding of how particular categories of utterances harm.⁷³ However, what Langton says is not that some utterances constitute and cause subordination per se, but that they constitute and cause subordination in ways that (ought to) matter when they are uttered with the requisite authority.⁷⁴ McGowan's work clarifies that the requisite authority is, in many contexts, relatively trivial. Vilification is (at least covertly) authoritative and constitutes subordination in societies in which target group members are systemically oppressed as it (re)enacts permissibility facts in and of that oppression. Sex-based vilification is (at least covertly) authoritative and constitutes subordination in patriarchal societies as it (re)enacts permissibility facts in and of patriarchal oppression. Constitutive subordination may not always result in subordination in fact, in a causal sense,⁷⁵ but systemic causal subordination is dependent on systemic constitutive subordination. Women in patriarchal societies are caused to be subordinated on the basis of their sex because they are constituted as subordinate on that basis — repeatedly, continuously, and cumulatively — including through the speech acts of even trivially authoritative speakers who participate in patriarchy. Of course, as Langton goes on to discuss in 'Speech Acts and Unspeakable Acts,' subordination is only one of the ways in which speech can harm. Earlier feminist scholarship on pornography, as well as earlier scholarship by critical race

⁷² I refer in particular to Langton's arguments as to pornography's force, as well as the feminist arguments on which she relies, regularly attributed to MacKinnon and Dworkin. Those arguments are discussed in Parts IV(A)(1)(a) and IV(A)(2)(a) below.

⁷³ See, eg, Leslie Green, 'Pornographizing, Subordinating, and Silencing' in Robert C Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Research Institute for the History of Art and the Humanities, 1998) 285.

⁷⁴ See, eg, Langton, 'Pornography's Authority' (n 64); Rae Langton, 'Pornography's Divine Command? Response to Judith Butler' in Rae Langton (ed), *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 103 ('Pornography's Divine Command'). See also Rae Langton, 'Dangerous Confusion? Response to Ronald Dworkin' in Rae Langton (ed), *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 65, 69–70; Hornsby and Langton (n 45). McGowan has written about how speakers may, with no particular authority, contribute to the 'perpetual re-enactment of social constructions' or what Butler may describe as 'reiteration': McGowan, 'Oppressive Speech' (n 68) 401–2 n 27, citing Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997). That premise has been accepted, at least implicitly, by some courts: see, eg, *Hudnut* (n 34); *Eatock v Bolt* (2011) 197 FCR 261, 357 [421] (Bromberg J) ('*Eatock*'), in the Australian context.

⁷⁵ See above n 71.

theorists grappling with the problem of racist speech, which I discuss below, provide a more complete picture of the harms of vilification.

IV A FUNCTIONAL THEORY OF SEX-BASED VILIFICATION WITH REFERENCE TO ITS HARMS

A Subordination and Silencing Harms of Vilifying Speech

1 *Subordination Harms of Vilifying Speech*

(a) *Subordination Harms of Some Pornography*

The focus of Langton's work in 'Speech Acts and Unspeakable Acts' is to defend claims previously made by feminist scholars, most notably Catharine MacKinnon and Andrea Dworkin in the 1980s, that some pornography acts to subordinate and silence women.⁷⁶ Their position as to the force of some pornography is set out in a number of their works.⁷⁷ For ease of reference, I refer mainly in this article to one of MacKinnon's key works, 'Francis Biddle's

⁷⁶ MacKinnon and Dworkin define pornography as a subset of sexually explicit speech that depicts women

dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised, or hurt in a context that makes these conditions sexual.

MacKinnon, 'Francis Biddle's Sister' (n 54) 176 (citations omitted). That is a stipulative definition in the sense that MacKinnon and Dworkin deal with pornography so defined as speech that subordinates and silences. I use 'pornography' in this article in a non-stipulative sense, in line with my provisional definition of sex-based vilification, to mean sexually explicit speech that prima facie expresses contempt for women on the basis of their sex. That pornography as defined by MacKinnon and Dworkin occurs prolifically, particularly online, and that it would, in most instances, constitute sex-based vilification in my sense is relatively uncontroversial. For a detailed discussion of pornography's locutionary content, see Rae Langton and Caroline West, 'Scorekeeping in a Pornographic Language Game' (1999) 77(3) *Australasian Journal of Philosophy* 303. That pornography may and does now exist in forms that fit neither MacKinnon and Dworkin's stipulative definition of pornography, nor my definition of sex-based vilification, is also uncontroversial. To be clear, the existence of such pornography does not problematise MacKinnon and Dworkin's arguments as to the subordinating and silencing force of pornography as they define it, or my application of those arguments to pornography constituting sex-based vilification as I define it. That is, those arguments remain coherent and persuasive in relation to pornography as so defined, notwithstanding the emergence of more contemporary pornographic forms, including, for example, some lesbian and 'feminist' pornography.

⁷⁷ See, eg, MacKinnon and Dworkin (n 4); MacKinnon, *Only Words* (n 4); MacKinnon, *Feminism Unmodified* (n 4); Dworkin (n 4).

Sister.⁷⁸ Although MacKinnon does not refer to speech act theory when making her arguments about some pornography, she agrees with Austin that to say something is to do something.⁷⁹ Accordingly, some pornography subordinates women, argues MacKinnon, because '[m]en's power over women means that the way men see women defines who women can be.'⁸⁰ In speech act terms, men's social power means that the way men see women defines what women count as. Some pornography eroticises hierarchy, sexualises inequality, and 'constructs what a woman is as what men want from sex.'⁸¹ In doing so, it is a 'constitutive practice' of gender inequality,⁸² and a 'practice of sex discrimination.'⁸³ So conceived, it is not merely the sexually explicit *depiction* of the subordination of women, it *is* the sexually explicit subordination of women: 'It harms many women one at a time and helps keep all women in an inferior status by defining our subordination as our sexuality and equating that with our gender.'⁸⁴

⁷⁸ MacKinnon, 'Francis Biddle's Sister' (n 54).

⁷⁹ As MacKinnon explains,

authoritatively *saying* someone is inferior is largely how structures of status and differential treatment are demarcated and actualized. Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized.

MacKinnon, *Only Words* (n 4) 31 (emphasis in original).

⁸⁰ Catharine A MacKinnon, 'Not a Moral Issue' in Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 146, 148.

⁸¹ That is,

[p]ornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby *celebrates, promotes, authorizes, and legitimizes* them. More generally, it *eroticizes* the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that "the truth about sex" or just a mirror of reality. Through this process pornography constructs what a woman is as what men want from sex.

MacKinnon, 'Francis Biddle's Sister' (n 54) 171, citing Michel Foucault and Lawrence E Winters, 'The West and the Truth of Sex' (1978) 6-7(20) *SubStance* 5 (emphasis added). Other feminists have made similar claims as to pornography's social construction of women. For example, Susan Brownmiller describes pornography as 'the undiluted essence of anti-female propaganda': Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Secker & Warburg, 1975) 394.

⁸² MacKinnon, 'Francis Biddle's Sister' (n 54) 173, citing Dworkin (n 4).

⁸³ MacKinnon, 'Francis Biddle's Sister' (n 54) 176.

⁸⁴ *Ibid* 178.

In ‘Speech Acts and Unspeakable Acts’, Langton makes sense of that feminist subordination claim from an Austinian perspective.⁸⁵ Part of the claim is that some pornography subordinates women in a perlocutionary sense by normalising attitudes that may increase the risk and harms of sexual violence against them.⁸⁶ The perlocutionary claim that some pornography causes women to be harmed becomes the perlocutionary claim that some pornography causes women to be subordinated when viewed in light of ‘the asymmetric pattern of sexual violence ... not simply as harm or as crime, but as an aspect of women’s subordinate status.’⁸⁷

The feminist claim of subordination goes further; it is primarily a claim as to some pornography’s illocutionary or constitutive force. MacKinnon and other feminists have argued that some pornography represents women in

⁸⁵ The subordination and silencing claims are not linguistic or discursive claims, but Langton explains them successfully in speech act theory terms: MacKinnon, ‘Foreword to *Speech and Harm*’ (n 40) vii–ix.

⁸⁶ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 38–9, citing Edward Donnerstein, Daniel Linz and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* (Free Press, 1987); *Report of the Attorney General’s Commission on Pornography* (Final Report, July 1986) 326–7, 332; *Pornography and Sexual Violence: Evidence of the Links* (Everywoman, 1988). For discussion as to how pornography’s verdictive ranking of women as subordinate ‘self-fulfils’ in a causal sense, as well as accompanying empirical evidence, see Langton, ‘Pornography’s Authority’ (n 64) 95; Langton, ‘Pornography’s Divine Command’ (n 74) 105–9. The feminist literature generally refers to much empirical evidence that shows that pornography causes its consumers to hold attitudes normalising (sexual) violence against women: see, eg, Susan Brison, ‘“The Price We Pay”? Pornography and Harm’ in Andrew I Cohen and Christopher Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (John Wiley & Sons, 2nd ed, 2014) 319, 323–6; Mary Kate McGowan, ‘On Pornography: MacKinnon, Speech Acts, and “False” Construction’ (2005) 20(3) *Hypatia* 22, 28; MacKinnon, *Only Words* (n 4). Some liberal authors have also admitted the possibility of pornography’s causal harms: see, eg, Frederick Schauer’s evidence to the Massachusetts pornography civil rights hearing, transcribed in MacKinnon and Dworkin (n 4) 396. More recently, the causal harms of pornography have been discussed in some mainstream media: see, eg, Alys Harte, ‘A Man Tried to Choke Me during Sex without Warning’, *BBC News* (Web Page, 28 November 2019) <<https://www.bbc.com/news/uk-50546184>>, archived at <<http://perma.cc/7A9U-MZS6>>; Anna Moore and Coco Khan, ‘The Fatal, Hateful Rise of Choking during Sex’, *The Guardian* (online, 25 July 2019) <<https://www.theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex>>, archived at <<http://perma.cc/62DP-TS2C>>; Jessica Masterson, ‘The Third Wave “Dream Girl” Begs to Be Broken’, *Medium* (Web Page, 22 July 2019) <https://medium.com/@jessicamasterson_6828/the-third-wave-dream-girl-begs-to-be-broken-9eb0bb717f29>, archived at <<http://perma.cc/9HJ7-58X6>>.

⁸⁷ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 39, citing MacKinnon, ‘Francis Biddle’s Sister’ (n 54). Not to view it in this way, argue feminist scholars, ‘would be to obscure its systemically discriminatory nature, and to obscure the fact that the perpetrators are nearly always members of one class of citizens, the victims nearly always members of another’: Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 39.

such a way as to ‘rank women as sex objects, “defined on the basis of [our] looks ... [our] availability for sexual pleasure”’.⁸⁸ MacKinnon also argues that some pornography represents degrading, abusive, and criminal sexual behaviour in such a way as to *legitimate* such behaviour.⁸⁹ That is, some pornography is verdictive speech that *ranks* women as objects for sex and exercitive speech that *legitimizes* or authorises sexual violence:⁹⁰ ‘[s]ince sexual violence is not simply harm, not simply crime, but discriminatory behavior’, some pornography is a constitutive speech act of subordination.⁹¹

Feminists do not claim, and Langton does not seek to show, that all utterances the locutions of which depict subordination actually subordinate. Documentaries, police reports, and books protesting against sexual violence may all contain depictions of subordination without subordinating.⁹² Similarly, not all sexually explicit speech subordinates. With pornography, as with other utterances, it ‘depends ... on the *use* to which the locution is put’.⁹³ Recall Langton’s preliminary example concerning the speech acts of apartheid. Those speech acts, she suggests, ‘offer a clear example’ of the ‘illocutionary paradigm’ for subordination.⁹⁴ They have verdictive and exercitive force because they rank a class of people, legitimate discrimination against them, and deprive them of rights and powers. They can do those things because their speakers, most significantly legislators, occupy positions of authority. They are speech acts that achieve the relevant uptake. They are ‘*taken to be* verdictive and exercitive acts’ of ranking, legitimating, and depriving.⁹⁵ They are speech acts that give rise to discernible ‘patterns of perlocutionary effects on the beliefs and behavior of the population: whites [(and some Blacks)] believe Blacks to be inferior, believe discrimination against [Blacks] to be legitimate, and believe [Blacks] to have fewer rights’.⁹⁶ Those people accord-

⁸⁸ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 40 (emphasis in original), quoting MacKinnon, ‘Francis Biddle’s Sister’ (n 54) 173. See also Helen E Longino, ‘Pornography, Oppression, and Freedom: A Closer Look’ in Laura Lederer (ed), *Take Back the Night: Women on Pornography* (William Morrow, 1980) 40, 45–7.

⁸⁹ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 40, quoting MacKinnon, ‘Francis Biddle’s Sister’ (n 54) 171.

⁹⁰ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 40.

⁹¹ *Ibid.*

⁹² *Ibid.* 38. See above n 76 for MacKinnon and Dworkin’s and my definition of ‘pornography’.

⁹³ *Ibid.* (emphasis in original).

⁹⁴ *Ibid.* 42.

⁹⁵ *Ibid.* (emphasis added).

⁹⁶ *Ibid.* 42–3.

ingly treat Blacks as inferior, as able to be discriminated against, and as having fewer rights.⁹⁷

Pornography ‘falls short of this [illocutionary] paradigm in a number of important respects, but it may nonetheless be subordination.’⁹⁸ First, like the speech acts of apartheid, some pornography has a particular pattern of perlocutionary effects. An explanation, or at least part of an explanation, for that pattern may be the illocutionary force of such pornography.⁹⁹ Second, and more materially, argues Langton, we can look to pornography’s uptake. Some hearers of pornography ‘take it to be entertainment, escapist storytelling.’¹⁰⁰ But some hearers take it to be subordination. Some hearers ‘take [some] pornography to be something that ranks them, judges them, denigrates them, and legitimates ways of behaving that hurt women.’¹⁰¹ In such cases of disagreement, Austin suggests that utterances ought to have ‘a construction put upon them by judges,’¹⁰² though it is unclear who those judges ought to be. It seems reasonable to suggest that target group members — in this case women — are best placed to judge, through their lived experiences, what demeans them and legitimates behaviours towards them that are violent, discriminatory, or otherwise harmful.¹⁰³ Third, and most materially, Langton suggests we look to the felicity conditions for subordinating speech.¹⁰⁴ ‘Since verdictives and exercitives are ... authoritative illocutions,’ whether pornographers have the requisite authority to subordinate women is key.¹⁰⁵ If pornographers do have the requisite authority, a crucial condition of successfully subordinating speech is satisfied.¹⁰⁶ Pornography may be substantively authoritative for those learning the rules of sex from it.¹⁰⁷ Pornography that abides by and reinforces the rules of patriarchy

⁹⁷ Ibid 43.

⁹⁸ Ibid.

⁹⁹ Ibid. That is, an explanation may be that some hearers of pornography believe women to be sex objects and treat them as such because pornography ranks women as sex objects and legitimates harmful behaviours towards them.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid, quoting Austin (n 23) 115 n 11.

¹⁰³ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 43–4. It is certainly *unreasonable* to suggest that individuals who have never experienced vilification are equipped to make those judgments.

¹⁰⁴ Ibid 44.

¹⁰⁵ Ibid (emphasis omitted).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 45 (citations omitted).

also has covert authority in patriarchal societies in ways that impact on women. Specifically, it has authority to (re)enact permissibility facts of male (sexual) dominance such that women are subordinated.¹⁰⁸ Authority in that sense is an aspect of what MacKinnon identifies as men's social power to define what women count as.¹⁰⁹

If some pornography has authority in patriarchal societies, and if it conforms closely enough to the illocutionary paradigm in other respects, we may conclude that it constitutes, as well as causes, the subordination of women on the basis of their sex.¹¹⁰ That is the first way, for the purposes of this article, in which feminists claim some pornography harms women.¹¹¹

(b) *Subordination Harms of Racist Speech*

Around the time of MacKinnon's work, American critical race theorists were attempting to understand and respond to what they saw as the incidence of racial harassment in America in 'near epidemic proportions', particularly on college campuses.¹¹² Four of those scholars are Mari J Matsuda, Charles Lawrence, Richard Delgado, and Kimberlé Crenshaw, whose work provides important and enduring insights into the functions of racist speech. Again, for ease of reference, I refer mainly in this article to a key compilation of their work.¹¹³ As is characteristic of critical race theorists, those scholars emphasise knowledge gained experientially and empirically. They 'privileg[e] contextual

¹⁰⁸ McGowan, 'Conversational Exercitives' (n 69) 181–9.

¹⁰⁹ In patriarchal societies, some speakers have authority merely by virtue of being (coded as) male. In such societies, speakers (male or female) also have authority if their speech abides by and reinforces the rules of patriarchal oppression. Authority derived in those ways — of being (coded as) male and of speaking according to patriarchy's rules — function simultaneously and are mutually reinforcing. They are both aspects of speakers' social power to define what women count as.

¹¹⁰ Langton, 'Speech Acts and Unspeakable Acts' (n 53) 46. Alternatively, one might argue that pornography 'socially constructs' women as subordinate: see, eg, Langton, 'Pornography's Authority' (n 64) 93–6; Langton, 'Pornography's Divine Command' (n 74).

¹¹¹ In addition to the subordination harms discussed in this part and the silencing harms discussed in Part IV(A)(2)(b) below, feminists claim that pornography harms the women involved in its manufacture: see, eg, MacKinnon and Dworkin (n 4); Catharine A MacKinnon, 'Linda's Life and Andrea's Work' in Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 127, 130 ('Linda's Life'). See also Linda Lovelace and Mike McGrady, *Ordeal* (Citadel Press, 1980) for a firsthand account. A discussion of these harms of pornography to women is outside the scope of this article.

¹¹² Charles R Lawrence III et al, 'Introduction' in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 1, 1.

¹¹³ Matsuda et al (n 16).

and historical descriptions over transhistorical or purely abstract ones,¹¹⁴ and draw connections between racist speech and other manifestations of racism, or 'systems of culture, of privilege, and of power'.¹¹⁵ As with feminist claims about pornography, critical race theorists' claims about racist speech are not Austinian. However, speech act theory is one framework through which to make sense of those claims as being about the subordinating and silencing force of racist speech.

First, racist speech subordinates in a perlocutionary sense. Recall that to subordinate someone is 'to put them in a position of inferiority or loss of power, or to demean or denigrate them'.¹¹⁶ In what ways might racist speech have those things as its consequential effects? Matsuda notes that '[t]o avoid receiving hate messages, victims have to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor'.¹¹⁷ Target group members also internalise vilifying speech.¹¹⁸ To be caused to suffer those things is to be caused to suffer harm. To be caused to suffer harm on the basis of one's race is to be denigrated, demeaned, put in a position of inferiority and disempowered. It is an aspect of one's systemic subordination.

As with the feminist subordination claim, however, critical race theorists' claims that racist speech subordinates are primarily illocutionary claims. Matsuda describes racism as the combination of 'the ideology of racial supremacy and the mechanisms for keeping selected victim groups in subordinated positions'.¹¹⁹ Racist speech is not merely an expression of that ideology, but forms part of the 'implements of racism', along with discrimination, violence, and genocide.¹²⁰ All forms of racism, including racist speech, thus 'work in coordination, reinforcing existing conditions of domination', and '[l]ess egregious forms of racism degenerate easily into more serious forms'.¹²¹ Lawrence describes (American) racism as 'continuous defamation'.¹²²

¹¹⁴ Lawrence et al (n 112) 3.

¹¹⁵ Mari J Matsuda and Charles R Lawrence III, 'Epilogue: Burning Crosses and the RAV Case' in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 133, 136.

¹¹⁶ Langton, 'Speech Acts and Unspeakable Acts' (n 53) 35. See above n 55 and accompanying text.

¹¹⁷ Matsuda (n 27) 24.

¹¹⁸ *Ibid* 25–6.

¹¹⁹ *Ibid* 23.

¹²⁰ *Ibid* (emphasis added).

¹²¹ *Ibid* 24. See also at 36.

The *message* of racism conveyed through the practice of segregation, for example, the ‘communicating [of] the idea of white supremacy’, is the most damaging part of segregation.¹²³ Thus, ‘[t]he nonspeech elements are by-products of the main message [of white supremacy] rather than the message being simply a by-product of unlawful conduct.’¹²⁴ Racist acts are ‘part of a totality.’¹²⁵ All incidences of racist speech ‘[construct] the social reality that constrains the liberty of nonwhites because of their race.’¹²⁶ That is, non-target group members and target group members alike believe target group members to be inferior because racist speech constitutes them as such. Racist speech *ranks* people on the basis of their race and *legitimizes* discrimination and, ultimately, violence against them.¹²⁷ It *deprives* target group members of powers and rights because it is the ‘expression of a judgment that [target group members are] entitled to less’ than other citizens.¹²⁸

Recall that Langton argues that one of the ways to scrutinise illocutionary claims of subordination from an Austinian perspective is to ask whether the speech in question fits the illocutionary paradigm of subordinating speech acts. Does racist speech fit, or come close to fitting, the paradigm? First, critical race theorists argue, as above, that racist speech has particular patterns of perlocutionary effects.¹²⁹ It affects attitudes and behaviours, making some of its hearers, both non-target group members and target group members, more likely to view target group members as inferior and deserving of unequal treatment. Part of an explanation for this may be the subordinating illocutionary force of racist speech. Second, we can look to hearers’ uptake of racist speech. Some hearers take it to be expressions of individual or deviant bigotry; offensive but otherwise harmless invective. However, some hearers take it to be subordination; something that puts them in a position of inferiority, disempowers, demeans, or denigrates them in a material sense. While we do not know from Austin which view ought to prevail, again it is reasonable

¹²² Lawrence (n 23) 56. See also Lawrence’s discussion of the United States Supreme Court’s reasoning in *Brown* (n 23): at 59.

¹²³ Lawrence (n 23) 60.

¹²⁴ *Ibid.* See also Brison, ‘The Mind–Body Problem’ (n 28) 58.

¹²⁵ Lawrence (n 23) 61.

¹²⁶ *Ibid.* 62.

¹²⁷ Matsuda (n 27) 22.

¹²⁸ Richard Delgado, ‘Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling’ in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 89, 94.

¹²⁹ See above nn 116–28 and accompanying text.

to suggest that target group members are best placed to judge what racist speech does to them. Third, and most relevantly, we can consider whether racist speech satisfies some of the important felicity conditions for subordinating speech. Since racist speech acts are verdictives, which rank some people as inferior, and exercitives, which legitimate harmful behaviours towards them, they must be authoritative in order to subordinate. Recall that what is important for substantive authority is not whether the speech of racists is held in high regard universally — no doubt it is not — but whether it is so accepted in domains that count, by hearers that count.¹³⁰ Certainly, it seems plausible that such speech is substantively authoritative for some members of historically oppressed groups, particularly children.¹³¹ It is also plausible that such speech is substantively authoritative for some non-target group members.¹³² Racists may also have covert authority if the speech situation, or the historical and cultural contexts, in which their speech occurs allow. Racists, argue critical race theorists, speak authoritatively because they are ‘accompanied by a cultural chorus of equally demeaning speech and symbols ... Each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous’.¹³³ Speakers who abide by and reinforce the rules of racial oppression thus have authority to speak in and to that oppression in racist societies.¹³⁴ Specifically, they have authority to (re)enact permissibility facts in and of racial oppression such that minorities are subordinated.

¹³⁰ See above nn 100–7 and accompanying text.

¹³¹ See, eg, Delgado (n 128) 91, quoting Kenneth B Clark, *Dark Ghetto: Dilemmas of Social Power* (Harper & Row, 1965) 63–4; Delgado (n 128) 94–5, quoting Irwin Katz, ‘Social and Psychological Perspectives: Introduction’ in Martin Deutsch, Irwin Katz and Arthur R Jensen (eds), *Social Class, Race, and Psychological Development* (Holt, Rinehart and Winston, 1968) 175, 175; Kenneth Keniston and the Carnegie Council on Children, *All Our Children: The American Family under Pressure* (Harcourt Brace Jovanovich, 1977) 33. See also Langton, ‘Pornography’s Authority’ (n 64) 95; Langton ‘Pornography’s Divine Command’ (n 74) 105–9 as to how pornography’s verdictive ranking of women as subordinate ‘self-fulfils’ in a causal sense.

¹³² See, eg, Matsuda (n 27) 25–6. See also Waldron (n 27) 2–3.

¹³³ Lawrence (n 23) 68–9. Ratna Kapur has described this as the ‘normative scaffolding’ within which speech is received and functions. She warns against an understanding of freedom of expression as a neutral space in which every idea, or every interpretation of a particular idea, is equally received: Simon, ‘Gender and Human Rights: Success, Failure, or New Imperialism?’ (YouTube, 19 June 2016) 01:06:43–01:12:10 <<https://www.youtube.com/watch?v=gOJg1xwXhA>>.

¹³⁴ In societies imbued with racism, some speakers have authority merely by virtue of their (being coded as having) non-membership of a racially oppressed group. In such societies, speakers of all races also have authority if their speech abides by and reinforces the rules of

If racist speech has authority in domains and societies in which target group members are racially oppressed, and if it conforms closely enough to the illocutionary paradigm in other respects, we may conclude that it functions to subordinate target group members on the basis of their race. That is the first way in which critical race theorists claim racist speech harms.¹³⁵

2 Silencing Harms of Vilifying Speech

(a) Silencing Harms of Some Pornography

The second way in which some feminists claim some pornography harms women is through its silencing of women. '[U]nder conditions of sexual dominance,' argues MacKinnon, '[some] pornography hides and distorts truth while at the same time enforcing itself, imprinting itself on the world, making itself real.'¹³⁶ In doing so, it 'strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are stripped of authority and reduced and devaluated and silenced.'¹³⁷ Specifically, some pornography 'acts dynamically over time to diminish the consumer's ability to distinguish sex from violence. The materials work behaviorally to diminish the capacity of men (but not women) to perceive that an account of a rape is an account of a rape.'¹³⁸

How does Langton explain the silencing claim in Austinian terms? 'The ability to perform speech acts of certain kinds,' she says, 'can be a mark of

racial oppression. Authority derived in those ways — from (being coded as having) non-membership of a racially oppressed group and from speaking according to racism's rules — function simultaneously and are mutually reinforcing. They are both aspects of speakers' social power to make moves in the rule-governed activity of racial oppression.

¹³⁵ More recently, other authors, some of whom may even be described as liberal, have argued that vilifying speech can harm in similar ways. Waldron, for example, argues that racist speech harms in a dignitarian sense that is analogous to the subordination claims made by critical race theorists: Waldron (n 27). Although Waldron's focus is racist speech, he makes similar claims regarding pornography, particularly given pornography's more pervasive 'pedagogical function' as compared to racist speech: at 90–2. See also Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York University Press, 2002); MacKinnon and Dworkin (n 4) 396, transcribing Frederick Schauer's evidence to the Massachusetts pornography civil rights hearing; Owen M Fiss, 'Freedom and Feminism' (1992) 80(6) *Georgetown Law Journal* 2041, 2052; Frank I Michelman, 'Alumni Distinguished Lecture in Jurisprudence: Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation' (1989) 56(2) *Tennessee Law Review* 291; Cass R Sunstein, 'Pornography and the First Amendment' [1986] (4) *Duke Law Journal* 589.

¹³⁶ MacKinnon, 'Linda's Life' (n 111) 130.

¹³⁷ MacKinnon, 'Francis Biddle's Sister' (n 54) 193.

¹³⁸ *Ibid* 187 (citations omitted). See also above n 86 and accompanying text.

political power ... [P]owerful people can generally do more, say more, and have their speech count for more than can the powerless. If you are powerful, there are more things you can do with your words.¹³⁹ Sometimes, if you are powerful enough, 'you ... have the ability to silence the speech of the powerless.'¹⁴⁰ One way you might do this is to stop others from engaging in locutionary acts: 'stop the powerless from speaking at all. Gag them, threaten them, condemn them to solitary confinement.'¹⁴¹ There is also another, equally effective way: 'Let them speak. Let them say whatever they like to whomever they like, but stop that speech from counting as an *action*. More precisely, stop it from counting as the action it was intended to be.'¹⁴² That is the way in which some feminists argue that '[s]ome speech acts are [made] *unspeakable* for women in some contexts: although the appropriate words can be uttered, those utterances fail to count as the actions they were intended to be.'¹⁴³

In the context of sex, for example, '[s]ometimes a woman tries to use the "no" locution to refuse sex, and it does not work.'¹⁴⁴ It does not work for one of two reasons. First, a hearer may hear a woman's 'no' and recognise that she is refusing, but he may nevertheless force sex on her. Langton describes silencing of that nature as 'perlocutionary frustration.'¹⁴⁵ Second, a hearer may hear a woman's 'no' and fail to recognise it as refusal. The woman's illocution misfires as she cannot secure uptake. Langton describes silencing of that nature as 'illocutionary disablement.'¹⁴⁶ In the first sense, some pornography silences women by preventing them, not from speaking, or engaging in a

¹³⁹ Langton, 'Speech Acts and Unspeakable Acts' (n 53) 30.

¹⁴⁰ Ibid 31.

¹⁴¹ Ibid.

¹⁴² Ibid (emphasis in original).

¹⁴³ Ibid (emphasis in original).

¹⁴⁴ Ibid 53.

¹⁴⁵ Ibid 54.

¹⁴⁶ Ibid. That is (emphasis in original):

there is the different phenomenon of illocutionary disablement. Sometimes 'no', when spoken by a woman, does not *count* as the act of refusal. The hearer fails to recognize the utterance as a refusal; uptake is not secured. In saying 'no' she may well intend to refuse. By saying 'no' she intends to prevent sex, but she is far from doing as she intends. Since illocutionary force depends, in part, on uptake being secured, the woman fails to refuse ... She says 'no'. She performs the appropriate locutionary act. She means what she says. She intends to refuse. She tries to refuse. But what she says misfires. Something about her, something about the role she occupies, prevents her from voicing refusal. Refusal — in that context — has become unspeakable for her. In this case refusal is not simply frustrated but disabled.

locutionary act, but by frustrating their perlocutionary goals.¹⁴⁷ If '[some] pornography legitimates sexual violence', indeed, if it makes it sexy, 'then it follows that one of [such] pornography's effects may be to prevent a woman's refusal of sex from achieving its intended purpose'.¹⁴⁸ Such pornography 'eroticizes refusal itself, presenting the overpowering of a woman's will as exciting. Someone learning the rules of the sexual game from that kind of pornography [may] recognize a woman's refusal and disobey it'.¹⁴⁹ In that way, perlocutionary frustration, although 'a common enough fact of life ... can have a political dimension when the effects achieved depend on the speaker's membership in a particular social class'¹⁵⁰ — in this case, women. In the second sense, where the rape victim's attempted refusal is simply not recognised as a refusal, there are 'structural constraints' on women's speech.¹⁵¹ An explanation for women's illocutionary disablement in attempting to refuse sex may be that the speech acts of some pornography, in which women never (get to) refuse, are fixing the felicity conditions for women's speech acts.¹⁵² Some pornography may 'leave no space for the refusal move' for women;¹⁵³ it may make it such that '[c]onsent is the *only* thing a woman can do with her words'.¹⁵⁴

Refusal in the context of sex, Langton notes, 'is a kind of prohibition, and it is an exercitive illocution, in Austin's terms. To satisfy its felicity conditions, the speaker must have authority in a relevant domain'.¹⁵⁵ If some pornography brings about women's illocutionary disablement in a sexual context, it does so by destroying a woman's authority within 'the local domain of her own life, her own body'.¹⁵⁶ That view is consistent with Austin's work on felicity conditions. Austin offered an implicit answer about how some speech might bring about illocutionary disablement through his observations that felicity conditions are fixed by conventions, either formal (for example, under law) or

¹⁴⁷ Ibid 56.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 48.

¹⁵¹ Ibid 57.

¹⁵² Ibid. The Court in *Hudnut* (n 34) accepted the premise that pornography results in illocutionary disablement of this sort: at 328 (Easterbrook J).

¹⁵³ Langton, 'Speech Acts and Unspeakable Acts' (n 53) 57.

¹⁵⁴ Ibid 58 (emphasis in original).

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

informal.¹⁵⁷ ‘[O]ne way that conventions are brought into being, one way that felicity conditions are set,’ notes Langton, ‘is indeed by means of other speech acts. These are “*words that set conditions*.”’¹⁵⁸ Felicity conditions for particular illocutionary acts ‘can be set by what is said ... by informal practices of speech and communication that gradually establish precedents and informal rules about what counts as [what].’¹⁵⁹ In other words, ‘[t]he space for potential speech acts can be built by speakers, as can the limits on that space, the constraints responsible for the silence of illocutionary disablement.’¹⁶⁰ That is what MacKinnon means when she says that some pornography is speech that determines what other speech there can be. Some pornography is illocutionary speech that limits the space or builds constraints for women’s speech acts. In doing so, it constitutes women as silent. Its authority to do so may derive substantively for those learning the rules of sex from it. Additionally, pornography that abides by and reinforces rules of male sexual dominance has covert authority in patriarchal societies to (re)enact permissibility facts about what women may and may not do with their words.¹⁶¹

If some pornography causes women’s perlocutionary frustration by sexualising the overpowering of their wills, and if it builds the constraints responsible for their illocutionary disablement such that sometimes ‘no’ does not mean no, it functions to silence them on the basis of their sex. That is the second way in which feminists claim some pornography harms women.

(b) *Silencing Harms of Racist Speech*

As to the silencing functions of racist speech, Lawrence argues that they are at times more pervasive even than violent coercion of target group members. That is because ‘the primary purpose and effect of the speech/conduct that

¹⁵⁷ Ibid 52.

¹⁵⁸ Ibid (emphasis in original), quoting Catharine A MacKinnon, ‘Afterword’ in Catharine A MacKinnon (ed), *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 215, 228.

¹⁵⁹ Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 53.

¹⁶⁰ Ibid.

¹⁶¹ Though note that felicity conditions in Austin’s and Langton’s sense are not perfectly analogous to permissibility facts in McGowan’s sense: see, eg, McGowan, ‘Conversational Exercitives’ (n 69) 172–4. Women also regularly suffer illocutionary disablement with respect to their attempts to speak to sexual violence perpetrated against them *as harm*: see, eg, Kimberlé Williams Crenshaw, ‘Beyond Racism and Misogyny: Black Feminism and 2 Live Crew’ in Mari J Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 111 (‘Beyond Racism and Misogyny’), discussed in Part IV(A)(2)(b) below.

constitutes white supremacy is the exclusion of nonwhites from full participation in the body politic.¹⁶² ‘The experience of being called “nigger”, “spic”, “Jap”, or “kike”’, he notes, ‘is like receiving a slap in the face.’¹⁶³ Racist ‘invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.’¹⁶⁴ The risk that vilifiers will follow up on epithets with violence further ‘forces targets to remain silent and submissive.’¹⁶⁵ Lawrence is referring there to the first way in which Langton suggests the speech of some can silence the speech of others. You can stop someone from speaking by threatening them, by stopping them from uttering anything at all. Racist speech silences some target group members by preventing them from engaging in locutionary acts.

Critical race theorists also claim that racist speech silences by marginalising and devaluing target group members’ speech. Racist speech is subordinating speech partly because it ranks target group members as inferior. A corollary of this is that such speech assigns an inferior status to the *speech* of target group members. Even where target group members can and do speak, ‘[r]acist speech ... distorts the marketplace of ideas by muting or devaluing the speech of Blacks and other despised minorities. Regardless of intrinsic value, their words and ideas become less salable.’¹⁶⁶ Utterances that would be widely embraced if spoken by whites ‘will be rejected or given less credence if its author belongs to a group demeaned and stigmatized by racist beliefs.’¹⁶⁷ In Langton’s terms, what results is perlocutionary frustration. Target group members intend for their speech to have particular consequential effects on its hearers, for example, for them to be informed, or persuaded, but those intended consequences do not occur. They do not occur because racist speech has denigrated target group members as lacking in authority or credibility.

Alternatively, what results may be described as illocutionary disablement. Crenshaw notes, in relation to the intersectionality of racism and misogyny, that stereotyped representations of women of colour ‘encourage and incite violence against us.’¹⁶⁸ They also do ‘much more’: ‘They create a dominant narrative that forces actual women of color to the margins of the discourse

¹⁶² Lawrence (n 23) 79.

¹⁶³ *Ibid* 67–8.

¹⁶⁴ *Ibid* 68.

¹⁶⁵ *Ibid* 69.

¹⁶⁶ *Ibid* 78.

¹⁶⁷ *Ibid*.

¹⁶⁸ Crenshaw, ‘Beyond Racism and Misogyny’ (n 161) 113.

and renders our own accounts of such victimization less credible.¹⁶⁹ Because racist and sex-based speech ‘define the spaces that women of color may occupy in dominant consciousness’, they ‘problematize our efforts to construct a political practice and cultural critique that address the physical and material violence we experience.’¹⁷⁰ That ‘[r]epresentational intersectionality’, Crenshaw argues, ‘is significant in exploring violence against women of color because it provides cues to the ways in which our experiences are weighed against counternarratives that cast doubt upon the validity and harm of such violence.’¹⁷¹ Recall that one of the ways Langton argues pornography effects women’s illocutionary disablement is by setting the felicity conditions for consent in sex.¹⁷² Crenshaw’s argument is that some speech about women of colour similarly sets the felicity conditions for their articulation of their experiences, particularly of harm.¹⁷³ Just as pornography sometimes leaves no space for women to make the refusal move in sex, some speech about women of colour leaves no room for them to do with their words what they will. They wish to protest, but something about their femaleness, something about their colour means that they cannot secure the desired uptake. They say the right words, use the right locutions, but their protest misfires. It is unspeakable for them in some contexts. It is not just that they are not believed when they describe what has been done to them, it is that they are unable to articulate what has been done to them as harm. They are *unable* to protest what has been done to them; their protest is disabled.¹⁷⁴ Thus, racist speech is also illocutionary speech that limits the space or builds constraints for target group members’ speech acts. In doing so, it constitutes target group members as silent. Its authority to do so may derive substantively for some hearers. Additionally, racist speech has covert authority in racially oppressive societies to (re)enact permissibility facts about what racially oppressed target group members may and may not do with their words.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 116–17.

¹⁷² See above nn 155–61 and accompanying text.

¹⁷³ Kimberlé Williams Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ in Kimberlé Williams Crenshaw et al (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (New Press, 1995) 357, 373, quoting Gary LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Wadsworth, 1989) 219–20.

¹⁷⁴ The protest example is also discussed by Langton in relation to Linda Marchiano’s autobiographical account, *Ordeal*: Langton, ‘Speech Acts and Unspeakable Acts’ (n 53) 55–6, discussing Lovelace and McGrady (n 111).

If racist speech prevents target group members from engaging in locutionary acts, and if it causes their perlocutionary frustration and effects their illocutionary disablement when they can and do speak, it silences them on the basis of their race. That is the second way in which critical race theorists claim that racist speech harms.¹⁷⁵

B *Sex-Based Vilification as Systemic Subordination and Silencing of Women*

The critical scholarship summarised above is crucial to understanding the harms of vilifying speech and, therefore, legal considerations regarding the regulation of such speech. It reflects what women and minority individuals — some, at least, and enough to matter, arguably — experience when confronted with vilifying speech. It also reflects how such speech impacts on women and minorities as regards their (structural or systemic) social and material realities in societies imbued with patriarchal and racial oppression. Applications of speech act theory to that scholarship assist to articulate how vilifying speech harms in those ways.

Anti-vilification laws, including sex-based vilification laws, may in turn be justifiable insofar as the speech they purport to regulate harms sufficiently and in ways that are relevant to law. As I flagged above, the prevailing liberal view, as reflected in scholarship, if not in law,¹⁷⁶ is that those harms must also be distinguishable from causal harms that flow only from the normative or persuasive force of the speech. What is relevant to law, then, is not sex-based vilification conceptualised with reference to its linguistic content as speech that *prima facie* expresses contempt for women on the basis of their sex, which conceptualisation I proposed provisionally at the beginning of this article. It is not the ‘hate’ in ‘hate speech’ with which critical theorists and other defenders of anti-vilification laws are concerned, as if they wish to engage in some form of thought control.¹⁷⁷ They are concerned with what

¹⁷⁵ Other authors, some of whom may even be described as liberal, have also noted the silencing functions of pornography and racist speech: see, eg, Owen M Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) 5–26. See also Robert C Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Getty Research Institute for the History of Art and the Humanities, 1998) pt III.

¹⁷⁶ Many liberal democracies have in place anti-vilification laws, and those laws are typically directed at likely causal harms of vilifying speech: see, eg, Brown (n 15) ch 2.

¹⁷⁷ See, eg, Waldron (n 27) 33.

such speech *does*. What is relevant to law is sex-based vilification conceptualised with reference to its harms.

In accordance with the critical scholarship, the harms of vilifying speech are best understood as the subordination and silencing of target group members on the basis of their relevant ascriptive characteristics. The harms of sex-based vilification are best understood as the subordination and silencing of women on the basis of their sex. Those subordination and silencing harms may be causal. Importantly, they may also be constitutive, in that an utterance may, in and of itself, constitute women as subordinate and silent. They are systemic harms of subordination and silencing for two related reasons. First, because they accrue to women on the basis of their sex, which is an axis of women's structural discrimination and disadvantage in patriarchal societies. Second, because the authority of sex-based vilification in patriarchal societies is at least partly derived from patriarchal oppression as a rule-governed activity at play in those societies. Speakers play by patriarchy's rules when they engage in speech acts of sex-based vilification and are able to (re)enact its permissibility facts. Accordingly, sex-based vilification, properly conceptualised with reference to its harms, as relevant to law, is *discriminatory treatment* of women that *constitutes and causes the systemic subordination and silencing of women on the basis of their sex*. I use 'sex-based vilification' to refer to that narrower conceptualisation going forward.

Conceptualising sex-based vilification in the manner for which I have argued has several advantages. First and fundamentally, it is a functional (illocutionary, perlocutionary), rather than linguistic (locutionary), theory of sex-based vilification with reference to its harms. It does not rely on assumptions about vilification as 'hate speech' with reference to its expressive qualities and/or speakers' intentions. It properly conceives of vilification and sex-based vilification as *discriminatory treatment* of target group members and women respectively that harms in ways relevant to law when it is hateful and when it is not, and when harm is intended and when it is not. Second, it makes clear that sex-based vilification is relevant to law because it harms women.¹⁷⁸ Third, it accounts for the ways in which sex-based vilification harms women as a group, in addition to any individual women at whom it is directed. That is, it accounts for sex-based vilification as speech that is *about all* women, even as it is directed *at particular* women. In doing so, it conceptualises sex-based vilification, as relevant to law, as *vilification*, rather than, for example, harass-

¹⁷⁸ That distinguishes sex-based vilification from, say, obscenity or public order offences that are not directed at mitigating harms to women.

ing, threatening, or defamatory speech, which law typically treats as wrongs to identifiable individuals.¹⁷⁹ Fourth, and relatedly, it identifies and articulates the *systemic* nature of sex-based vilification's harms. In doing so, it places sex-based vilification firmly within its structural context as speech that is both symptomatic of, and that (re)enacts, patriarchal oppression. Fifth, it identifies that, and how, sex-based vilification harms both causally and constitutively. In doing so, it forecloses liberal arguments against sex-based vilification laws on the (assumed) basis that sex-based vilification may only harm in a normative, persuasive or causal sense, and on the (questionable) basis that only constitutive speech harms may justify speech regulation. Sixth, it identifies the most serious constitutive and causal harms of sex-based vilification and delineates those harms as the harms that are relevant to law. It confines arguments in favour of sex-based vilification laws to those that rely on sex-based vilification's material harms and thereby respects that speech in liberal democracies ought only to be regulated in limited, compelling circumstances.¹⁸⁰

The extent to which sex-based vilification in a given instance subordinates and silences women, or will do so over time, in fact, causally speaking, is an empirical question that legislators, lawyers, and judges cannot possibly account for or assess on a case-by-case basis. If, as liberal theorists argue, causal speech harms are irrelevant to law, that uncertainty is immaterial.¹⁸¹ What matters is this: it is plausible and coherent to argue that women are, in fact, systemically subordinated and silenced in patriarchal societies; as demonstrated, those harms flow from the systemic (re)constitution of women as subordinate and silent in those societies; and speech acts of sex-based vilification contribute to — in that they are speech acts of — that (re)constitution. The overall value of sex-based vilification laws centres on those constitutive harms, but ultimately depends on a range of factors. Those include whether, as foreshadowed above, constitutive speech harms of subordination and silencing of the kinds described are serious or material

¹⁷⁹ This also precludes arguments against sex-based vilification laws on the basis that such speech is already regulated by laws on harassment, and so forth.

¹⁸⁰ I demonstrate how it does those things in Part VI(B) below. That is not to say, of course, that other harms may not accrue to women individually and as a group as a result of problematic sex-based speech that does not systemically subordinate and silence women. While those harms matter, they are not, in my view, harms of sex-based vilification that are relevant to law.

¹⁸¹ To be clear, I am not saying that I agree with liberal views that only constitutive speech harms are relevant to law. I think there are good arguments to be made for speech regulation on the basis of likely and material causal harms. It is not necessary for me to make those arguments here.

enough to warrant regulation when balanced against relevant free speech concerns. That in turn depends on the ease with which those speech harms may be ‘undone’, and how likely it is that they *are* undone in patriarchal societies.¹⁸² I do not have the scope here to address those issues. What I will venture is this. A rethinking of speakers’ authority as reinforcing, cumulative, and systemic in the ways described throughout this article suggests that speech acts of sex-based vilification in patriarchal societies do regularly systemically subordinate and silence women. That is the case even if those harms are subsequently undone.¹⁸³ Harms of systemic subordination and silencing — in this case of approximately half the population — are relevant to law. They are relevant to law regardless of whether, all things considered, they warrant regulation.

V IMPLICATIONS FOR LAW AS COUNTER-SPEECH

Above, with reference to extant critical theory scholarship, I arrived at a functional theory of sex-based vilification with reference to its harms and outlined some of its benefits to legal considerations of such speech and its regulation. On the basis of my functional theory, if sex-based vilification ‘produce[s] women’s vulnerability’¹⁸⁴ in ways that are relevant to law, it does so in constituting women as subordinate and silent and by causing them to be subordinated and silenced. Sex-based vilification must be authoritative in order to do those things. Its authority may derive substantively, formally or informally. It may also derive covertly, by virtue of its speakers’ alignment with the rules of a relevant rule-governed activity in and to which they are speaking. Patriarchal oppression is a rule-governed activity that is at play in patriarchal societies. As speakers of sex-based vilification abide by and reinforce rules of patriarchal oppression, they have (at least) covert authority in patriarchal societies to speak in and to that oppression. Specifically, they are able with their words to (re)enact permissibility facts that uphold and

¹⁸² Note that if a policy decision is made to not enact sex-based vilification laws on the basis that the harms of sex-based vilification can be undone, that decision is made implicitly also on the basis that (non-state) hearers of or bystanders to sex-based vilification ought to bear the responsibility and burdens of that undoing. I discuss how the state may itself mitigate the harms of sex-based vilification in Part V below.

¹⁸³ See, eg, McGowan, ‘Oppressive Speech’ (n 68) 402–4; McGowan, ‘Conversational Exercitives’ (n 69) 187–9.

¹⁸⁴ D’Souza et al (n 14) 972.

perpetuate women's subordination to men, as well as women's perlocutionary frustration and illocutionary disablement.

Other speakers may also do things with their words. They may refute, contradict, interject, support, reinforce, or accommodate. Whether a particular speaker or category of speakers has authority to do those things depends on their substantive authority, if any, as well as their alignment with the rules of the relevant rule-governed activities in and to which they are speaking. Though patriarchal oppression functions at a societal level, there are any number of other rule-governed activities that function alongside it at that level or within sub-societal domains. Speakers who do not abide by the rules of patriarchal oppression typically do not have covert authority to speak in and to that oppression. They may nevertheless have substantive authority to speak in and to it and dictate its permissible range of conduct. Speakers may also have substantive or covert authority to speak in and to other rule-governed activities in ways that mitigate patriarchy's harms. For example, speakers may use their words to enact permissibility facts in and of other rule-governed activities that refute or contradict patriarchy's permissibility facts.

Law, like patriarchal oppression, is a rule-governed activity. The state has substantive (formal, institutional) authority to speak in and to law and it can enact permissibility facts within the rule-governed activity that is law.¹⁸⁵ The state also has institutional authority to speak to the boundaries of permissibility of rule-governed activities of systemic oppression. We know this because state-based institutionalisation of oppression is one of the main ways in which oppression *is systematised*. Thus, the state may, through law, also speak in and to patriarchal oppression itself. As it can enact permissibility facts in and of law, and in and of patriarchal oppression that refute other permissibility facts of patriarchal oppression, law is one way in which the state can 'speak back' or 'counter-speak' against that oppression. For example, anti-discrimination laws on the basis of sex enact permissibility facts in and of law and in and of patriarchal oppression that compete with other permissibility facts of patriarchal oppression, including permissibility facts (re)enacted through speech acts of sex-based vilification. So too do laws sanctioning sexual or domestic

¹⁸⁵ 'Enact' applies here both in the sense in which McGowan uses it and in which I have been using it with respect to speakers of sex-based vilification, as well as literally; the state 'speaks' in and to law in its enactment of laws: see McGowan, 'Oppressive Speech' (n 68); McGowan, 'Conversational Exercises' (n 69). In Austinian terms, the state's enactments of laws are illocutionary speech acts that do things; they enact permissibility facts in and of law.

violence against women.¹⁸⁶ Similarly, the state may, through sex-based vilification laws, enact permissibility facts in and of law and in and of patriarchal oppression that go to how women may be treated and (re)constituted with words. If sex-based vilification laws can '[interrupt] the social and discursive production of women's vulnerability [by sex-based vilification]',¹⁸⁷ that is a way in which the state may do so. Conversely, if by failing to enact sex-based vilification laws the state is 'complicit in producing the ongoing harms of [sex-based vilification]',¹⁸⁸ that may be because its silence accommodates and derives authority on such speech, therein constituting the permissibility facts it (re)enacts as 'correct play' for some hearers.¹⁸⁹

The enactment of sex-based vilification laws would thus constitute an illocutionary counter-speech act by the state that enacts permissibility facts that may mitigate the harms to women of sex-based vilification. One obvious way in which they may mitigate those harms is by sanctioning utterances of sex-based vilification such that speakers are deterred from speaking them and the harms never occur. There is also the distinct potential of law as counter-speech. For example, permissibility facts enacted through law may mitigate the harms of sex-based vilification by diluting the authority of such speech for women and other hearers.¹⁹⁰ That a breach of the enacted permissibility facts would attract criminal or civil sanctions does not make the enactment of sex-based vilification laws any less a relevant counter-speech act of the state. It merely means that the permissibility facts enacted are coercive rather than accommodating or enabling in nature.¹⁹¹

¹⁸⁶ Note that the prohibition by such laws of particular conduct — sex-based discrimination or violence, for example — may refute patriarchy's permissibility facts, while their procedural or other aspects — pertaining to admissible evidence, for example — may reinforce patriarchy's permissibility facts.

¹⁸⁷ D'Souza et al (n 14) 972.

¹⁸⁸ Ibid 968.

¹⁸⁹ The state's silence as to sex-based vilification makes 'what actually transpires [that is, sex-based vilification] [count] as fair play': McGowan, 'Conversational Exercitives' (n 69) 171.

¹⁹⁰ For example, Katharine Gelber and Luke McNamara write of the symbolic value of anti-vilification laws to target group members: Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 507–8. See also Waldron (n 27) ch 4. Anti-vilification laws may restore some of the 'assurance' that target group members have of their equality and dignity in liberal societies, which Waldron argues vilifying speech destroys. Sex-based vilification laws may also plausibly dilute the authority of sex-based vilification for men.

¹⁹¹ It also means those permissibility facts may function particularly powerfully to effect changes to speakers' behaviours in fact.

Much more can, and should, be said regarding law's functions in accommodating and (potentially) mitigating the harms of sex-based vilification and other vilifying speech.¹⁹² I leave that for a separate article.

VI SOME FURTHER IMPLICATIONS FOR LAW

I outlined some of the advantages of my functional theory of sex-based vilification with reference to its harms to legal considerations of such speech and its regulation above. I also demonstrated that a crucial advantage of the theory is that it allows for the understanding of sex-based vilification laws as a form of counter-speech act by which the state may mitigate the harms of sex-based vilification.

In this part, I narrow the discussion to respond specifically to two key modes of analysis that D'Souza et al use in their article. In doing so, I demonstrate some further implications and advantages for law of my functional theory and broaden the contributions of this article to the literature. First, I argue that D'Souza et al misconceive causal and constitutive harms and their interrelationship. Second, I argue that their categorisation of existing Australian definitions of vilifying speech as 'progressive' or 'conservative', while novel, fails adequately to take into account the harms of sex-based vilification, correctly conceived as relevant to law, and therein fails adequately to account for free speech considerations. I use 'vilification' and 'sex-based vilification' in this part to refer respectively to my conceptualisations of vilification and sex-based vilification as arrived at above. In order to avoid confusion, I adopt D'Souza et al's terminology, namely, 'hate speech' and 'gendered hate speech', when referring to arguments they make in their article.¹⁹³

¹⁹² In keeping with this article overall, my focus in this part is the potential of sex-based vilification laws to mitigate the harms of sex-based vilification. However, my arguments in that regard apply analogously and equally to anti-vilification laws directed at other categories of vilifying speech that systemically subordinate and silence target group members, including racist speech.

¹⁹³ As I flagged in my introduction, 'gendered hate speech' is not defined in D'Souza et al (n 14) in linguistic or other terms, and neither is 'hate speech'. I assume for the purposes of this article that those terms respectively mean speech that prima facie expresses contempt for women on the basis of their sex, and speech that prima facie expresses contempt for target group members on the basis of their relevant ascriptive characteristics.

A *Constitutive versus Causal Harms*

D'Souza et al characterise 'constitutive harms' of hate speech as 'harms caused directly to the individual targeted by the hate speech', including 'psychological distress, silencing and impact on self-esteem, as well as wider considerations such as restrictions on freedom of movement and association'.¹⁹⁴ Constitutive harms in that sense are contrasted to 'consequential harms' of hate speech, which they characterise as 'harms caused by indirect effects on individuals who were not the target of the hate speech, and who usually form part of wider society'.¹⁹⁵ Those harms include 'persuading those hearing the speech of negative stereotypes, leading to further harmful conduct'¹⁹⁶ — most seriously in the case of gendered hate speech, the perpetuation of gender-based violence against women.¹⁹⁷

Those harms to women are plausible and significant harms of sex-based vilification and they accord with some of the harms identified in the feminist literature on pornography. Properly understood, however, they are all causal harms, as opposed to constitutive harms. By way of illustration, consider D'Souza et al's examples. How might sex-based vilification cause a woman at whom it is directed ('targeted woman') to experience distress, a lack of self-worth, or restriction in her capacities to speak (in a locutionary sense) or freedom to move or associate? A plausible explanation may be that such speech causes her to experience those things by causing her to feel humiliated. An alternative plausible explanation may be that such speech causes her to experience those things by causing her to feel threatened. Recall now that the illocutionary act of legitimating something is not the same as the perlocutionary act of making people believe that something is legitimate.¹⁹⁸ An effect of legitimating something may be that people believe it to be legitimate, but they believe it to be legitimate because it has been legitimated, and not the other

¹⁹⁴ Ibid 962, citing Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22(3) *Social Identities* 324, 325 ('Evidencing the Harms'). As per my discussion in this part, D'Souza et al seem to have mischaracterised Gelber and McNamara's categorisation of 'constitutive' and 'consequential' harms and improperly conflated those categories with direct and indirect harms respectively.

¹⁹⁵ D'Souza et al (n 14) 962.

¹⁹⁶ Ibid. See also Ishani Maitra and Mary Kate McGowan, 'Introduction and Overview' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 1, 1.

¹⁹⁷ D'Souza et al (n 14) 963–5.

¹⁹⁸ Langton, 'Speech Acts and Unspeakable Acts' (n 53) 35.

way around.¹⁹⁹ Similarly, if an utterance of sex-based vilification causes the targeted woman to feel humiliated, it may do so because it is a constitutive speech act of humiliation. *In* speaking the utterance, the speaker humiliates her and *by* speaking the utterance, he causes her to be humiliated. She, in turn, feels humiliated because she *is* humiliated, because the utterance *constitutes* her *as humiliated*. If that utterance also causes her to feel threatened, it may do so because it is a constitutive speech act of threatening. She feels threatened because she is threatened, because the utterance constitutes her as threatened. Constitutive harms of the utterance with respect to the targeted woman thus may include its humiliating and threatening her. Her feeling humiliated and threatened are causal harms of the utterance. To the extent that the utterance persuades or encourages other hearers to mistreat the targeted woman, say by acting violently towards her, it may do so by legitimating her violation, perhaps by authoritatively constituting her as deserving or desiring of that violation. The legitimation is constitutive harm, whereas the violation is causal harm flowing from the legitimation.²⁰⁰ As the utterance constitutes the targeted woman as a legitimate object of violation *because she is a woman*, it may also constitute other women as legitimate objects of violation. The utterance may also humiliate and threaten other women who are not the targeted woman.²⁰¹ The constitutive harms of sex-based vilification thus accrue to all women, as opposed to only to women who are the targets of such speech. That in turn is a key reason to treat such speech *as vilification*.²⁰²

B Legal Definitions of Harm

D'Souza et al argue that gendered hate speech 'occurs on a continuum of seriousness', which 'makes it difficult to develop a general definition' of such speech, and even more difficult to develop a 'legal definition' of it.²⁰³ Attempts at legal definition are complicated, they argue, by 'ongoing debate about how

¹⁹⁹ Ibid 35–6.

²⁰⁰ D'Souza et al (n 14) also identify the violation as causal (in their terms, consequential) harm: at 964.

²⁰¹ Empirical research suggests that target group members experience vilification in much the same way, whether it is directed at them 'personally' or whether it is about them, in the sense that it forms part of public discourse more generally: see, eg, Gelber and McNamara, 'Evidencing the Harms' (n 194) 327.

²⁰² As opposed to speech that is already regulated by laws on harassment, for example: but see D'Souza et al (n 14) 962.

²⁰³ Ibid 958 (emphasis in original).

serious or severe [gendered hate speech] should be before it attracts the attention of the civil or criminal law, and whether the definition should focus on the harm caused to the victim or to the community'.²⁰⁴ I have demonstrated in this article that it is possible to develop a satisfactory theory of sex-based vilification both generally and as relevant to law with reference to its harms. I set out some of the benefits of conceptualising sex-based vilification in that way above. In particular, my theory offers a functional, rather than a linguistic, account of sex-based vilification. Accordingly, it addresses the problem of the 'continuum of seriousness' of sex-based vilification by delineating systemic subordination and silencing as speech harms that are sufficiently serious to be relevant to law and defining sex-based vilification as any utterance that harms in those ways, regardless of the 'seriousness' of its locutionary content.²⁰⁵

In contrast, D'Souza et al's primary argument is to distinguish between harms of hate speech 'caused to the victim' and those 'caused to public order'.²⁰⁶ They characterise existing Australian legislative definitions of hate speech that they perceive to be directed at each of those harms as 'progressive' and 'conservative' respectively.²⁰⁷ While their approach is novel and correctly distinguishes between harms to target group members and public order-type harms, it fails adequately to account for sex-based vilification as speech that systemically subordinates and silences women and as speech that harms both causally and constitutively. For example, they characterise s 18C of the *Racial Discrimination Act 1975* (Cth), which prohibits some racial vilification, as a 'progressive' definition of hate speech that is desirable in its focus on harms to victims.²⁰⁸ A sex-based vilification law based on that provision would, broadly speaking, make unlawful public utterances that are 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' persons on the basis of their sex.²⁰⁹ A hypothetical sex-based vilification law in those terms is a useful device with which to demonstrate some important distinctions that my functional theory reveals that would otherwise not be visible.

Consider my example in Part IV(A). Are speech acts of humiliating, threatening, and legitimating violence against women on the basis of their sex

²⁰⁴ Ibid.

²⁰⁵ Harms of systemic subordination and silencing are relevant to law in the sense that they deserve legal — scholarly and policy — attention. Whether or not they ought to attract the *sanction* of the criminal or civil law is a different matter, as discussed in Part IV(B) above.

²⁰⁶ D'Souza et al (n 14) 958.

²⁰⁷ Ibid 958–61.

²⁰⁸ Ibid 959.

²⁰⁹ See *Racial Discrimination Act* (n 15) s 18C.

speech acts of systemic subordination and silencing? To be constituted as humiliated, threatened, and a legitimate object of violation on the basis of sex clearly is to be systemically subordinated. Thus, the illocutionary speech acts of humiliating, threatening, and legitimating violence against women on the basis of their sex are illocutionary speech acts of systemic subordination. Those speech acts are also perlocutionary speech acts of systemic subordination: they cause women to feel humiliated and threatened on the basis of their sex and they may cause women to be violated on the basis of their sex. As they are speech acts of systemic subordination, they are likely also to be speech acts of systemic silencing, not just in the locutionary sense that D'Souza et al prioritise, but also in the senses of the perlocutionary frustration and illocutionary disablement of women.²¹⁰ Consider now speech acts of 'offending', which are speech acts that would be sanctioned by the hypothetical sex-based vilification law described above, as a matter of drafting, if not as a matter of interpretation and operation.²¹¹ Is it plausible to say that to be offended — to be constituted as offended in illocutionary terms, or to be caused to be offended in perlocutionary terms — is to be subordinated? No. Would the fact that an utterance offends a hearer on the basis of her female sex change our answer? No. The reason that a speech act of offending cannot constitute or cause subordination is, I think, because its felicity conditions are no more than that the hearer offended should have had a particular reaction. Nothing is done to them by the speech act, including in any outward-facing sense, or in relation to other persons, that does not depend on their *feeling* offended. There is a legitimate sense in which the speaker is not responsible for the hearer's offence. By way of contrast, speech acts of 'insulting' are capable of doing things to target group members that do not depend on their reactions. They are capable, for example, of abusing or disparaging target group members in ways that are successful or 'happy' in an Austinian sense regardless of how they make target group members feel. That target group members feel

²¹⁰ For example, sex-based vilification that legitimates violence against women may constitute their illocutionary disablement with respect to their articulation of that violence as harm, or at least as 'wrongs': see, eg, Crenshaw, 'Beyond Racism and Misogyny' (n 161); Langton, 'Unspeakable Acts' (n 53), both discussed in Part IV(A)(2)(b) above. See also above n 86 and accompanying text.

²¹¹ Section 18C of the *Racial Discrimination Act* (n 15) has consistently been interpreted by the Federal Court of Australia to involve an objective test. The subjective reactions of target group members to the vilifying conduct in question is admissible as evidence, but is not determinative of the contravention or otherwise of the provision: see, eg, *Eatock* (n 74) 318 [241]–[242] (Bromberg J); *Jones v Scully* (2002) 120 FCR 243, 268–9 [98]–[99] (Hely J); *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355–6 [12]–[13] (Kiefel J). As such, my arguments in this part do not apply to the prevailing interpretation of s 18C.

insulted by them is relevant, but it is not required or necessarily sufficient for them to be successful. Speech acts of humiliating or threatening function similarly, as discussed above. In any case, what we see is that the inclusion of 'offend' in a sex-based vilification law would draw the threshold too *low*, at least as a matter of drafting, if not interpretation.²¹² Speech that merely offends on the basis of sex or other ascriptive characteristics is arguably ill-advised, or even immoral, but it does not harm in ways that ought to be relevant to law. My functional theory of sex-based vilification with reference to its systemic subordination and silencing harms allows for those important distinctions to be made and, indeed, illuminates them.²¹³ Conversely, D'Souza et al's approach, conflating as it does 'progressive' or desirable legal definitions of gendered hate speech with 'direct' causal harms to women, risks obfuscating those distinctions. Accordingly, their approach also risks unduly impinging on legitimate free speech considerations in liberal democracies by casting the net for regulated speech too wide.

VII CONCLUSION

In this article, I have put forward a functional theory of sex-based vilification with reference to its harms. I have argued, with reference to extant critical and speech act theory scholarship, that vilifying speech is discriminatory treatment of target group members that constitutes and causes subordination and silencing harms to target group members. Accordingly, I have argued that sex-based vilification, properly conceptualised as relevant to law, constitutes and causes subordinating and silencing harms to women. It constitutes women as subordinate and silent and, by doing so, causes them to be subordinated and silenced. As sex-based vilification derives its authority at least partly from women's structural or systemic oppression to men in patriarchal societies, and as it harms women on the basis of their sex, its constitutive and causal harms of subordination and silencing are systemic harms.

My functional theory lends context to the legal questions: should sex-based vilification be regulated; how should it be regulated; and what, plausibly, can regulation achieve? In relation to those questions, the overall value of sex-based vilification laws depends on a range of factors. Those include whether the speech harms of subordination and silencing of the kinds

²¹² See above n 211 as to the prevailing interpretation of s 18C of the *Racial Discrimination Act* (n 15).

²¹³ See above n 14 as to some key distinctions that my functional theory allows in relation to the Racial and Religious Tolerance Amendment Bill (n 14).

described in this article are serious or material enough to warrant regulation when balanced against relevant free speech concerns. That in turn depends on the ease with which those speech harms may be 'undone' and how likely it is that they *are* undone in patriarchal societies. The overall value of sex-based vilification laws also depends on the potential utility of such laws. I have argued in that regard, and on the basis of my functional theory, that the state's silence as to sex-based vilification is an act of accommodation that derives authority on such speech and may constitute the permissibility facts it (re)enacts as 'correct play' for some hearers. I have argued that, conversely, the enactment of sex-based vilification laws would constitute a counter-speech act by the state that enacts permissibility facts in and of law and in and of patriarchal oppression that may mitigate the harms to women of sex-based vilification. That the state can do that is encouraging. It is particularly encouraging given that sex-based vilification not only subordinates women, but simultaneously silences them and impedes their agency to 'speak back' against their subordination.

My contributions in this article to the legal literature on sex-based vilification and the 'hate speech' literature are, accordingly, fourfold. First, I have synthesised key critical and speech act theory scholarship regarding the harms of some pornography and of racist speech to demonstrate that such speech functions in analogous ways to harm women and minorities respectively. Second, I have conceptualised vilification and sex-based vilification, as relevant to law, functionally, with reference to their harms. Third, I have conceptualised the enactment of sex-based vilification laws as a counter-speech act by the state that may mitigate the harms to women of sex-based vilification. I have conceptualised the state's silence as to sex-based vilification as accommodation of such speech. Fourth, I have responded explicitly to aspects of D'Souza et al's arguments, which represent the most recent extant additions to the limited literature in this area, and have demonstrated how those aspects of their approach might benefit from the application of my theory. In those veins, my functional theory of sex-based vilification has several advantages for legal considerations of sex-based vilification and its potential regulation. Specifically, it assists to: understand the harms of sex-based vilification as constitutive, rather than merely causal; illuminate how law might mitigate those harms; and enact sex-based vilification laws that are adequately and appropriately responsive to those harms, while sufficiently narrow to account for free speech concerns.